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SUPREME COURT OF FLORIDA

Case No: 87,594

QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA, a political subdivision of the State of Florida; and **WES KELLY**, in his official capacity as Tax Collector of Madison County, Florida,

Respondents.
_____/

1st DCA Nos: 95-466
95-978

PETITIONERS' BRIEF ON THE MERITS

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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." Respondent Wes Kelly, Madison County Tax Collector will be referred to herein as the "collector." Wiley Foxx, who was a plaintiff in the trial court, was not a party to this appeal because, after remand in Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994), the trial court did not address the contentions made by Foxx and reserved jurisdiction on such contentions. Such contentions were to be heard in a separate hearing below. The record on appeal consists of an index which contains volumes I thru IV, a supplemental index which contains volume V, and an index titled the cross appeal index. No cross appeal was filed but a separate appeal was filed by the county of case no. 92-173 and that case was consolidated with Dryden, et al., by order of the district court. References to the record on appeal will be delineated as (R-) followed by the appropriate volume and page numbers and references to the cross appeal index will be delineated as (R-CA) followed by the appropriate page number. References to the appendix will be delineated as (A-) followed by the appropriate document number.

STATEMENT OF THE CASE

This case is before this court on certification by the First District Court of Appeal. The case below was the second appeal of this case. On the first appeal, the district court remanded the case to the trial court after upholding the trial court's determination that the levies, referred to the in the involved ordinances as "special assessments," were illegal, null and void. Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994)(circuit court case no: 90-198) There initially were two cases filed in circuit court in Madison County, one by Foxx and one by Dryden, et al., and the cases were consolidated for final hearing.

In the district court's initial decision, it set aside that part of the trial judge's order ordering refunds and that part of the order finding that the charges levied were not valid "special assessments" but were some other form of charge, as being premature for resolution on summary judgment. (It is interesting to note that the First District Court of Appeal reached an opposite result in part in Harris v. Wilson, 656 So.2d 512 (Fla. 1st DCA 1995), review granted, 666 So.2d 143 (Fla. 1995), when it held that summary judgment was not premature. That case is pending in this court now.)

On remand, it was not necessary to have any further testimony or evidence submitted on the issue of whether the charges levied were "special assessments," so this issue remained unresolved. Since the charges and ordinances were invalid on

other grounds, the sole issue on remand before the trial court was the propriety of the original order which had ordered refunds.

After remand, the property owners moved for the entry of an order pursuant to this court's decision and moved to consolidate the case on remand, which involved those assessments imposed for 1989 and 1990, with circuit court case no. 92-173 between the same parties which case had been held in abeyance pending a decision by this court in Foxx. (R-V-670-672; R-CA-38-44; A-8) By order dated October 13, 1994, the trial court consolidated case no. 92-173 with case no. 90-198 for purposes of hearing on remand, because the same ordinances and assessments were involved in all five years. (R-CA-45) Case no. 92-173, as originally filed, challenged the assessments for tax year 1991 and, subsequently, was amended so as to include the identical challenges to the assessments for tax years 1992 and 1993. (R-CA-21-31; R-CA-46-48; R-V-673-675)

Two stipulations were entered into by the parties so that no special assessment/tax certificates were sold for nonpayment of the assessments for the years 1991 and 1992. (R-CA-15-18; R-CA-32-35; A-4; A-6) The district court's decision in February 1994 was rendered before the time for sale of certificates would have occurred, so no stipulation was entered into for those assessments levied for 1993. The first stipulation entered into by the parties, dated May 27, 1992, stated in part:

b) If such ordinances are ultimately found to have been lawfully enacted, the Defendants may issue at the end of the collection process of the year following such final determination tax certificates for the principal amount of all delinquent special assessments, plus interest, at the legal rate, compounded annually, and normal collection costs.

c) If such ordinances are found to be unlawful and a refund ordered all special assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to Plaintiffs and all members of the class paying same.

(R-CA-17; A-3) Pursuant to said stipulation, the circuit court entered its order on May 28, 1992 stating in part:

That the Defendant, WES KELLY, Tax Collector, be and he is hereby restrained and enjoined from the selling of tax certificates on the property of the plaintiffs who have failed to pay their special assessments levied pursuant to Ordinance Nos. 89-26, 89-27, 89-28, 89-29, 33, 34, 35, and 36, for tax year 1991 until further order of this Court.

It is further ordered that all monies paid by Plaintiffs and the members of the class they represent shall be received and utilized together with other funds received by the Defendant, MADISON COUNTY, FLORIDA, so as to insure that adequate funds shall be available to pay any refund that might ultimately be ordered by this Court originally or pursuant to an appellate mandate.

(R-CA-20; A-4) In March 1993, an identical stipulation and similar order were executed and entered for the 1992 assessment. (R-CA-32; R-CA-36; A-5; A-6)

After further depositions, hearing on remand was held on December 21-22, 1994, and at the close of said hearings, the circuit court judge announced his ruling that the assessments

levied for all five years should be refunded. He subsequently modified such ruling by letter to the parties, finding that refund should be made only for the 1991, 1992, and 1993 years and not for the 1989 and 1990 tax years. The property owners timely filed their appeal from said order on remand, in case no. 90-198, which was the case involving the 1989 and 1990 assessments. (R-I-125-150) The property owners contended that the court was incorrect in failing to order refunds for years 1989 and 1990.

Subsequently, the county also appealed from the order on remand in case no. 92-173, in which the circuit court ordered that the county was required to refund all monies collected pursuant to the ordinances for 1991, 1992, and 1993. (R-CA-76-101) The county's appeal addressed only that part of the order finding that the property owners were entitled to interest under section 55.03, Florida Statutes (1993). The county did not appeal the judgment ordering refunds for the monies collected pursuant to the ordinances for 1991, 1992, and 1993. These cases were consolidated by order of the district court.

On appeal, the district court upheld the trial court's order denying retroactive relief but reversed his holding on interest, and included a certification to this court. See Dryden v. Madison County, 21 Fla. L. Weekly at D587 (Fla. 1st DCA Mar. 5, 1996) (A-7) The property owners timely filed their notice to invoke jurisdiction of this court.

STATEMENT OF THE FACTS

In 1989, the county adopted ordinances 89-26, 89-27, 89-28, and 89-29 (R-I-102; R-CA-53) Subsequently, the county adopted ordinances 33, 34, 35, and 36 in 1990. (R-I-102; R-CA-53). The 1989 ordinances were adopted in August 1989, and the 1989 assessments were levied pursuant to said 1989 ordinances.

The 1990 ordinances attempted to amend the 1989 ordinances and were adopted after the property owners filed suit and the 1990 assessments were levied pursuant to the 1990 ordinances. The 1991, 1992, and 1993 charges labeled "special assessments" were all levied pursuant to the same ordinances.

The district court upheld the circuit court's holding that the assessments were invalid. However, it held that that part of the court's holding ordering refunds was premature and remanded for a hearing to be held in the circuit court on the refund issue.

Case no. 92-173, which is the subject of the county's appeal, was held in abeyance pending the outcome in case no. 90-198 and was consolidated for hearing on remand. (R-V-670-672; R-CA-38-44; R-I-102; R-CA-53) After hearing on remand, the court held that "all class members who paid the charges levied by the previously mentioned ordinances are entitled to refund of all such monies paid subsequent to October 31, 1991, the payment of which was challenged, in Consolidated Case Nos. 90-198 and 92-173 for Years 1989 through 1993 . . . . plus interest." (R-I-103; R-CA-54; A-2) The circuit court declined to order refund of monies

paid prior to said date concluding that the county acted in "good faith" although it also held that the county's reliance on Gulesian v. Dade County, 281 So.2d 325 (Fla. 1973), was misplaced. (R-I-104; R-CA-55; A-2)

The testimony adduced at trial was, in large part, that of present or prior county commissioners and other county employees. Mr. Faim Poppell testified that, beginning in 1988, the county sought advice as to ways to obtain additional revenues. (R-V-776-785) He testified that various state meetings were attended and that he was informed by the Florida Association of Counties that the use of special assessments was the best source recommended. (R-V-781) He testified that the county hired legal counsel who was represented as being an expert. (R-I-109-110; R-CA-59-50; R-V-782) However, no witness for the county testified that the county had requested or received a written opinion from any attorney or person on the validity of the levies or its ordinances.

Mr. Poppell also admitted on cross examination that he and the board were told prior to the adoption of the 1989 ordinances "that its proposed levies being considered were of questionable validity." (R-I-115; R-CA-65; TR-II-209-210) In July 1990, after suits were filed, the county enacted new ordinances attempting to correct the discrepancies in the 1989 ordinances but these also failed to comply with the state statutes. (R-I-110; R-CA-60) The circuit court's decision points out that "it is difficult to imagine how the County was

not then aware of the deficiencies and resulting illegality of its Special Assessment Ordinances . . . ." referring to the filing of the suits. (R-I-110; R-CA-60; A-2)

While the first case was pending on appeal, the parties executed two identical stipulations (except for the dates) in case no. 92-173. (R-CA-15-18; R-CA-32-35; A-3; A-5) These stipulations were submitted to the court and injunctions were entered enjoining the sale of certificates. (R-CA-19; R-CA-36) The stipulations dated May 27, 1992 and March 19, 1993 provided in part that:

> 3. The issuance of tax certificates will cause great confusion if this court's Summary Final Judgment in Case No. 90-198-CA is affirmed by the highest possible appellate court exercising jurisdiction, as during the appellate process tax certificates may be issued to third parties. This would, of course, subject the defendant Madison County, Florida, to potential third party claims for invalid certificates and create liens and clouds on citizens' property for a period of time based on insufficient legal authority. Also, persons failing to pay their assessments will be required to either pay the assessments or have a lien placed against their property that could effect its marketability for a period of time.
>
> * * * * *
>
> b) If such ordinances are ultimately found to have been lawfully enacted the defendants may issue, at the end of the collection process of the year following such final determination, tax certificates for the principal amount of all delinquent special assessments, plus interest at the legal rate compounded annually, and normal collection costs.
>
> c) If such ordinances are found to be unlawful and a refund ordered all special

> assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to plaintiffs and all members of the class paying same.

(R-CA-33-34; R-CA-20; A-3; A-5) The trial court's order entered pursuant to the May 27, 1992, stipulation provided in part:

> 2. That the Defendant, WES KELLY, Tax Collector, be and he is hereby restrained and enjoined from the selling of tax certificates on the property of the Plaintiffs who have failed to pay their special assessments levied pursuant to Ordinance Nos. 89-26, 89-27, 89-28, 89-29, 33, 34, 35, and 36, for tax years 1991 and 1992 until further order of this Court.

(R-CA-37; A-4) Subsequent to the district court's decision, the county purchased from the holders of all certificates which had been sold for nonpayment of the 1990 assessments, all certificates sold with interest at 18 percent. (R-I-123; R-CA-73)

Based on the stipulations, no certificates were sold for nonpayment for 1991 and 1992, and the county stopped receiving payments after the court's decision in February 1994, and, at that time, cancelled all certificates including those sold to purchasers, for the 1990 tax year by paying the total amount owed plus 18 percent interest. (R-I-123; R-CA-73; R-CA-52-55; R-846-848)

The charges levied for 1989 were not levied using the non-ad valorem collection method which did not become effective until January 1, 1990. All levies for 1990, 1991, 1992, and 1993 were made using the non-ad valorem collection method which provided for the sale of certificates for nonpayment. No

foreclosure attempt ever was made by the county for nonpayment of the 1989 levies. At no time did the county make any attempt to hold or escrow monies collected for refund, if refund became necessary. (Poppell, TR-II-210-215, Bond, TR-II-158; R-I-122-123; R-CA-72-73) Except for the 1990 levies, no certificates ever were sold to coerce payment for 1991, 1992 and the 1993 levies due to the stipulations executed by the parties and the trial court's stipulated orders of injunction. (R-I-123; R-CA-73) The court noted this in its Order on Remand stating:

> Many people never paid the charges from the beginning starting in 1989, and for that year, the County never attempted to foreclose on their property to coerce payment. For 1990, certificates were sold on the property of owners who did not pay and those ultimately had to be redeemed and cancelled with the County paying up to 18 percent interest. For 1991 and 1992 years, the County executed stipulations so no certificates were sold for unpaid special assessments. Thus, in each year since 1989, some persons paid and some did not.

(R-I-121-122; R-CA-72-73; A-2) Mr. Cohen Bond, testifying on behalf of the county, testified as follows:

> Q. You testified that the collection rate for '91 was around 50 percent?
>
> A. Yes, sir.
>
> Q. I think you said some, did you do any report to see what the collection rate was for '89-90?
>
> A. The collection rate for '89-90 was 40 percent.
>
> Q. For '89-90? What about '90-91?
>
> A. 50 percent.

Q. '91-92?

A. 44 percent.

Q. And then 29 percent for finally in '93?

A. Yes, sir.

(TR-I-176-177)

Notwithstanding the stipulations and injunctions, the warnings, and the fact that the suits pointed out the questionable validity of the levies, the county spent all of the money it collected pursuant to said ordinances.

The county acted contrary to the intent of the legislature expressed in the specific statutes cited in the ordinances, and the district court so held in the first appeal. (R-I-115; R-CA-66; A-8)

SUMMARY OF ARGUMENT

The First District Court of Appeal held that, even though the property owners filed suit in 1990 challenging the 1989 and 1990 assessments and prevailed, they were not entitled to refunds of amounts paid pursuant to the 1989 and 1990 ordinances which were held to have been unlawfully collected citing Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973). The trial court had held that interest was due on refunds allowed for the 1991, 1992, and 1993 years, citing Palm Beach County v. Town of Palm Beach, 579 So.2d 719 (Fla. 1991), and rejected the county's contention that Mailman v. Green, 111 So.2d 267 (Fla. 1959), and its progeny including Kuhnlein v. Department of Revenue, 662 So.2d 308 (Fla. 1995), controlled because they dealt with refunds of taxes which are controlled by special statutes. The district court reversed citing Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), as controlling. It held that neither McKesson v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990), nor Kuhnlein overruled or modified Gulesian.

The property owners contend that the district court was incorrect in refusing to grant retroactive relief and order refunds and that interest should have been allowed as this court held in Town of Palm Beach. Neither taxes nor special statutes dealing with refunds are involved. The property owners contend as follows:

1. Gulesian is not applicable because the factual

situation is totally dissimilar, if Gulesian still is viable.

2. Due process and equal protection considerations require retroactive relief in the form of refunds. The county's action discriminates against those who paid compared to those who refused to pay. McKesson noted that equal protection violations preclude prospective relief only.

3. Gulesian has been overruled or drastically eroded and is no longer "good law." The doctrine of prospective relief allowed at one time no longer is viable. If citizens are subjected to unlawful government charges, and are not permitted retroactive relief in the form of refunds by the courts, fundamental rights are violated.

4. Interest should be allowed pursuant to Town of Palm Beach. This case does not involve taxes or special statutes which govern refunds of same, such as section 215.26, Florida Statutes (1995), and accordingly, interest should be allowed. The county has had the use of the money since beginning in 1989, and although the trial court ordered refunds for 1991, 1992, and 1993, and this was not appealed, no money has been refunded and the county has used or presumably still is using the money.

The property owners submit that Gulesian does not control because the county acted contrary to law as both the district court and the trial court held. The property owners further submit that Gulesian has either been overruled or seriously eroded by the United States Supreme Court's ruling in McKesson and this court's ruling in Kuhnlein. In Division of

Alcoholic Bev. v. McKesson, 524 So.2d 1000 (Fla. 1988), this court initially refused to order refunds and grant retroactive because the state agency had acted pursuant to a presumptively valid statute, citing Gulesian. The United States Supreme Court reversed citing due process and equal protection considerations which preclude not allowing retroactive relief.

At bar, the county did not comply with the applicable statutes which was the same situation as in Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978), where refunds were ordered and Gulesian was easily distinguished. The district court never mentions Coe in its decision.

Since McKesson, which relied on Gulesian, was overruled by the United States Supreme Court, some erosion of Gulesian had to have occurred. Cases cited in McKesson point out that due process is violated if government can take a person's property illegally and not have to give it back. In McKesson, discrimination and equal protection violations resulted because the statutes involved discriminated against non-Florida businesses. At bar, many people refused to pay the levies in either 1989 or 1990, and the county did not attempt to foreclose the liens as provided for in the ordinances in 1989. Although certificates were sold on the property for 1990, the county paid $73,073.33 to redeem these subsequently in 1994, in effect, paying on behalf of those who did not pay.

The district court never mentions this which was found as a fact by the trial court. It also chose to ignore the fact

that the trial court expressly held that failure to order refunds resulted in a denial of equal protection because 60 percent in 1989, and 50 percent in 1990, refused to pay the charges even though the ordinances made failure to pay a lien against the property including homesteads. It also ignored the fact that the county never attempted to foreclose the liens for 1989, and although certificates were sold for non-payment of the 1990 charges, these were redeemed with interest at the rate of 18 percent by the county for year 1990. Thus, for 1990 the county paid the amounts due with interest on behalf of those who did not pay. Some certificates were struck off to the county since no bidders purchased same and those were cancelled.

The trial court held that both a violation of due process and equal protection occurred. The district court ignores this. Furthermore, while the case was pending on appeal, the county exemplified the utmost bad faith by continuing to collect and spend the money instead of escrowing it. It even violated specific stipulations which it entered into in 1991 and 1992 respectively and the trial judge's injunction order.

The property owners submit that no good faith within Gulesian exists if Gulesian still is viable. The property owners also submit that due process and equal protection considerations require retroactive relief within the pronouncements in McKesson. It is further submitted that Gulesian is no longer viable.

Disallowing interest was improper and the trial judge's order should be reinstated. In Town of Palm Beach, this court

held that a county was required to pay interest to a city in an action controlled by section 55.03, Florida Statutes (1991). Citizens are certainly entitled to be treated as well as a city and if a city is entitled to interest under section 55.03, the property owners should be also. This court held in Town of Palm Beach, that interest was allowed back to the date of the original final judgment. This case does not involve taxes and, accordingly, the statutes, section 215.26, Florida Statutes (1995), and others, governing refunds of taxes, and the cases dealing with same, such as Mailman and its progeny, McKesson and Kuhnlein, are not applicable. Kuhnlein recognizes this by never mentioning Town of Palm Beach. Interest should be allowed as ordered by the trial court from 1991 or to the date suit was filed.

ARGUMENT

I. THE PROPERTY OWNERS ARE ENTITLED TO REFUND OF MONIES PAID FOR YEARS 1989 AND 1990 PURSUANT TO LEVIES IMPOSED BY ORDINANCES WHICH ARE ILLEGAL, NULL, AND VOID.

The First District Court of Appeal referred to the charges levied as "taxes." This is incorrect. The case does not involve taxes and this fact is not in dispute. The true nature of the county's levies was never determined. The trial court originally held that the levies were not special assessments, but that part of the initial circuit court decision was vacated as being premature for decision on summary judgment. Since the

levies were held to be void on other grounds, it was not necessary to revisit this issue on remand. It is somewhat baffling that the district court vacated the Madison trial court's decision on this issue finding summary judgment improper, but later upheld summary judgment on a similar type levy in Harris, which case now is pending before this Court.

However, "taxes" are not involved in the case at bar as the trial judge recognized in finding that interest was due under section 55.03, Florida Statutes (1995), and Town of Palm Beach, rejecting the county's argument that Mailman and its progeny controlled.

(a) If Gulesian still is viable in light of McKesson, the evidence does not support a denial of refund, because Gulesian is readily distinguishable.

The property owners submit that the district court was in error in not ordering refund for monies paid pursuant to the 1989 and 1990 levies prior to October 31, 1991, and that the evidence presented below does not constitute "good faith" within the parameters of Gulesian. In fact, the trial court expressly found that the county's reliance on Gulesian is misplaced stating:

> Madison County relies on Gulesian, and the statements therein, for its contention that it should not be required to make refunds of monies collected pursuant to the 1989 and 1990 Ordinances. This Court finds that its reliance is misplaced, particularly after October 1991, but even if the statements in Gulesian applied, such would not permit this Court to deny all refunds.

> In Gulesian the refund was sought from the Dade County School Board, which had adopted its millage pursuant to a duly enacted state statute authorizing its millage levy in the amount adopted. In this case, Madison County both adopted the ordinances and levied the charges (assessments) pursuant thereto. Madison County cannot blame its actions on some act of the legislature. In Gulesian the school board acted consistent with the statute in levying its millage. Here, Madison County did not comply with the general statutes cited in its own ordinances as authority for the ordinances, and this was glaringly obvious.

(R-I-104; R-CA-55, emphasis in original; A-2) Thus, the court clearly distinguished Gulesian and thereafter pointed out that the statute involved in Gulesian which allowed school millage in excess of 10 mills for limited purposes, was enacted at a time when Florida's constitutional 10-mill cap had been held unconstitutional by a Federal court. Thus, at the time of the millage levy such was valid because no constitutional 10-mill cap existed. The reversal of the lower Federal court's decision by the Federal appellate court had the effect of reinstating the Florida Constitution's 10-mill cap. The trial court recognized the factual difference stating:

> Thus, the factual situation in Gulesian is different from that in the case at bar. The school board in Gulesian had totally complied with the 1971 statute in its levy, which had been enacted while Florida's constitutional 10 mill cap limitation had been declared invalid by a federal judge. Here, the county's ordinances did not comply with the statutes. The county acted contrary to the statutes.

(R-I-106; R-CA-57; A-2)

In spite of these observations, the circuit court

nevertheless held that the county was not required to refund monies paid prior to November 1, 1991, stating that it acted in "good faith" within the parameters of Gulesian and the district court affirmed. The trial court's refusal to order refund is glaringly inconsistent with its own analysis of Gulesian and its own reasoning.

The undisputed facts upon which the circuit court bottomed its good faith conclusion are as follows:

1. Beginning in 1988 the county began to search for ways of obtaining additional revenues;

2. County representatives attended meetings and were informed by the State Association of County Commissioners that the use of special assessments was the best source;

3. The county hired legal counsel represented as being an "expert" to help draft the ordinances but no written legal opinions on the validity of the levies and ordinances was either sought or received; and

4. The county held workshops and used the services of a certified public accountant.

In upholding this, the district court has cited a new "good faith" standard broader than Gulesian ever was.

Before the county adopted the ordinances it was advised at a board meeting that its proposed actions and levies were of questionable validity. The trial court recognized this stating:

> Former County Commissioner and Chairman Poppell testified that the board was told prior to adoption of the 1989 ordinances that its proposed levies being considered were of

> questionable validity. Suit was filed pointing out the deficiencies in May and June 1990, and it still continued to assess, collect and spend. It then adopted the 1990 ordinances which had the same deficiencies as the 1989 ordinances. On October 3, 1991, the hearing was held on Plaintiffs' Motions for Summary Judgment in the suits challenging the ordinances. At conclusion of the hearing, the Court announced its ruling that the 1989 and 1990 ordinances were invalid for failure to comply with Section 125.01(1)(q) 2, F.S. (1987). This ruling was then confirmed in writing by Judgment entered November 25, 1991. The 1991 Special Assessment collection period did not begin until November 1, 1991, yet Madison County continued to assess, collect and spend under the same 1989 and 1990 ordinances which had then been declared invalid.

(R-I-114-115; R-CA-65-66, emphasis added; A-2). These facts do not constitute "good faith" within Gulesian. If they did, no refunds would ever be ordered because a county could always claim it acted on purportedly good advice. Reliance on "good advice" is legally insufficient.

Furthermore, the trial court expressly found that not ordering refunds would constitute denial of equal protection because many persons (some years as high as 71 percent) never paid the levies. The district court chose not to address this finding. This is especially glaring for the 1990 levies. The court refused to order refunds for 1990 levies, even though the county purchased all certificates which had been sold to holders for nonpayment of the 1990 levies, and cancelled same which, in effect, has the county paying the assessments on behalf of persons who did not pay for that year. Thus, those who never paid do not have to but those who did pay cannot get their money

back. (Note many certificates were struck off to the county which is what happens when no person bids on same so these required no repurchase but could simply be cancelled.)

Thus, 60 percent never paid the 1989 levies, 50 percent never paid the 1990 levies, and 50 percent never paid the 1991 levies, 56 percent never paid the 1992 levies, and 71 percent never paid the 1993 levies. See (R-I-173-177) As the trial court observed, not permitting refunds to all constitutes a denial of equal protection of the law. The trial court stated:

> 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.

(R-I-122; R-CA-73, emphasis added; A-2) Furthermore, except for the sale of certificates in 1990, no other attempt was ever made to force payment either through foreclosure proceedings for 1989, or through the sale of certificates for 1991, 1992 and 1993, although all became liens on the property which restricted sale. Thus, those that paid for 1989 and 1990 are "stuck." Their money was used by the county and the courts have held that they cannot get it back even though such constitutes unlawful discrimination. Those who refused to pay the county's unlawful levy, even though it meant that liens attached to their property, are proven the

wiser.

In 1989, approximately 60 percent never paid and the court's ruling of invalidity has extinguished the liens on their property. All certificates sold to purchasers or struck off to the county for 1990 levies have been extinguished by repurchase and cancellation resulting from the ruling of invalidity. No certificates were sold for 1991, 1992, and 1993, and the liens have been extinguished by the ruling of invalidity. Not ordering refunds to all is patent discrimination and as the trial court observed "is not fair." (R-I-122; R-CA-23; A-2)

The lower court recognized the similarity to the situation here and that in Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978). It pointed out that the county in Coe had made "virtually the same" contentions as those made by Madison county and then set forth the contentions. (R-I-107; R-CA-58; A-2) The trial court quoted Coe stating:

> In rejecting Broward County's contention and reliance on Gulesian, the Court stated:
>
> > First, we believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment. We construe the Supreme Court's ruling in Gulesian to have carved out a very narrow exception to the taxpayer's right to a refund.
> >
> > The point most emphasized by the Supreme Court in Gulesian was the good faith of the school board in making the assessment.
>
> Coe, 358 So.2d at 216 (emphasis added).

(R-I-107; R-CA-58, emphasis in original; A-2) The trial court

then held that, like in Coe, the county "has acted contrary to the intent of the legislature" stating:

> And, since this court found the assessment to be contrary to the "obvious" intent of the legislature, we do not believe that good faith can be presumed. Further, we do not believe that the findings related to the surplus funds and their availability for emergencies, and the change in ownership of the property taxed, are sufficient to defeat the property owners' right to a refund.
>
> The remaining question is whether the finding by the trial court that a refund would result in a disproportionate expense to the county, as compared to the benefit to the average taxpayer, is sufficient in itself to support a denial of the refund. If this factor alone is to be determinative of the issue, then the taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing tax refunds. We do not feel the Supreme Court in *Gulesian* intended to so limit the rights of property owners. A taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the property owners their right to a refund of the illegally assessed taxes.
>
> Coe, 358 So.2d at 216-217 (emphasis added). In this case, as in Coe, Madison County has acted contrary to the intent of the legislature.

(R-I-107-108; R-CA-58-59, emphasis in original; A-2). Coe is never mentioned by the First District Court of Appeal. Instead, the First District Court of Appeal tries to "shoehorn" Gulesian into the case.

The property owners submit that none of the county's actions constitute good faith. First, its actions must be governed in large part by what it did as expressed in its

ordinances, and by its actions subsequent thereto.

A cursory examination of the face of the ordinances discloses that the county did not even come close to complying with the statutes cited in the ordinances as authority for its levies. The 1989 ordinances, 89-26, 89-27, 89-28, and 89-29 which were adopted August 17, 1989, cited section 125.01(1)(q)2, Florida Statutes (1987) as authority for the county's levies. Ordinances 89-26, 89-27, and 89-29 imposed the levies county-wide while 89-28 exempted the cities of Madison and Greenville, but included the City of Lee. Section 125.01(1)(q)2 applied only to fire and rescue services, not landfill and garbage collection, and for any city to be included, the city electors must have approved same in an election and passage of the required resolutions and ordinance must have been completed and notice given to the property appraiser at least 9 months prior to the beginning of the fiscal year for which the taxing or benefit unit is first established. None of these requirements were met. No city elections were ever held, and no ordinance or resolution was submitted to the property appraiser 9 months prior to October 1, 1989. The 1989 ordinances were adopted August 17, 1989 and none of the statutory requirements had been met. This demonstrates a clear blatant disregard for the law and this is obvious from the face of the ordinances. The referenced statute states what must be done and the county cannot profess ignorance of the contents of its own ordinances. Thus, the face of the 1989 ordinances showed that the statute was not complied with, so this clearly

and blatantly is not within the intent of the legislature. Gulesian requires that the levies be within the legislative intent to constitute "good faith."

The county is hardly so large that county commissioners do not know what these cities of Lee, Madison, and Greenville are doing and that no elections were ever held. In fact, that is one reason the district court held invalid the assessments in its prior decision.

Landfill and garbage collection were not authorized under section 125.01(1)(q)2 at all and even a cursory reading of the statute reveals this. Thus, in effect, the county is suggesting that it has no duty to know the contents of its own ordinances, or the statutes cited therein, and that its failure to know or make any effort to know should be "good faith." Although the 1989 ordinances were adopted August 17, 1989, one city, Madison, did adopt a resolution approving ordinances 89-26 and 89-27, but not until October 3, 1989, almost two months later and the approval was conditional, and not made after a proper city election.

The county would have this court believe that it has no duty to know that this does not comply with section 125.01(1)(q)2, that the approval did not take place after an election over 9 months previously, instead of after no election at all, that the approval came 6 weeks after the adoption of county ordinances 89-26 and 89-27, and that the resolution of approval is conditioned upon all other affected cities agreeing.

The county further would have this court believe that it did not know that one of the other cities never approved the ordinances and that Greenville's approval occurred on April 3, 1990, and that it too was conditioned upon the concurrence of the three affected cities, and none were after an election as the statute required.

All action by cities for fire and rescue charges to be valid would have had to occur no later than 9 months prior to October 1, 1989, and garbage disposal and landfill are not authorized under section 125.01(1)(q)2 at all. This cannot be good faith and the county certainly has a duty to know the contents of its own ordinances and what is going on with the three cities affected by the ordinances.

The 1990 ordinances adopted in reaction to the suit being filed, were no better. These ordinances were not retroactive and simply referred to "scrivener's error" in the 1989 ordinances. 1990 ordinances 33, 34, and 35 state that section 125.01(1)(q)2 should have been section 125.01(1)(q)1, Florida Statutes (1987) and reference said statute and section 125.01(5)(a), Florida Statutes (1987). However, section 125.01(1)(q)1 only authorized levies in the unincorporated areas not county-wide, so it did not authorize the levies. Ordinance 36 again cites 125.01(1)(q)2 and adds section 125.01(5)(a). It deals with fire, but again no municipal election approving same had taken place so section 125.01(1)(q)2 was not complied with.

Section 125.01(5)(a) deals with county-wide levies in

special districts, not municipal service benefit units, and also requires approval of the governing bodies affected, and no final approval ever took place, even if it applied to municipal service benefit units, which it does not. Madison's approval was conditional as was Greenville's and Lee never approved at all. Furthermore, three of the 1990 ordinances contained the following language:

> A certified copy of the resolution agreeing to the inclusion must be received by the County prior to December 1, 1989, and shall be effective for 1989 and each subsequent year.

Since the 1990 ordinances were not adopted until July 18, 1990, the county had to have known that December 1, 1989 had already passed and, that on their faces, the ordinances were invalid. This cannot be good faith.

No Florida court has ever upheld a denial of refund sought by property owners where the public entity acted directly contrary to the intent of the legislature. Additionally, no Florida court has ever upheld a denial of a refund where to do so is discriminatory and violates the due process and the equal protection clauses. The trial court found that by denial of refunds, both a denial of the due process and equal protection clauses exist due to the circumstances and that the action or inaction of the county from 1989 through part of 1993 was "not fair." The trial judge stated:

> 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.

(R-I-122; R-CA-73, emphasis added; A-2)

The trial court reached the conclusion that (1) the county acted contrary to the intent of the legislature, (2) that denying refunds resulted in persons being discriminated against constituting a denial of equal protection of the law and due process, (3) that the face of the ordinances showed that the county had not complied with same, (4) that the county was warned before it adopted the 1989 levies of their questionable validity, (5) that the county had to know when the suits were filed in 1990 that the levies were improper, and (6) that in spite of knowing this it collected and spent the money it collected and continued to do so for the next three years even to the extent of violating its own stipulations and the court's injunction.

In view of this the courts should have ordered refund of payments made in 1989 and 1990, because Gulesian is inapplicable.

(b) Gulesian is no longer viable in light of McKesson and Kuhnlein.

(c) Due Process and Equal Protection considerations require refund of levies found to be unlawful.

These two issues will be addressed together. In the

district court, the county contended that the trial court improperly considered McKesson because it was not cited in the district court's decision ordering remand. The property owners submit that Gulesian has been overruled in whole or in part by McKesson. The property owners also contend that McKesson requires refund of the monies collected through the county's unlawful levies.

As pointed out previously, although the county's levies and collection schemes were coercive and liens attached to all property, many persons refused to pay--60 percent in 1989 and 50 percent in 1990. Not refunding discriminates against those who did pay. The trial court found discrimination and due process violation. (R-I-122; R-CA-73; A-2)

First, in Division of Alcoholic Bev. v. McKesson, 524 So.2d 1000 (Fla. 1988), this Court initially declined to order refunds citing Gulesian. As the court stated:

> We agree with the DABT that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla.1973); *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, as pointed out by the DABT, if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers.

McKesson, 524 So.2d at 1010. In McKesson, the legislature had enacted the statute and the state beverage department collected the taxes as provided in the statute. Thus, the beverage

department complied with the statute and still a refund ultimately was ordered. In Gulesian, Dade County complied with a statute subsequently rendered unconstitutional by virtue of a Federal court decision partially reversing a lower court decision. Here, Madison County failed to comply with the precise statute it cited in its ordinances.

Considering that the United States Supreme Court reversed this Court's decision in McKesson denying a refund based upon the equitable considerations of Gulesian, the taxpayers contend that Gulesian has been overruled. If it has not been specifically overruled, its application certainly has been eroded.

Second, if Gulesian has not been overruled, its viability should be limited to that specific situation or a very similar situation. It certainly could not be extended. The trial court's holding, however, extends Gulesian to a totally new factual situation, because the factual situation in the case at bar is totally unlike Gulesian. Relying on advice of counsel, CPA's, and the Florida Association of Counties never has been held to be good faith, especially where the ordinances facially do not comply with the statutes cited therein.

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

McKesson and Reich v. Collins, --- U.S. ---, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994).

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

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

relief, such as enjoining the issuance of a tax deed, the taxpayer must post a bond equal to the amount of disputed tax, interest, and anticipated litigation expenses. Fla.R.Civ.P 1.610. This is precisely the sort of duress for which due process of law demands that the state and county extend a post-payment remedy to taxpayers which encompasses retroactive relief - a refund of unconstitutionally collected taxes or assessments. See McKesson; Kuhnlein.

Florida constitutional provisions indisputably protect property interests within the Due Process Clause of the 14th Amendment. E.g., James v. City of St. Petersburg, 33 F.3d 1304 (11th Cir. 1994). Due process protections are invoked by creating such property interests, and the state and its political subdivisions must comply with federal commands under the 14th Amendment in dealing with those property interests. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); See also Atkins v. Parker, 472 U.S. 115, 105 S.Ct. 2520; 86 L.Ed.2d 81 (1985). The state may not deprive a taxpayer of due process protection by denying him the retrospective refund remedy due process demands when assessments wrongfully encroaching on the property interest are imposed by coercive means. McKesson. In sum, it makes no difference whether the property interest is created by federal law or by state law. Once the protected interest is brought into being, the Due Process Clause of the 14th Amendment controls the state and the county in dealing with it.

Here, the ordinances created liens against all property for nonpayment. In 1989 payment was coerced through foreclosure of said liens. Beginning in 1990, liens were foreclosed through sale of a non-ad valorem certificate (like a tax certificate) for nonpayment. This results in forfeiture of the property.

Although always a lien against the property, the county chose not to foreclosure in 1990, but did sell certificates in 1990. Many resisted and refused to be coerced. These paid nothing. Not providing refunds discriminates against those who did pay.

II. THE TAXPAYERS ARE ENTITLED TO INTEREST ON ALL REFUNDS.

Initially, it should be pointed out that the county has not appealed the trial court's decision ordering refunds for 1991, 1992, and 1993. Thus, the correctness of the trial court's decision on this issue is not disputed.

The county appealed only the allowance of post-judgment interest on the refunds for 1991, 1992, and 1993. The county disagrees with the trial court's decision awarding interest from November 25, 1991, because the taxpayers challenged the 1991, 1992, and 1993 assessments in a different case, case no. 92-173, and the trial court did not render a decision in that case until after the court's remand. November 25, 1991, is the date the trial court signed the final judgment invalidating the assessments which it orally had held invalid on October 3, 1991. The taxpayers filed suit June 6, 1990.

There are two lines of cases involving interest recognized by this Court. One is that involving a specific statute, usually section 215.26, which makes no provision for payment of interest on refunds of taxes, fees, or other charges to the state. This line is exemplified by Mailman, and most recently followed in Kuhnlein, also under section 215.26, where interest was disallowed. The other line of cases begins with Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), and continues through Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990), and Town of Palm Beach. These cases allowed interest.

The county argues that Mailman and its progeny control. The property owners contend that Simpson and its progeny control. The county acknowledges that the present case does not involve taxes and is not controlled by section 215.26 or any other refund mechanism statute. The property owners agree and submit that that is why Mailman and its progeny, most recently Kuhnlein, do not control.

The trial court rejected the county's contention that Mailman controlled and cited Town of Palm Beach in allowing interest from the date of its final judgment in 1991. The property owners submit that the trial judge was correct in rejecting Mailman and the decisions following it. However, the court should have fixed the starting point from which interest was to be calculated as of the date suit was filed, June 6, 1990.

The trial court explained its reasoning for ordering interest stating:

> For refunds of assessments for Years 1991, 1992 and 1993 challenged in Case No. 92-173, the Plaintiffs are entitled to refund of those amounts paid after October 31, 1991, together with post judgment interest following the November 25, 1991 Final Judgment pursuant to Section 55.03, Florida Statutes (1993), at the rate of 12 percent, such interest to be computed from the date of payment. See Palm Beach County vs. Town of Palm Beach, 579 So.2d 719 (Fla. 1991). This is not prejudgment interest as Case No. 92-173 which challenged the assessments for each of those years was held in abeyance by stipulation of the parties recognizing that since the ordinances and assessments and issues raised concerning same were identical in both cases, the outcome in the first case would control the outcome of the second. Thus, this Court's Final Judgment finding the Ordinances and assessments invalid, null and void controls Case No. 92-173. The only issue remaining to be resolved in Case No. 92-173 was the refund issue remanded to this Court and accordingly the cases were consolidated for disposition on remand.

(A-23; R-123) The court's holding that the first case controlled the second case on the issue of the validity of the assessments and the ordinances is amply demonstrated by the language of the stipulations which the county chooses to try to ignore. In fact, the county's witness, Fain Poppell, testified that he understood the stipulations to mean that the county would have to make refunds with interest (R-367) The county's argument that the stipulations only addressed the issuance of certificates is simply not accurate as the face of the stipulations demonstrate. See Paragraphs 5.b) and c) of the stipulation and the second paragraph of the trial court's order dated May 28, 1992, state respectively:

> b) If such ordinances are ultimately

found to have been lawfully enacted, the Defendants may issue at the end of the collection process of the year following such final determination tax certificates for the principal amount of all delinquent special assessments, plus interest, at the legal rate, compounded annually, and normal collection costs.

c) If such ordinances are found to be unlawful and a refund ordered all special assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to Plaintiffs and all members of the class paying same.

* * * * *

That the Defendant, WES KELLY, Tax Collector, be and he is hereby restrained and enjoined from the selling of tax certificates on the property of the plaintiffs who have failed to pay their special assessments levied pursuant to Ordinance Nos. 89-26, 89-27, 89-28, 89-29, 33, 34, 35, and 36, for tax year 1991 until further order of this Court.

It is further ordered that all monies paid by Plaintiffs and the members of the class they represent shall be received and utilized together with other funds received by the Defendant, MADISON COUNTY, FLORIDA, so as to insure that adequate funds shall be available to pay any refund that might ultimately be ordered by this Court originally or pursuant to an appellate mandate.

(R-CA-17; R-CA-20, emphasis added) The parties agreed to consolidate the two cases pursuant to these stipulations which contained the agreement that the first case's holding would control the second case.

Paragraphs b) and c) of the stipulation are referring to the 1990 case when they reference the ultimate decision and to "any refund that might ultimately be ordered by this court originally or pursuant to appellate mandate." The trial court

originally ordered refunds of the 1989 and 1990 assessments in the 1990 case. Thus, the final judgment of the assessments and ordinances' validity in the 1990 case was decided in November 1991. No new final judgment on invalidity was entered in the second case (1992 case) because none was necessary. The first final judgment controlled by stipulation.

Under these circumstances, the trial court based its holding on this Court's decision in Town of Palm Beach. In Town of Palm Beach, this Court reviewed Town of Palm Beach v. Palm Beach County, 537 So.2d 1055 (Fla. 4th DCA 1989), which certified the question of allowance of interest on an unspecified amount of money held to be due the city from the county. That case involved a controversy concerning the sharing of road and bridge tax funds under section 336.59, Florida Statutes, for fiscal years 1981-82, 1982-83, and 1983-84, and was first heard on appeal in 1987. Palm Beach County v. Town of Palm Beach, 507 So.2d 128 (Fla. 4th DCA 1987). The trial judge had held that the county's levy of ad valorem taxes under section 336.59 was, in effect, a sham. The trial judge had attempted to measure the amount of money due to the city by virtue of the county's sham, based on sales tax revenues.

The appellate court reversed that part of the trial court's holding with directions to consider only ad valorem taxes levied against the seventeen municipalities and spent by the county on roads. The court did not direct what millage the county should have levied but left this calculation and

determination to the trial court on remand. Accordingly, no fixed amount was set for payment by the county to the city in either the supreme court or the appellate court decision. The final amount to be paid had to be determined by a formula and mathematical calculation on remand.

After addressing the history of the case, this Court awarded post-judgment interest from the date of the original judgment. As this Court stated:

> We find the question presented is governed by section 55.03, Florida Statutes (1987), which in relevant part provides:
>
> Judgments; rate of interest, generally.--
> (1) A judgment or decree entered on or after October 1, 1981, shall bear interest at the rate of 12 percent a year unless the judgment or decree is rendered on a written contract or obligation providing for interest at a lesser rate, in which case the judgment or decree bears interest at the rate specified in such written contract or obligation.

Town of Palm Beach, 579 So.2d at 720. This Court observed in a footnote that the parties had stipulated to the amount to be paid so that no recalculation became necessary. Importantly, this Court held that interest should be awarded from the date of the original judgment.

In the case at bar, the trial court originally ordered the county to pay the class members all amounts paid by them and reserved jurisdiction stating:

> 3. Finding that there is no genuine issue at to any material fact the Court hereby finds and holds that the Plaintiffs' motion for summary judgment should be granted and that Plaintiffs are entitled to the relief

> prayed for including refund of all monies paid. Inasmuch as the disposition of these issues constitutes a total determination of the merits of all the allegations contained in the complaint and issues raised by the answers, and permanently lays to rest the dispute between the parties, this summary judgment is hereby deemed a final judgment. The Court retains jurisdiction of this cause solely for the purpose of entertaining motions to tax costs and fixing the amount of attorney's fees prayed for pursuant to the class action, and for the purpose of entering such further orders as may be necessary and proper for the complete exercise of this Court's jurisdiction.

(R-665; A-1) Further matters for consideration included fixing the amount due each person from the county records and permitting exclusion of those, if any, wishing to waive refunds. However, this order on refunds was stayed for 30 days so the county could take an appeal, which it did. (R-665)

The district court and the county rely on cases involving specific refund statutes which make no provision for the payment of interest on refunds. Mailman involved an action for refund of estate taxes and sections 198.29 and 215.26, Florida Statutes. In refusing to order the payment of interest, the court stated:

> The only section in Chapter 198, supra, that appears pertinent to the present case, Sec. 198.29, provides for refund of overpayment and overpayment of interest thereon" but it is silent about payment to the taxpayer by the Comptroller of interest on the tax.
>
> At the suggestion of the petitioners we have examined also Sec. 215.26, Florida Statutes 1943, and F.S.A., a part of the chapter dealing with "Financial Matters, Generally" and here we have found no

> provision for payment of interest on refunded taxes.

Mailman, 111 So.2d at 269.

Mailman has been followed whenever refund is sought pursuant to a statute authorizing refund. See e.g. State ex rel Four-Fifty Two-Thirty Corp. v. Dickinson, 322 So.2d 525 (Fla. 1975)(involving sections 199.252 and 215.26, Florida Statutes); Della-Donna v. Dept. of Revenue, 485 So.2d 859 (Fla. 1st DCA 1986)(involving estate taxes, chapter 198, Florida Statutes); Department of Revenue v. Goembel, 382 So.2d 783 (Fla. 5th DCA 1980)(involving ad valorem taxes); Lewis v. Andersen, 382 So.2d 1343 (Fla. 5th DCA 1980)(involving section 199.052, Florida Statutes); Hansen v. Port Everglades Steel Corp., 155 So.2d 387 (Fla. 2d DCA 1963)(involving section 200.36, Florida Statutes). All of these cases involved taxes and specific statutes controlling refunds which is not so in the case at bar. At the trial court, the county argued that Mailman controlled. The court rejected this argument, relying instead on Palm Beach County.

Most recently, Kuhnlein cited Mailman. Kuhnlein involved refund of impact fees under section 215.26, which does not authorize payment of interest. Applying the statute, the supreme court refused to allow interest on the refund amount. Interestingly, the state argued in Kuhnlein that section 215.26 prevented both circuit court jurisdiction and a class action but the supreme court rejected both contentions in ordering refunds. In any event, Kuhnlein is not controlling because it involved

taxes and a specific statute which did not authorize interest.

The trial court rejected the county's argument that Mailman controlled and held that post-judgment interest was due from November 25, 1991, the date of the original final judgment, citing Town of Palm Beach. In Town of Palm Beach, this Court considered Mailman and other cases dealing with taxes and refunds controlled by statutes, usually section 215.26, and held that Mailman did not control. As the court stated in its footnotes:

> 2. We find nothing in those cases inconsistent with an award of interest here. Particularly relevant in them is the observation that an award of interest is necessary to do "complete justice," *Gladden*, 86 So.2d at 813; *Treadway*, 117 Fla. at 858, 158 So.2d at 519, or to satisfy a "basic sense of fairness." *Simpson v. Merrill*, 234 So.2d 350 (Fla.1970)(cited for authority in *Roberts*).
>
> 3. Likewise unavailing is the county's assertion that, because it was exercising a purely governmental function, sovereign immunity prevents the award of postjudgment interest. Although, in tort actions, the exercise of a purely governmental function may appropriately raise the defense of sovereign immunity from liability, it is not a defense to the award of interest where the county's liability has been determined.

Town of Palm Beach, 579 So.2d at 720 (emphasis added).

In Simpson, cited in Town of Palm Beach, this Court held that the state was liable for costs under section 57.04(1), Florida Statutes, and expressly receded from contrary holdings. The court stated:

> We hold that under the foregoing Statute costs may be taxed against the State and its agencies in favor of the party recovering judgment. To the extent that this holding is

> contrary to prior decisions of this Court in the *Palethorpe* and *Green* cases, or any other cases, we expressly recede from those prior decisions. Florida Statues § 57.041, F.S.A., provides for the recovery of legal costs by the party recovering the judgment in all cases except those specifically exempted. The exemptions in the statutes do not include the State or its agencies and we can find no basis for reading such an exemption into the plain language of the Act.

Simpson, 234 So.2d at 351 (emphasis added). It explained its reasoning thereafter stating:

> We are aware of decisions holding the State and its agencies immune from taxation of costs of litigation. We are also aware that governmental agencies today directly effect the lives and property of private citizens more than at any time in the past. This trend has given rise to increased litigation as individuals contest the demands of government. When, through litigation, these demands are determined to be unlawful, the government, like any other party, should be compelled to pay the costs of litigation.
>
> To require successful litigants against the State and its agencies to pay their own costs offends our basic sense of due process of law. As pointed out by District Judge Wigginton, sitting as a member of this Court in Corneal v. State Plant Board, in his dissent:
>
> > "When the general government acting through any of its many officers, boards, bureaus, commissions, departments or agencies, takes or threatens action calculated to deprive a person of his property unlawfully and without the payment of just compensation, that person should be permitted to seek protection of the courts without suffering an undue penalty as the price thereof.
> >
> > "The costs of a successful proceeding instituted by one in the

> protection of his constitutional rights to restrain the unlawful exercise or abuse of governmental power should not fall on the threatened party, but on those whose action make the institution of the proceeding necessary."

Simpson, 234 So.2d at 351-352 (emphasis added).

Judge Wigginton's comments became the law of Florida when the court in Simpson receded from prior holdings and followed his reasoning in awarding costs under section 57.04(1), Florida Statutes, and pointed out that said statute did not exempt the state or counties. Section 55.03, like section 57.041, does not exempt the state or counties. Here, Madison County has unlawfully taken action calculated to deprive Madison County's citizens of their property either through coerced payment of the unlawful assessments or through forced sale of their homestead property and other property if not paid.

In Finlayson, this Court ordered the payment of prejudgment interest by the county in a class action case brought against the county for back payment of overtime. The court stated:

> For the reasons discussed below, we approve the district court's decision but find that prejudgment interest on the amount recovered should start accruing on June 17, 1980, the date the first claim for back pay was made.

Finlayson, 555 So.2d at 1212 (emphasis added). The court distinguished its decision in Flack v. Graham, 461 So.2d 82 (Fla. 1984), where prejudgment interest was denied stating that:

> In *Flack v. Graham*, 461 So.2d 92 (Fla. 1984), we refused to permit recovery of any

> prejudgment interest, stating: "'[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.'"

Finlayson, 555 So.2d at 1213. Thereafter, the court addressed the state of the law on the subject matter stating that:

> We did not recede from this principle in *Argonaut Insurance or Kissimmee Utility Authority*. Further, in *Ball v. Public Health Trust*, 491 So.2d 608 (Fla. 3d DCA 1986), the Third District Court of Appeal allowed prejudgment interest but restricted the date it commenced to the date of demand or the commencement of the lawsuit, whichever occurred first. The district court did so on equitable grounds, relying on our decision in *First State Bank v. Singletary*, 124 Fla. 770, 169 So. 407 (1936). As noted by these decisions, the law is not absolute and may depend on equitable considerations.

Finlayson, 555 So.2d at 1213 (emphasis added). The court held that prejudgment interest would be awarded from the date demand was first made to the county, June 17, 1980.

Here, the trial court denied pre-judgment interest but awarded post-judgment interest. Under Finlayson, the property owners submit that the court should or could have awarded pre-judgment interest as well as post-judgment interest. The county was placed on notice prior to adoption of its ordinances that its levies were of doubtful validity. Suit was filed June 6, 1990. At that point the county had actual knowledge that its ordinances were of doubtful validity. The face of its own ordinances revealed that it had not complied with the precise statutes cited therein. Still, the county continued to collect and spend the

monies. The county flagrantly did not comply with the statutes.

The trial court awarded what it held to be post-judgment interest from the date of its final judgment. However, it recognized that the county was placed on notice that its ordinances failed to comply with the law in May and June when the two suits were filed stating:

> The County adopted the 1989 Ordinances and when suit was filed in May and June 1990 challenging the ordinances and assessments levied, the County enacted new ordinances, attempting to correct the 1989 ordinances, but these also failed to comply with the state statutes. Although it is difficult to imagine how the County was not then aware of the deficiencies and resulting illegality of its Special Assessment Ordinances, the Court does recognize that governing bodies cannot always await possible lawsuits prior to making collections under revenue ordinances.

(A-8; R-109)

Neither Finalyson, Simpson, nor Palm Beach County are cited in Kuhnlein relied upon by the county because Mailman and the cases following Mailman are readily distinguishable. Most involved taxes and all involved specific statutes which did not allow interest, usually section 215.26. Mailman and Flack are cited in the dissent in Finlayson so the distinctions are crystallized by the majority's 6-1 holding. Similarly, Mailman is cited and distinguished in Palm Beach County.

Finlayson cited with approval Ball v. Public Health Trust, 491 So.2d 608 (Fla. 3d DCA 1986). There, the court allowed pre-judgment interest but restricted the date it commenced to the date of demand or the date suit was filed,

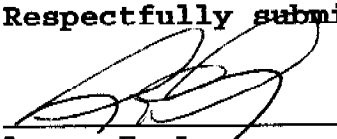
whichever first occurred. It pointed out that "the district court did so on equitable grounds." Finlayson, 555 So.2d at 1213. Ball held that, in cases involving a payment of money under a mutual mistake, such gives rise to the right to interest from the time of notice of the erroneous payment. At that time, the court recognized that the entity who had received same knew "that it had been given money which did not belong to it" and "from that time forward it retained the sum wrongfully and had the obvious obligations both to return it and to pay interest until it did." Ball, 491 So.2d at 610.

Giving the county the benefit of every doubt, it cannot be disputed that the county knew, at least when suit was filed, that it had not complied with the general statutes in its levy of the 1989 assessments. When it amended its 1989 ordinances to levy the 1990 assessments, these ordinances also failed to comply with the same statutes as the 1989 ordinances and the amended complaint advised it of that fact. Accordingly, the county was placed on notice June 6, 1990 and knew, or should have known, that it had collected monies unlawfully. From that time it had obtained funds unlawfully and wrongfully and, therefore, it had the obligation both to return the funds and pay interest thereon.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the property owners represented herein are entitled to a refund of all monies collected pursuant to the 1989 and 1990 levies, and that that part of the trial court's order on remand holding to the contrary should be reversed. Interest should be allowed on all refunds from the date suit was filed, June 6, 1990, or, if not then, from the date of the final judgment on November 25, 1991.

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 **EDWIN B. BROWNING, JR., ESQUIRE**, Davis, Browning & Schnitker, Post Office Drawer 652, Madison, Florida 32341; **KEN VAN ASSENDERP, ESQUIRE**, Young, van Assenderp & Varnadoe, Post Office Box 1833, Tallahassee, Florida 32302; and **JOSEPH C. MELLICHAMP, III, ESQUIRE**, Senior Assistant Attorney General, and **ERIC J. TAYLOR, ESQUIRE**, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050 on this the **30th** day of April 1996.

Larry E. Levy