SUPREME COURT OF FLORIDA

Case No. 87,594



QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA,

Respondent.
_____/

---

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

---

Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

Counsel for petitioners

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## 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." Amicus Curiae, Florida Department of Revenue, will be referred to herein as the "department." 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 #). References to the county's answer brief will be delineated as (AB-page #)

## ARGUMENT

Madison County and the Attorney General, on behalf of amicus curie, Florida Department of Revenue, each do not dispute the following: (1) There is no predeprivation remedy provided by law; (2) Section 95.11(3), Florida Statutes (1997), provides the statutory authority and the four-year statute of limitations for seeking refund for suits against the county; (3) Approximately 50 percent of the property owners in the county refused to pay with the result that certificates were sold on their property and, under this Court's decision, these persons are treated differently from those persons who did pay; (4) The county paid the taxes with interest for the persons owning property for which certificates were sold to private entities, and canceled all liens on all property which subject to certificates struck off to the county; and (5) The effect of this Court's decision is to render it prospectively for those who did pay by refusing to authorize refunds, and render it retroactive for those who did not pay because they will never have to pay and have received the benefit of the First District Court's decision holding the ordinance invalid by having all liens canceled on their property. The Attorney General further admits that, under existing case law, not including this Court's decision in the instant case, for equitable considerations to justify a decision of prospectivity, there must have been an existing judicial decision on the issue upon which the governmental body could have relied for its action, and that none exist in this case.

In its answer brief, Madison County argues that this Court should not change its initial opinion because (1) the levies in the instant case only were declared invalid because of a "procedural irregularity" and the requirement of refunds is limited to situations where the tax or imposition is unconstitutional and (2) Newsweek v. Florida Dept. of Revenue, 118 S.Ct. 904 (1998), is dissimilar to the instant case and, therefore, does not require a refund. Each argument will be addressed in order.

**I. The due process requirements articulated in McKesson Corp. v. Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), of a clear and certain remedy for individuals paying illegal impositions or taxes under duress is not limited to those impositions that are unconstitutional.**

Madison County's argument that McKesson only requires a clear and certain remedy when an imposition or tax is unconstitutional, as opposed to merely illegal, ignores the due process principles upon which the United States Supreme Court based its decision. The due process principles forming the basis for McKesson and its progeny focus on the due process remedy required for individuals paying illegal impositions or taxes under duress – not on why the imposition or tax was declared illegal. Madison County also made the same argument to the United States Supreme Court, which appears to have rejected it by vacating this Court's initial decision and remanding for consideration in light of Newsweek.

Moreover, Madison County's argument would mean that the state could deny a refund to a taxpayer who successfully challenged the amount or accuracy of a tax because the tax was not unconstitutional but merely excessive. McKesson flatly rejected such an argument and stated that:

> To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, 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*, 223 U.S., at 285, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39 (emphasis added). If due process requires a clear and certain remedy to an individual compelled to pay an excessive or inaccurate tax or imposition, certainly it requires the same remedy when the entire tax or imposition is illegal and unlawfully imposed. Regardless of whether the tax is excessive, unlawful, or unconstitutional, the due process requirements set forth in McKesson and the line of cases following McKesson require either a clear and certain remedy or a predeprivation mechanism that is clearly exclusive. See Newsweek; Fulton Corp. v. Faulkner, 116 S.Ct. 848 (1996); Reich v. Collins, 513 U.S. 106 (1994); Harper v. Virginia Dept. of Transp., 509 U.S. 86 (1993); James B. Distilling Co. v. Georgia, 501 U.S. 529 (1991).

In McKesson, the Supreme Court discussed a long line of its previous decisions explaining "the scope of a State's obligation to provide retrospective relief as part of its postdeprivation procedure in cases such as this." 496 U.S. at

32. After discussing these cases, the Court then articulated the due process requirements upon which its based its decision by stating that:

> These cases demonstrate the traditional legal analysis appropriate for determining Florida's constitutional duty to provide relief to petitioner McKesson for its payment of an unlawful tax. Because the exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.

McKesson, 496 U.S. at 36 (emphasis added). Review of these cases reveal that the United States Supreme Court has not limited a state's obligation of retrospective relief to those cases where the tax was struck down as unconstitutional.

For example, Montana Nat'l Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928), required a refund of taxes where the tax violated a federal statute. There, Montana officials had imposed a tax on shares of banks incorporated under federal law but not on shares of state-incorporated banks, relying upon an older Montana Supreme Court decision interpreting state law to preclude such taxation of state bank shares. A federal statute, however, required equal taxation of shares of state and national banks. The Montana Supreme Court subsequently held that the unequal taxation violated the federal statute but declined to order a refund. The Montana court reasoned that state officials had reasonably relied upon its previous decision precluding taxation of state banks. The United States Supreme Court disagreed, holding that a refund of the excess tax paid was

required in addition to prospective relief. See McKesson, 496 U.S. at 34-35.

Similarly, Ward v. Love County, 253 U.S. 17 (1920), involved a county's attempt to tax Indian lands in violation of a federal treaty and a federal statute. Love County observed that "it is certain that the lands were nontaxable by the State and its subdivisions under the allotment treaty and, therefore, the taxes were assessed in violation of federal law." 253 U.S. at 21. After finding that the taxes were assessed under duress, the Court ordered a refund. The Court explained the state's duty to remit the tax as follows:

> 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 allotees 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.

McKesson, 486 U.S. at 33-34, quoting Love County, 253 U.S. at 24.

Although Montana Bank and Love County both involve state taxing measures that violated federal statutes, the fact that Madison County's ordinances were struck down because they violated Florida statutes does not require a contrary conclusion. As McKesson explained in rejecting the state's argument that it had no jurisdiction to review the case under the Eleventh Amendment:

> We have repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against

> States in state court; indeed, we frequently have entertained cases analogous to this one, where a taxpayer who had brought a refund action in state court against the State asked us to reverse an adverse state judicial decision premised upon federal law.

486 U.S. at 27.

In the instant case, the United States Supreme Court had no jurisdiction to entertain the property owners' petition for certiorari review but for the federal due process and equal protection questions addressing the remedy afforded to the property owners who had paid the illegal assessments. Why the ordinances were declared unlawful was an issue of pure state law. Federal due process is bottomed on the Fourteenth Amendment mandate that states cannot take a person's property unlawfully and force payment by any statutory scheme which is illegal. McKesson makes it crystal clear that a clear and certain remedy is the "minimum" federal due process requirement and that a state "is free, of course, to provide broader relief as a matter of state law than is required by the Federal Constitution." 486 U.S. at 52, n.36. A state, however, cannot provide less relief than required by federal due process and equal protection.

Although the basis for declaring a tax or imposition unlawful or excessive is irrelevant to McKesson's due process analysis, it is important to clarify the precise nature of the "procedural irregularity" claimed by Madison County as the reason its ordinances were declared unlawful. (AB-20) Although the county attempts to characterize the illegality of the assessments as being based on procedural irregularity, this is a totally

incorrect statement. The statute in force and effect at that time, section 125.01(1)(q)2, Florida Statutes (1987), required that an election be held in the cities 9 months prior to January 1 of the date of the first year for which the levies would be effective, as a condition precedent to the levy of any special assessment in the county and city. No such elections were ever held. Failure to hold an election is hardly a procedural irregularity. The other statute, section 125.01(5), Florida Statutes (1989), which was relied on in the 1990 ordinances that the county hurriedly adopted after suit was filed challenging the 1989 ordinances, required the consent of every affected municipality within which the levies were to be made, and the consent had to given by a specific point in time. No such consent was given. Lack of good faith could hardly be better demonstrated and the money problem was cured by the legislature.[1]

The First District Court held that the flaws in Madison County's ordinances were "material and substantial" and that "the county totally failed to comply with the terms of that statute." Madison County v. Foxx, 636 So.2d 39, 48 (Fla. 1st DCA 1994). The district court held that to "uphold the validity of the ordinances imposing special assessments based upon authority not cited in the ordinances, when the County totally failed to comply with the authority referenced in the ordinances, would undermine

---

[1]In 1995, section 336.025, Florida Statutes (1995), was amended to permit a county to use its local option gas taxes "for the express and limited purpose of paying for a court-ordered refund of special assessments." See ch. 95-345, Laws of Florida (1995).

the requirements stated in the above-mentioned authorities." Id. (emphasis added).

The following hypothetical illustrates the flaw in Madison County's argument and, for that matter, this Court's initial decision. Suppose that the Florida legislature passed a statute that imposed a statewide ad valorem tax on real property. Such a tax clearly would be in contravention of the Florida Constitution which provides that: "No state ad valorem taxes shall be levied upon real estate or tangible personal property." Art. VII, § 1, Fla. Const. As with ad valorem taxes levied by the county, the unpaid state ad valorem taxes required the sale of tax certificates, interest on delinquent amounts, payment of at least those taxes in good faith admitted to be owing, and forced sale of property. See §§ 194.171, 197.432, 197.122, 197.542, Fla. Stat. (1997). Thus, there is no question that the statewide ad valorem tax was enforced under duress.

Before any adjudication that the statute was unconstitutional, some property owners paid the ad valorem taxes and others refused to pay. The trial court ultimately held the statute unconstitutional in a class action involving all property owners statewide and the case was immediately accepted for review by this Court. During this time, however, the state continued to levy the tax and collect and spend the monies collected.

Both Madison County and the Attorney General agree that refunds would be due if the statute were declared unconstitutional and this Court's "commensurate benefit" theory

would not apply. Even under Madison County's argument and the position taken by the Attorney General in his amicus curiae brief, the state would be required to refund those taxes paid once it declared the statute unconstitutional. See § 197.182, Fla. Stat. (1997).

Besides, the United States Supreme Court has held that the ability of a state court to make its decision prospective only is subject to the limitations of the federal constitution. In Harper, the state supreme court declined to order a refund, relying upon its previous decisions that a decision declaring a taxing scheme unconstitutional is to be applied prospectively only. See Harper, 509 U.S. at 99. The United States Supreme Court rejected this position, stating that:

> We reject the department's defense of the decision below. The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law.

Harper, 509 U.S. at 100 (emphasis added, citations omitted). Harper declined to order the state to grant a refund but, instead, ordered the state supreme court to consider its decision in McKesson and what remedy would be appropriate. Virginia was "'free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine

petitioners to a lesser remedy." Harper, 509 U.S. at 102, quoting McKesson, 496 U.S. at 51-52 (citations omitted).

On the other hand, assume that there was no constitutional prohibition against a state ad valorem tax and that Florida statutes permitted the state to levy an ad valorem tax if each of the 67 counties consented. Again, some property owners paid and others did not. Approximately 50 percent of the counties voted in favor of the tax but other counties failed to approve the tax or took no action. Nevertheless, the state collected and spent the monies received, and when the case finally was considered by this Court, it held that the levy was invalid under the statute. Would there be a procedural irregularity?

Would Madison County argue that no refund or other remedy would be required because the statute was only invalid and not unconstitutional? The fact that property owners were required to pay the tax under duress has not changed and the federal due process requirements have not changed. Regardless of whether the tax is excessive, invalid, or unconstitutional, if the property owner is required to pay under duress, due process requires a clear and certain postdeprivation remedy or a predeprivation mechanism by which to challenge the tax or imposition that is clearly exclusive. See Newsweek; Reich; McKesson; Love County.

Even assuming arguendo that a "commensurate benefit" may be constitutionally sufficient to override due process

requirements, this Court's holding in its initial decision that the property owners received a "commensurate benefit" from the availability of that funded by the levies pursuant to the ordinance lacks any support in the record. No finding was ever made at the trial level that the property owners received any benefit from the levies and no finding was ever made that the levies constituted legitimate special assessments.

Prior to the adoption of the 1989 ordinances and thereafter, the county offered the same identical services funded by ad valorem taxes. That which was funded through the levies under the ordinances was the cost associated with funding the particular function and no new or different service was furnished to anyone, either those who paid or those who did not pay. Scattered throughout the county were green boxes in which persons could deposit garbage. This certainly is not a specific service offered to the property owners because everyone in the county or passing through the county could place garbage in the green boxes. The landfill was available for all persons whether property owners or not.

Fire protection and emergency medical services were just exactly that; that is, functions previously funded with ad valorem taxes but now funded through the levies imposed by the ordinances which were available to everyone in the county whether or not a property owner. Persons passing through the county involved in accidents had the same availability of emergency medical services as property owners. Vehicles on the highway

catching on fire would have the same availability of fire protection service if needed. The availability of these matters is no different than the availability of roads, sidewalks, street lighting, police protection, and any other aspect of county government, including the judiciary, and the functions of the clerk, tax collector, property appraiser, school board, etc., which were simply different aspects of the county's budget. The availability of these matters provides no direct special benefit to anyone.

In sum, a clearer case of no specific benefit flowing to the property owners or anyone else could hardly be found, and there never was any judicial finding in the trial court or the appellate court to the contrary. As the county points out, the district court remanded the case after holding the ordinances and levies invalid, finding that the determination that the charges were not valid special assessments was premature. See Foxx, 636 So.2d at 49. Considering that the levies and ordinances were invalid for other reasons, there was no need for the trial court to revisit that issue. Hence, no judicial finding of special benefit or that these charges were valid special assessments ever was made.

**II. The United States Supreme Court's remand for consideration in light of Newsweek requires a refund in the instant case.**

The county acknowledges that Newsweek was reversed even though there was a predeprivation remedy, which was the basis upon which the First District Court of Appeal had declined to

order refunds. Newsweek characterized the state's position as "bait and switch" because a refund statute existed. Newsweek simply reiterates McKesson and the cases which followed it concerning the demands of due process in refund situations. The First District Court simply was attempting to circumvent McKesson and its progeny and the United States Supreme Court held that it would not permit circumvention of federal due process principles.

Madison County relies upon Lawrence v. Chater, 516 U.S. 163 (1996), for the proposition that the Supreme Court's "GVR" order in this case has no effect on remand because Newsweek is distinguishable. To the contrary, the Court in Lawrence stated as follows in discussing the effect of a GVR order:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

516 U.S. at 167 (emphasis added).

Thus, the effect of the Supreme Court's remand in this case is that it is of the opinion that the Court believes that a "reasonable probability" exists that this Court's initial decision rests on a premise that it would reject if given the opportunity to reconsider it in light of Newsweek. The Supreme Court did not believe that Newsweek was distinguishable and the county's attempt to distinguish Newsweek should be rejected.

The county also states that: "In the instance case, the county does not contest that the petitioners are equally as entitled to a postdeprivation remedy as they are predeprivation remedy." (AB-19) Through some circuitous reasoning, however, the county contends that no refund should be made in the instant case, even though it admits that no predeprivation remedy exists. Instead, it contends that the property owners received some sort of benefit from the availability of the services offered through the ordinances that were held invalid. This contention is fallacious for two reasons: (1) the services offered consisted of the availability of green boxes for garbage disposal scattered throughout the county, the availability of a county landfill which everyone in the county could use, the availability of fire protection, and the availability of emergency medical service should it be needed. No specific service was ever furnished to any of the property owners before 1989 or after, and certainly the availability of these services was as beneficial to the roughly 50 percent who did not pay as it was to those who did; and (2) the same matters and services were available before and after the adoption of the ordinances and levies pursuant thereto. All that changed was the funding source and those who did not pay had the same access and availability of the services as those that did pay.

### III. The property owners are entitled to interest.

The county admits in its brief that the parties stipulated that the decision on the validity of the ordinances

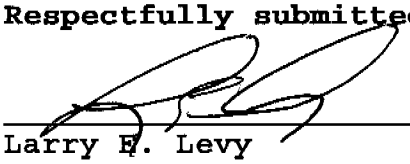
and levies in the first case involving 1989 and 1990 levies would control the 1991, 1992, and 1993 levies. (AB-4) Justice Wells pointed out that since there was a final judgment in the first decision, which the parties stipulated controlled the validity issue in the second, interest was due. The commands of the Fourteenth Amendment require that the property owners be treated the same as those who did not pay for which the county paid 18 percent interest in certificate redemption. The trial court held interest due citing decisions of this Court, one of which required a county to pay interest to cities from the date of the original judgment, seven years before. Here, the original Final Judgment controlling was November 1991. Palm Beach Co. v. Town of Palm Beach, 579 So.2d 719 (Fla. 1994).

Precedent from this Court supports allowance of interest. See Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990)(allowed pre-judgment interest); Ball v. Public Health Trust, 491 So.2d 608 (Fla. 1986)(cited in Finlayson allowing interest on equitable grounds; Simpson v. Merrill, 234 So.2d 350 (Fla. 1970). Interest should be allowed.

## CONCLUSION

Based upon the aforementioned arguments and authorities, this Court respectfully is requested to grant the property owners a refund with interest.

**Respectfully submitted,**

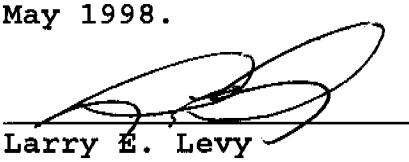


Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

Counsel for petitioners

**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; and **JOSEPH C. MELLICHAMP, III**, Senior Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050 on this the **18th** day of May 1998.



Larry E. Levy