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SUPREME COURT OF FLORIDA

Case No: 87,594

FILED
SID J. WHITE
JUL 8 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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' REPLY BRIEF

Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for petitioners

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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 (Foxx), who was a plaintiff in the trial court in a separate case, 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 since Foxx was a plaintiff in a different case. 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-volume #-page #) and references to the cross appeal index will be delineated as (R-CA-page #). References to the county's Answer Brief will be delineated as (AB-page #). The various amici curiae will be referred to herein by name.

STATEMENT OF THE CASE AND OF THE FACTS

One matter which needs to be addressed is contained in the county's Answer Brief in its Statement of the Facts and of the Case. The district court's opinion in Dryden v. Madison County, 21 Fla. L. Weekly D587 (Fla. 1st DCA Mar. 5, 1996), which certified the case to this Court, subsequently was clarified at 21 Fla. L. Weekly D1121 (Fla. 1st DCA May 7, 1996), after the property owners filed the petition to invoke this Court's jurisdiction. The property owners' petition was filed on the 14th day after the date of the decision, and the following day the county filed a motion for clarification. Apparently, the district court was not aware that it had been divested of jurisdiction with the filing of the notice and issued its clarification on May 7, 1996. (Clarification attached as exhibit 1) The clarification acknowledges that the court had improperly referred to the assessments as "taxes" in its original order of March 5, 1996, and, as the county notes, probably incorrectly referred to Kuhnlein v. Department of Revenue, 662 So.2d 308 (Fla. 1995) (Kuhnlein II), instead of Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994) (Kuhnlein I). The district court's clarification referring to the charges as "special assessments" also is incorrect because the nature of the impositions as being "special assessments" or some other form of charge was not addressed on remand by the trial judge. Accordingly, the district court incorrectly characterized the charges as "special assessments" when it, itself, had held in

Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994), that the trial court's decision as to the nature of the imposition was premature on summary judgment.

ARGUMENT

Throughout their briefs, the county and the various amici refer to the basis for the invalidity of the charges labeled "special assessments" by the county as being a procedural irregularity. This is incorrect and untrue. The charges were invalid because the county failed to comply with the law which contained specific requirements prior to the impositions. Furthermore, the invalidity of the charges was blatant and obvious from the face of the ordinances. The levies required the consent of the municipalities involved and this never took place, and has not to this day. In addition, the consent had to have been made prior to December 1, 1989, based on the face of the ordinances, and in the case of the 1989 levies, municipal approval had to have occurred 9 months prior to the time of the impositions. Since the ordinances were enacted in August 1989, consent would have had to have occurred 9 months prior thereto, or no later than November 1988. The 1990 ordinances adopted after suit was filed still contained the requirement that municipal consent had to have occurred prior to December 1, 1989, some 8 months prior to July 1990, which was when the 1990 ordinances were adopted, and the county had to know in July 1990 that November 1988 and December 1989 had already passed and no city approval had taken place prior or after those dates. The

statutory requirements of municipal approval are substantive requirements of law and it was on that basis that the district court held the ordinances invalid. These were not procedural irregularities in the manner of the adoption of the ordinances as the county and the amici attempt to suggest. Without municipal concurrence and approval, the county lacked the power to adopt the ordinances imposing the charges characterized as "special assessments" therein county-wide.

I. Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973), is no longer viable in light of McKesson v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990), and Kuhnlein v. Department of Revenue, 662 So.2d 308 (Fla. 1995).

In their briefs, the county and the amici argue that the holdings of McKesson and Kuhnlein do not apply in the instant case because those cases involve Federal constitutional issues founded on the commerce clause. The property owners disagree. The holdings in McKesson and Kuhnlein dictate quite clearly that, if taxes and other charges are assessed and collected under a coercive method, Federal due process requirements mandate that refunds must be given. The determinative inquiry is whether due process requires refunds where the illegal taxes or other charges are collected under a coercive procedure and not whether the basis for striking down the ordinance or statute levying the tax or other charge was a federal constitutional deficiency.

Furthermore, in the instant case both due process and equal protection issues were raised and addressed by the trial judge, although ignored on appeal. These are federal issues as well as

state issues and the trial judge specifically found that failure to give refunds constituted a violation of equal protection because many people suffered the detriment of having liens attached to their property which effect its alienation rather than pay the charges as levied. Most significantly, the equivalent of tax certificates were sold for nonpayment of the 1990 assessments and, after the district court's ruling in Foxx upholding the decision of the trial judge finding the charges illegal, null, and void, the county canceled all the certificates which had been struck off to the county, and was required to purchase those certificates where no bid was received and which had been sold to individuals, by paying such assessments plus interest at the rate of 18 percent. Thus, in 1990, the county effectively paid assessments for those who refused to pay.

The county cites City of Miami v. Bell, 634 So.2d 163 (Fla. 1994), Martinez v. Scanlon, 582 So.2d 1167 (Fla. 1991), and Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), all of which involve workmen's compensation issues. None of these cases involve the situation where taxes, assessments, or other charges are levied or imposed by a governmental unit under a coercive mechanism.

In Bell, employees entitled to worker's compensation benefits challenged a Dade County ordinance which permitted a deduction from the Dade County pension benefits of an amount received under worker's compensation. The issue was whether such deduction was lawful and the court held that it was unlawful.

However, there had been a prior Third District Court of Appeal decision which had upheld the Dade County ordinance and the practice of making the deduction. Some 15 years later, this Court invalidated the ordinance disagreeing with the prior district court's decision. In that situation, this Court said that to require adjustments for benefits for prior years would be fiscally unjust, since the city was entitled to rely on the previous district court decision upholding the validity of the ordinances. At bar, the 1989 ordinances were challenged promptly after adoption and the 1990 ordinances were adopted while the suit was pending. Thus, Bell is not applicable for two reasons which are (1) at no time had the county's ordinances ever been held to be valid by a court of competent jurisdiction, and (2) no assessment of taxes, special assessments, or other charges was involved.

Scanlon was decided prior to McKesson and Kuhnlein and also did not involve taxes, assessments, or other charges. More significantly, this court invalidated the 1990 enactment because it embraced two subjects, not because of any substantive infirmity in the enactment which rendered it unauthorized as in the instant case. If the worker's compensation part of the enactment had been separated from the part dealing with international trade, it would have been valid. This Court observed that, while the case was pending, the legislature re-enacted the worker's compensation law without the international trade provisions. One comment made in Scanlon, however, is

significant because this Court distinguished between the power to enact as opposed to the form of the enactment. See 582 So.2d at 1174. At bar, the county's levies were null and void because it lacked the power to impose same without municipal approval. This is substantive not procedural form.

Barragan also involved worker's compensation benefits and a city ordinance permitting deduction from pension benefits. It did not involve a governmental imposition of taxes, assessments, or other charges, collected under a coercive mechanism which makes the property stand forfeit for nonpayment.

Neither the county's brief nor those of the supporting amici dispute that the assessments were collected pursuant to a coercive scheme. They could not. This being so, due process attaches and refunds are proper. The amici, Department of Revenue, attempts to couch the issue in terms of a retroactive rule of law which is not correct. This is not a case of deciding if a rule of law should be applied retroactively or prospectively. The precise issue is whether a state or county can refuse to order refunds where state or county levies are illegal and have been collected under a coercive procedure to force payment now or, in this instance, forfeit property. Once this is established, federal due process requires that retroactive relief be made. Here, the only sure relief is refunds because the facts preclude any other type relief. To treat all property owners the same, either refunds are required or all those who did not pay should be back-assessed and that is

not a feasible alternative for three reasons: (1) the ordinances were invalid when enacted and do not supply the basis for a retroactive assessment; (2) the statutes all require designated times each year within which certain acts must occur; and (3) the county already has cancelled all certificates sold for non-payment and purchased those sold with interest, in effect paying the levies on behalf of those who did not pay.

McKesson held that federal due process requires a post-deprivation procedure to provide a clear and certain remedy. The Department of Revenue acknowledges such. (Departments' brief at p.8) Here about one-half of the people refused to pay and suffered liens against their property. Certificates were sold to coerce payment pursuant to the liens, all of which were subsequently cancelled by the county. The only clear and certain remedy making all property owners equal is a refund.

II. Gulesian does not apply to the situation at bar.

The Department of Revenue acknowledges that Gulesian "good faith" reliance was not applicable in Kuhnlein because the state had no "previous court ruling upholding the disputed" statutes. (Department's brief at p.4.) That is precisely why the district court was incorrect in finding Gulesian applicable.

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, and American Trucking Assoc. v. Smith, 496 U.S. 167, did not involve due process considerations. Smith only addressed retroactive application of the rule of law. The court stated that "it is important to distinguish the question of

retroactivity at issue . . . from the distinct remedial question in McKesson." It emphasized that Arkansas had relied on prior court rulings which had supported the flat taxes. Gulesian also relied on an intervening court ruling in not applying its decision retroactively. Here, the county cannot claim reliance on a court decision supporting its levies and ordinances.

Similarly, State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924), involved a situation where a prior judicial adjudication of validity and reliance on same existed. The same situation existed in National Dist. Co., Inc. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988). There, this Court relied on the existence of United States Supreme Court decisions upholding the state plenary power over liquor.

None of these cases addressed the due process issue included in McKesson, and all addressed only retroactivity where the state had relied on judicial decisions upholding the state actions subsequently held invalid. The Department acknowledges this difference in its brief stating:

> In contrast to cases such as *Gulesian* and *National Distributing*, it is equally clear that states cannot claim reliance to prevent retroactive remedies where there is no prior court adjudication upholding the challenged tax scheme. An example of where the State could not claim a reliance on past case-law is found in *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994).

(Department's brief at pp. 19-20.) This acknowledges that Gulesian, if viable, does not prevent refund in the situation at bar.

The county has no prior judicial decision upholding its ordinances and levies, on which to base its claimed reliance. It only claims that it had advice of lawyers, a CPA, and had heard the topic addressed at a meeting of the Florida Association of Counties. The county, however, produced no written opinion of anyone advising that its ordinances were proper and complied with law, and that its levies were valid.

II. The property owners are entitled to interest on all refunds.

The county argues that interest should not be paid because it contends that the decision below was not a final judgment in that the court still must address attorney fees and costs The court also attempts to distinguish cases cited by the property owners which have held that a county was required to pay interest. See Palm Beach County v. Town of Palm Beach, 579 So.2d 719 (Fla. 1991); Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990); Simpson v. Merrill, 234 So.2d 350 (Fla. 1970).

In Roberts v. Askew, 260 So.2d 452 (Fla. 1972), the petitioners sought a mandamus to compel the state to pay costs and interest on same, pursuant to Merrill. The state argued for prospective application and contended that the motion to tax costs was "tainted by laches." In rejecting the state's arguments, this Court stated:

> We now hold that costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded. However, the motion to tax costs should be made within a reasonable time after the appeal has been concluded. In the case

> *sub judice,* the motion to tax costs was filed approximately four months after the appeal had been dismissed. This is not an unreasonable length of time and it does not appear that the delay prejudiced the respondents in any way.

Roberts, 260 So.2d at 494. This court also held that the state must pay interest on the cost judgment stating:

> Fla.Stat. § 55.03, F.S.A., provides that all judgments and decrees shall bear interest at the rate of six per cent. This statute and other applicable statutes make no exemption in favor of the Trustees from the obligation to pay interest on a judgment rendered against the Trustees. The same reasoning employed by this Court in Simpson v. Merrill, *supra*, should apply here and the Trustees should be required to pay interest just as they are required to pay court costs.

Roberts, 260 So.2d at 495. The state was required to pay interest from the date of the original circuit court decision, October 15, 1969.

Roberts was cited with approval in McGurn v. Scott, 596 So.2d 1042 (Fla. 1992). McGurn approved and reaffirmed decisions holding that motions to tax costs and award attorney fees may be considered after final judgment and were incidental to the main action. The court stated:

> However, this Court has previously held that "costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded." *Roberts v. Askew,* 260 So.2d 492, 494 (Fla.1972). We have also held that proof of attorneys' fees may be presented for the first time after final judgment is issued. *Cheek v. McGowan Elec. Supply Co.*, 511 So.2d 977 (Fla.1987). In addition, the district courts have consistently held that a trial court's reservation of jurisdiction to award

> costs or attorneys' fees does not affect the finality of an underlying judgment for purposes of appeal. *See Casavan v. Land O'lakes Realty, Inc.*, 526 So.2d 215 (Fla. 5th DCA 1988); *C.B.T. Realty Corp. v. St. Andrews Cove I Condominium Ass'n, Inc.*, 508 So.2d 409 (Fla. 2d DCA 1987); *Dade County v. Davidson*, 418 So.2d 1231 (Fla. 3d DCA 1982); *Ruby Mountain Constr. & Dev. Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th DCA 1982). The rationale behind these decisions is that an award of attorneys' fees or costs is ancillary to, and does not interfere with, the subject matter of the appeal and, thus, is incidental to the main adjudication. McGurn contends that the calculation of prejudgment interest is generally straightforward and ministerial and that a reservation of jurisdiction to award prejudgment interest should be treated in a manner similar to the taxing of costs and attorneys' fees. We disagree.

McGurn, 596 So.2d at 1044 (emphasis added). Under Florida law, it is crystal clear that trial court's reservation of jurisdiction to fix attorney fees and costs does not effect the finality of the Order on Remand which was entered modifying a final judgment pursuant to mandate. It is a final judgment, and the district court erred in holding to the contrary. It orders a partial refund and fixes the amount, which amount has not been appealed by the county. A judgment attains "the degree of finality necessary to support an appeal when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment." McGurn, 595 So.2d at 1043. The Order on Remand modifying the prior final judgment does precisely that. The only matters remaining are the awarding of costs and fixing attorney's fees. The refund is part of the execution of

the final judgment. See also Parham v. Price, 499 So.2d 830 (Fla. 1986); Finkelstein v. North Broward Hosp., 484 So.2d 1241 (Fla. 1986); Chatlos v. City of Hallendale, 220 So.2d 353 (Fla. 1969), approving Craft v. Clarembeaux, 162 So.2d 325 (Fla. 2d DCA 1964); Bernstein v. Berrin, 516 So.2d 1042 (Fla. 2d DCA 1987).

Moreover, Department of Revenue v. Brock, 21 Fla. L. Weekly D1120 (Fla. 1st DCA May 7, 1996), is consistent with Palm Beach County, Finlayson, Roberts, Stone v. Jeffres, 208 So.2d 827 (Fla. 1968), and City of Miami Beach v. Jacobs, 341 So.2d 236 (Fla. 3d DCA 1976). In Jacobs, the court held that the trial court properly awarded interest on refunds of charges levied by a city ordinance described as "fire line charges." There, as here, the ordinance was declared invalid and refunds ordered. The court stated:

> We find no error in the provision of the order which conferred upon the members of the class interest on the amounts to which the court found the city was obligated to reimburse them. The interest provided for by the court was that which would accrue from the time of the entry of the judgment determining the plaintiffs were entitled to refunds from the city, as provided for by Section 55.03, Florida Statutes, 1973. See *Southeastern Mobile Homes, Inc. v. Transit Homes, Inc.*, 192 So.2d 53, 57-58 (Fla.2d DCA 1966); *Stone v. Jeffres*, 208 So.2d 827, 829 (Fla.1968).

Jacobs, 341 So.2d at 238 (emphasis added). In Jacobs, interest was to run from the time of entry of the judgment ordering refunds, which is the same as this court's holding in Town of Palm Beach. At bar, that date was November 1, 1991. The trial judge's order is squarely consistent with Jacobs and this court's

decisions in Town of Palm Beach, Roberts, and the other cases cited herein.

The property owners contend that any decision which fixes the right to refund and a requirement for payment is a final decision. In the instant case, the court ordered refunds in the amount of $2,199,004.00, and this decision was not appealed by the county. Although some 16 months have now lapsed since the court ordered refunds, however, no refund has been made. If this is not a final judgment from which the money is due and owing, does this mean that the county should not be required to pay interest from the date of the amended final judgment to the present time? This permits the county to use the money interest free even though it did not appeal the matter.

Furthermore, since the district court's decision in Dryden, the district court has rendered another decision, which involved taxes, and held that interest was due and owing citing Palm Beach County. See Brock. In Brock the court stated:

> The State of Florida appeals a final summary judgment ruling that appellees/ plaintiffs below were entitled to a tax refund with interest. The dispute over the tax assessment was based upon the Department of Revenue's interpretation that section 440.57(7), Florida Statutes (1989), obligated the Florida Hotel-Motel Self Insurers Fund to pay the premium tax in section 624.509, Florida Statutes (1989), without entitlement to the salary credit provided in section 624.509(5).

21 Fla. L. Weekly at D1120. Thereafter the court stated:

> We also affirm the trial court's conclusion that appellees are entitled to post-judgment interest on that amount.

> Unlike the circumstance in *Kuhnlein v. Department of Revenue*, 662 So.2d 308 (Fla. 1995), this *is* a final money judgment, and therefore there is now an entitlement to post-judgment interest. In that case the Florida Supreme Court expressly ruled that there is no entitlement to prejudgment interest on a tax refund, but did not hold that there cannot be post-judgment interest on a tax refund. Instead, the court stated that it was affirming the denial of post-judgment interest because there was not yet a final money judgment, and relinquished jurisdiction to the circuit court for entry of a final order. *See also Dryden v. Madison County, Florida*, 21 Fla. L. Weekly D587, D588 (Fla. 1st DCA March 5, 1996). We affirm appellees' entitlement to post-judgment interest. *See Palm Beach County v. Town of Palm Beach*, 579 So.2d 719 (Fla. 1991).

Brock, 21 Fla. L. Weekly at D1120 (emphasis added).

In the instant case, there initially was a final summary judgment which was reversed in part in Foxx. The order on remand simply modifies the initial final summary judgment on the issue remanded. It is purely and simply a final judgment. In its initial judgment, the trial judge found that the ordinances and levies made pursuant thereto were invalid and that the property owners were entitled to refund. The district court held that the determination that refunds were in order was premature and remanded the case for further hearings on whether refunds should be ordered. The court adhered to its original judgment and ordered refunds in the companion case which had been filed challenging the assessments for 1991, 1992, and 1993, which was held in abeyance based on stipulation of the parties that it would be controlled by the outcome in the first case. No further judicial labor was required to be performed in either of the two

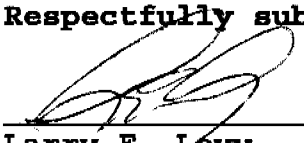
cases, other than the issue remanded which centered around the right to refund. The trial judge, citing this court's decision in Palm Beach County, held that the county was required to pay interest from the date of the initial final summary judgment. That is precisely what this Court held in Palm Beach County. It certainly is blatantly unfair to find that a city is entitled to interest on money which the county owed to the city as in Palm Beach County, but that property owners are not entitled to interest on money the county owes to the property owners.

In any refund suit, the court is required to first determine the right to refund. The amounts to be refunded to each property owner could not be in dispute because it is the precise amounts paid to the tax collector each year. This Court has always held that determinations as to attorney fees and costs were not required for finality of judgments. See Roberts; McGurn. In fact, in most cases the ruling on the determination of costs and attorney fees are settled after an appeal of the original decision has been exhausted.

CONCLUSION

Based on the aforementioned authorities, this Court respectfully is requested to answer the certified question by holding that the district court was incorrect in holding that Gulesian applies, and order refunds for years 1989 and 1990, together with interest from the date of the original final judgment.

Respectfully submitted,

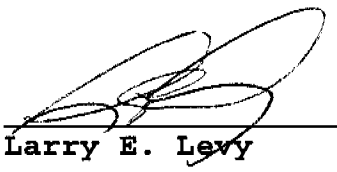


Larry E. Levy
Fla Bar No. 047019
Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

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 **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; **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; **KEITH C. HETRICK, ESQUIRE, ROBERT M. RHODES, ESQUIRE**, and **VICTORIA L. WEBER, ESQUIRE**, Steel Hector & Davis, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301; **DANIEL C. BROWN, ESQUIRE**, Katz Kutter Haigler Alderman Marks Bryant & Yon, Suite 1200, 106 East College Avenue, Tallahassee, Florida 32301; and **SANFORD A. MINKOFF, ESQUIRE**, Post Office Box 7800, Tavares, Florida 32778 on this the 3rd day of July 1996.



Larry E. Levy

Barnes, the plaintiff in the trial court. We affirm on all issues without further comment except as to two points raised, one by each of the parties.

One of appellant's points was that the comments made by plaintiff's counsel in violation of rule 4-3.4(e) of the Rules of Professional Conduct, Rules Regulating the Florida Bar, require reversal of the case and remand for a new trial.

A number of times during closing argument, counsel for the plaintiff expressed his personal beliefs concerning the evidence which was presented. Several times, defense counsel objected and the trial judge sustained the objection, issuing a curative instruction. Appellant complains that notwithstanding these instructions, counsel continued to express his personal beliefs.

Rule 4-3.4 of the Rules of Professional Conduct, Rules Regulating the Florida Bar, provides,

> A lawyer shall not: ... (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or *state a personal opinion as to the justness of a cause, the credibility of a witness*, the culpability of a civil litigant, or the guilt or innocence of an accused.

(Emphasis added).

We definitely do not condone the injection of the personal opinion of plaintiff's counsel into argument before the jury. The practice is in violation of the Rules of Professional Conduct. However, in the case before us, the improper activity did not reach the level of reversible error. The trial judge responded to the objections made and issued curative instructions. Further, we point out that appellant failed to move for mistrial. In all, we believe that a fair trial was conducted despite the improprieties of counsel.

On cross-appeal, Barnes contends that she should have been awarded interest accruing from the date the verdict was rendered rather than from the date the judgment was entered, arguing that the amendment to section 55.03, Florida Statutes, effected by chapter 94-239, Laws of Florida (1994) somehow undermines our decision in *Easkold v. Rhodes*, 632 So. 2d 146, 147 (Fla. 1st DCA 1994) that it was error in a personal injury case to award interest from the date of the jury verdict. In our view, the statutory amendment has no bearing on the question. We do, however, acknowledge conflict with *Palm Beach County School Board v. Montgomery*, 641 So. 2d 183, 184 (Fla. 4th DCA 1994) that held that the interest should run from the date of the jury verdict.

AFFIRMED. (JOANOS and BENTON, JJ., CONCUR. WOLF, J., CONCURS WITH OPINION.)

(WOLF, J., specially concurring.) I concur to note that contrary to how some have read this court's decision in *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676 (Fla. 1st DCA 1995), a closing argument that violates rule 4-3.4 of the Rules of Professional Conduct, Rules Regulating The Florida Bar, does not necessarily constitute fundamental or harmful error. The job of this court in reviewing trial court decisions is not to police improper conduct, but to determine if the level of conduct was so pervasive that it could not be corrected by proper instruction from the trial court, and whether the conduct was so "pervasive, inflammatory, and prejudicial to preclude the jury's rational consideration of the case." *Hagan v. Sun Bank*, 666 So. 2d 580, 583 (Fla. 2d DCA 1996). See also Judge Farmer's dissent in *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th DCA 1996). In *Sacred Heart Hosp., supra*, and *Baptist Hosp. v. Rawson*, No. 95-2237 (Fla. 1st DCA April 24, 1996) [21 Fla. L. Weekly D1023b], the conduct was so egregious as to affect the fairness of those proceedings; in this case, it was not.

* * *

Workers' compensation—Attorney's fee—Carrier/carrier for failure to pay claim within 21 days—Error to deny fee where the only adjudication of any pending claim in this case was a denial of permanent total disability benefits

GILBERT SOUTHERN CORPORATION and AETNA LIFE & CASUALTY COMPANY, Appellants, v. WILBUR FRYE, Appellee. 1st District. Case No. 95-1258. Opinion filed May 7, 1996. An appeal from an order of Judge of Compensation Claims J. Paul Jones, Jr. Counsel: Daniel Deciccio and Wayne Johnson of Deciccio, Herzfeld & Rubin, Orlando, for Appellants. Robert A. Wohn, Jr. of Wohn & McKinley, P.A., Cocoa, for Appellee.

(PER CURIAM.) In this workers' compensation case we reverse the award of attorney's fees made by the Judge of Compensation Claims (JCC). The JCC awarded fees pursuant to section 440.34(3)(b), Florida Statutes (1991). This statute requires a fee award in any case in which the employer or carrier fails or refuses to pay a claim filed with the Division on or before the twenty-first day after receiving notice of the claim, and the claimant has employed an attorney in the successful prosecution of the claim. The only adjudication of any pending claim in this case was a denial of permanent total disability benefits. Accordingly, claimant was not entitled to a fee payable by the employer or carrier under section 440.34(3)(b).

REVERSED. (BARFIELD and KAHN, JJ., and SHIVERS, Senior Judge, CONCUR.)

* * *

Counties—Taxation—Special assessments—Question certified

QUINTON DRYDEN, et al., Appellants, v. MADISON COUNTY, FLORIDA, a political subdivision of the State of Florida, and WES KELLEY, as his official capacity as Tax Collector, MADISON COUNTY, FLORIDA, Appellees. MADISON COUNTY, FLORIDA, a political subdivision of the State of Florida, and WES KELLEY, in his official capacity as Tax Collector of Madison County, Florida, Appellants, v. QUINTON DRYDEN, et al., Appellees. 1st District. Case Nos. 95-466/95-978. Opinion filed May 7, 1996. An appeal from the Circuit Court for Madison County. John Peach, Judge. Counsel: Larry E. Levy of Law Offices of Larry E. Levy, Tallahassee, for appellants/cross appellees. George T. Reeves and Edwin B. Browning, Jr. of Davis, Browning & Schnitker, P.A., Madison; Ken Van Assenderp, Tallahassee, for appellees/cross appellants.

ON MOTION FOR CLARIFICATION
[Original Opinion at 21 Fla. L. Weekly D587a]

(WOLF, J.) We grant appellees' motion for clarification to the extent that we reword the certified question to read as follows:

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

In all other respects, we deny the motion and readopt our previous opinion. (JOANOS and VAN NORTWICK, JJ., concur.)

* * *

Criminal law—Attempted third degree murder conviction reversed because attempted felony murder is no longer recognized as criminal offense in Florida—No merit to argument that case should be remanded for entry of judgment for attempted manslaughter, a necessary lesser included offense of the crime originally charged, attempted first degree murder—Question certified

JOSEPH WILEY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-1047. Opinion filed May 7, 1996. An appeal from Circuit Court for Okaloosa County. William H. Anderson, Judge. Counsel: Nancy A. Daniels, Public Defender, and David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and [illegible]ey General, Tallahassee, for Appellee.

[illegible]se the appellant's conviction for at-[illegible], a classification of attempted felony