IN THE SUPREME COURT OF FLORIDA

Case No. 87,594

QUINTON DRYDEN, et al,

Petitioners,

vs.

MADISON COUNTY, etc., et al.,

Respondents.

_____/

1st DCA Nos. 95-466
95-978

BRIEF OF AMICI CURIAE WATER OAK MANAGEMENT CORPORATION AND JOHN RICHARD SELLARS IN SUPPORT OF PETITIONERS

ON REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT AND INTEREST OF AMICI

Water Oak Management Corporation ("Water Oak") and John Richard Sellars ("Sellars") are Plaintiffs and Appellants in *Water Oak Management Corporation, et al. v. Lake County, Florida, etc., et al.,* Case Number 94-02729 before the Fifth District Court of Appeal (*"Water Oak"*). Water Oak and Sellars file this brief, subject to the Court's approval, contemporaneously with their Motion for Leave to Appear as Amici Curiae. As noted in that Motion, Respondent does not object to Water Oak and Sellars so appearing in support of Petitioners, so long as their brief is served by May 24, to allow Respondents ample time to respond in Respondents' Answer Brief. For that reason, this brief is filed now, subject to the Court's approval.

Water Oak and Sellars represent a certified class of property owners in Lake County subject to special assessments for fire protection and solid waste management. Water Oak and Sellars prevailed before the Fifth District Court of Appeal in challenging the constitutionality of Lake County's imposition of "special assessments" or "non-ad valorem assessments" for fire protection services. The Fifth District Court of Appeal has certified questions in that case as of great public importance. *See* Appendix 1. The class which Water Oak and Sellars represent have paid such assessments and seek refunds of such unconstitutional, and thus void, exactions. Water Oak and Sellars support Petitioners' arguments here, and point out that the counties have the

constitutional obligation to make refunds where a charge is found to be a spurious special assessment.

The issue of whether refunds should be granted if a special assessment is invalid may substantially affect the relief available Water Oak and Sellars, and the class they represent.

STATEMENT OF THE CASE AND THE FACTS

Water Oak and Sellars accept and adopt Petitioners' Statement of the Case and Statement of the Facts.

SUMMARY OF ARGUMENT

McKesson Corp. v. Division of Alcoholic Bev. & Tobacco, 496 U.S. 18, 110 S.Ct. 223, 110 L.Ed. 2d 17 (1990), and subsequent United States Supreme Court decisions make it clear that, as a matter of federal constitutional law, the state and its political subdivisions must provide the remedy of a refund when they exact special assessments under a coercive collection mechanism and it is subsequently determined that the exaction was unauthorized. As a matter of federal due process of law, refunds are required. The First District Court of Appeal erred in not recognizing that federal constitutional requirement, and in improperly extending the rationale of *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973).

As a matter of Florida law, also, the imposition of spurious "special assessments" must be remedied by refunds, in order to preserve inviolate the sanctity of the homestead exemption.

ARGUMENT

I. THE USE OF THE SO-CALLED "NON-RETROACTIVITY" DEVICE TO AVOID REFUNDS WHERE THE COUNTY HAS COLLECTED UNAUTHORIZED ASSESSMENTS UNDER DURESS VIOLATES FEDERAL DUE PROCESS.

The notion that the states are free to provide "prospective only" relief to taxpayers in cases challenging the substantive legality of a tax or special assessment which is exacted coercively is contrary to due process of law. Any lingering debate on the subject was ended by *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990) ("*McKesson*") and *Reich v. Collins*, ___ U.S. ___, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994) ("*Reich*"). *See also Harper v. Virginia Dep't of Taxation*, 496 U.S. 18, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).

McKesson reaffirmed 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), holding that the states may not deny refunds to taxpayers who successfully challenge the states' authority to impose an assessment paid under duress. 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, supra; see also Reich, supra*.

Florida's method of imposing and collecting special assessments, such as that at issue here, 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, supra*, 115 S.Ct. at 551. If the property 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 judicial process or the extra-judicial process of 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.* 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 the post-payment remedy of a refund of unauthorized taxes or assessments. *McKesson, supra*, at 110 S.Ct. 2251, n. 21.

McKesson dealt with an infirmity which was not a prohibition against the exercise of the taxing power or a lack of authority for the levy, but instead was discrimination in the manner of taxation. *McKesson*, however, explicitly reaffirmed the holdings of earlier cases that where a tax or assessment is prohibited or without legitimate authority, due process requires a refund of the illegal exaction, without exception:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, ... or because the taxpayers were absolutely immune from the tax, ... no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress.

McKesson, supra, at 110 S.Ct. 2251. *See also Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 19 (Fla. 1994).[1]

The exaction here was outside of the county's power, since, as the lower courts found, it was imposed contrary to Florida law. To deny refunds under those circumstances also circumvents the homestead exemption, and fosters the circumvention of the millage caps imposed by the Florida Constitution on local governments. *E.g., State v. City of Port Orange, infra; Carter, infra; Higgs, infra.*

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[1]In a supplement to its *Kuhnlein* opinion, this Court recognized that *McKesson* in some circumstances allows a taxing authority to attempt to fashion a retroactive remedy other than a refund for taxes declared discriminatory. *Department of Revenue v. Kuhnlein*, 20 Fla.L.Weekly S5 (Fla. November 30, 1994). The issues here, however, do not fit that pattern. They encompass whether the taxing authority must refund a special assessment which it has coercively imposed contrary to Florida law. *McKesson* reaffirms that refunds are always required where the exaction was enacted in excess of the county's authority and where taxpayers are subject to duress with regard to payment.

In these circumstances, some form of "retroactive remedy" other than refunding the assessments paid, such as the retroactive imposition of the special assessment on those who did not pay, is not possible, since it would coercively collect a concededly invalid special assessment from all property owners as a means of "remedying" its coerced collection from some.

Similarly, Florida ultimately granted McKesson Corporation a refund, after the trial court on remand determined that curing the discrimination which infected that tax by retroactively taxing McKesson's competing distributors did not comport with due process guarantees against retroactive taxation as to the competing distributors. *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, Case nos. 86-2997, 92-1200 (*McKesson II*)(unreported decision dated March 4, 1993) (App. 2 to this Brief), *aff'd on other grounds, Division of Alcoholic Bev. & Tobacco v. McKesson Corp.*, 643 So.2d 16 (Fla. 1st DCA 1994), *rehearing denied* (Oct. 31, 1994).

We note that the cases considering federal due process constraints on the states have usually arisen where the challenge to a tax or assessment was founded in the federal constitution. It is of no consequence, however, that the prohibition against this special assessment arises from Florida law. Property interests, the expectancies which the Due Process Clause of the 14th Amendment protects, usually arise from and are defined in the first instance by state law. *E.g., James v. City of St. Petersburg*, 33 F.3d 1304, 1306 (11th Cir. 1994). The property interest here, immunity from forced liens for property tax and special assessments beyond defined limits, has been judged so important by Floridians that it is enshrined in provisions of the Florida Constitution (the millage caps and homestead exemption provisions) so that neither the state nor its political subdivisions, the counties, may abridge it. Additionally, Florida Statutes impose substantive requirements concerning the imposition of non-ad valorem assessments which the county failed to heed.

Florida law thus indisputably creates property interests vis-a-vis county's the taxing power which are protected by the Due Process Clause of the 14th Amendment. *E.g., James v. City of St. Petersburg, supra*. Due process protections are invoked by creating such expectancies, and the state and its political subdivisions must thus comply with federal commands under the 14th Amendment in dealing with those expectancies. *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 property taxpayer of due process protection by denying him the refund remedy due process demands when illegal assessments are imposed by coercive means. *McKesson, supra*. 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.

As the United States Supreme Court observed in *McKesson*, the state may resort to a number of means to soften the impact of providing refunds of unlawful assessments or taxes. It may impose relatively short statutes of limitations on actions seeking the refund of assessments.[2] It may make provision for the pay-out of refunds over time, to allow for financial planning where necessary. *McKesson, supra*, at 110 S.Ct. 2254. But the state and the county may not do what the county argues for here: both collect an unlawful special assessment by coercive means and then deny refunds on the theory that the assessments were collected in "good faith reliance" on a presumptively valid ordinance. That denies taxpayers the due process of law guaranteed them by the 14th Amendment to the United States Constitution. *McKesson, supra*.

The First District Court of Appeal erred in failing to adhere to these federal constitutional principles. It improperly extended *Gulesian, supra*. If *Gulesian* retains any validity at all after

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[2]For example, the state has enacted a short limitation period for refund actions pertaining to state-imposed taxes. §§ 215.26, 72.011, *Fla. Stat.*

McKesson, it is surely limited to very narrow circumstances. The exceptional facts of *Gulesian* and the narrow boundary of that decision are discussed below in Point II of this brief.

The court below improperly extended *Gulesian* well beyond its limits. That is especially true in this case, where, as the trial court found, there is no equity in refusing refunds to citizens who felt compelled to submit to the county's coercion and paid the illegal assessment, when many property taxpayers did not pay the assessment.

II. THIS CASE PRESENTS NO OCCASION FOR A NON-RETROACTIVE RULING, IN ANY EVENT.

Even without *McKesson* and its progeny, this case presents no basis to deny a refund of illegally exacted assessments in 1989 and 1990. In the sequence of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) and *Harper v. Virginia Dep't of Taxation*, ___ U.S.___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), the United States Supreme Court recognized that the federal experiment with non-retroactive judicial decisions was ill-conceived in large part. The court restored to federal jurisprudence the "general rule of retrospective effect for the constitutional decisions," noting the "fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.'" *Harper v. Virginia Dep't of Taxation, supra,* at 113 S.Ct 2516, *quoting Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed.228 (1910) (Holmes J., dissenting), and *quoting Robinson v. Neill*, 409 U.S. 505, 507, 93 S.Ct. 876, 877, 35 L.Ed.2d 29 (1973). Whatever

remaining viability the "prospective only" experiment has, sound jurisprudence rejects it as a doctrine to be casually employed, especially in cases with constitutional ramifications, such as this. That court's current view is consistent with the view of Florida's appellate courts. *E.g., Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978).

The doctrine, at its genesis, applied only in those cases where a decision was wholly unforeshadowed, such as where a decision overruled firmly established precedent. *E.g., Harper v. Virginia Dep't of Taxation, supra*. It was never intended to extend to the case where no radical shift in jurisprudence is announced by the decision. *E.g., McKesson, supra*. It was never intended, even in its federal heyday, to apply to cases such as this.

In this case, Madison County was well aware that these special assessment levies were of uncertain validity. The statutory requirements to impose special, or non-ad valorem assessments were known to the county. The county failed to comply with those statutes.

More fundamentally, the constitutional principles limiting special assessments have long been well established by the jurisprudence of this Court and the other courts of this state. It has been the long-held and consistent view of the courts that, to guard the Florida Constitution's taxpayer protections, a special assessment must be accompanied by a truly special benefit. A benefit which inures to the citizens and property owners generally within a county from the provision of some governmental service or

function is insufficient to support the funding of that governmental service through a special assessment. *Hanna v. City of Palm Bay*, 579 So.2d 320, 322 (Fla. 5th DCA 1991): *St. Lucie County - Fort Pierce Fire Prevention Control Dist. v. Higgs*, 141 So.2d 744, 745-46 (Fla. 1962); *City of Ft. Lauderdale v. Carter*, 71 So.2d 260 (Fla. 1954); *Fisher v. Board of County Commissioners of Dade County*, 84 So.2d 572 (Fla. 1956). It has been the view of this Court that creative attempts to circumvent the protections extended to taxpayers by the millage caps on local government and the homestead exemption clauses will not be countenanced. *E.g., State v. City of Port Orange*, 650 So.2d 1 (Fla. 1994).

This case thus presented no novel question of law concerning the validity of special assessments, and certainly the trial court did not overrule firmly entrenched precedents on that question to establish a new and unforeshadowed rule. But as to *Gulesian*, the effect of the trial judge's ruling and the district court's affirmance is to create a new judicial basis for denying refunds, far broader than that established by *Gulesian*.

The county's attempt to fit this case into *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973) is misplaced. *Gulesian* involved peculiar factual circumstances not present here. In *Gulesian*, the United States District Court had stricken Article VII, Section (9)(b) of the Florida Constitution because it limited millage elections to freeholders. *Id.* at 327. That court found the freeholder limitation inseparable from the remainder of the

provision and struck down Article VII, Section (9)(b) in its entirety. *Id.*

In response to the District Court's ruling, the Florida Legislature passed Chapter 71-263, amending section 236.25, Florida Statutes, to statutorily reinstate the 10 mil cap. However, the statute, unlike the stricken constitutional section, provided that the 10 mil cap could be exceeded for certain specified purposes. *Id.* There was thus at that time no absolute cap limiting ad valorem millage.

Acting in reliance on amended section 236.25, the Dade County School Board levied more than 10 mils for a purpose for which amended section 236.25 authorized. This levy was collected. Afterwards, the United States Fifth Circuit Court of Appeals, on appeal from the ruling of the United States District Court, found that the offending language regarding freeholder elections in Florida Constitution Article VII, Section 9(b) could be severed and the remainder of Article VII, Section 9(b), including the 10 mil cap, remained valid. *Id.*

Thus, in *Gulesian*, this Court determined only whether a refund would be ordered where the levy was, at the time made, in strict compliance with statutory authority and not in violation of any existing constitutional restriction on the taxing power. The Florida constitutional provision prohibiting millage exactions above 10 mils was only later reinstated by the decision of the Fifth Circuit Court of Appeals. On these unique facts, the *Gulesian* Court resorted to equitable considerations for the purpose

of determining whether the declaration of invalidity of the tax levy, caused by the decision of the Fifth Circuit which reinstated the constitutional cap on millage, should be applied retroactively to require a refund. *Id.*

Here, unlike *Gulesian*, there are no such remarkable and unique facts. The statutory limits on the imposition of non-ad valorem assessments, which the county violated, were operative at all material times. There was no judicial excision or suspension of Florida's constitutional or statutory limits on the county's power to impose special assessments when the assessments were levied.

The narrow scope of the refund exception allowed by *Gulesian* was recognized in *Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978). In *Coe*, the court stated: "[W]e 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." *Id.* at 216 [footnote omitted]. After stating the facts of *Gulesian*, the *Coe* court found that "[in *Gulesian*] [i]t is clear that the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature. A better case of good faith would be hard to find." *Id.* The *Coe* court held that "[a] taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes," and rejected as a basis for denial of refund the fact that the taxes collected had already

been spent by the taxing authority. *Id.* at 215-217. *Accord, McKesson, supra.*

Similarly here, nothing prevents Madison County from refunding the unlawful special assessments. The courts are well-equipped to order refunds on a schedule which does not cast county services into disarray, yet which gives the property taxpayers the full relief from the illegal levy which is their right under both the United States Constitution and the Florida Constitution.

CONCLUSION

For the reasons expressed herein, the decision below should be reversed with directions to enter a decree ordering Madison County to refund amounts illegally exacted from the members of the plaintiff class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **EDWIN B. BROWNING, JR.**, Davis, Browning & Schnitker, Post Office Drawer 652, Madison, Florida 32341; **KEN VAN ASSENDERP**, Young, van Assenderp & Varnadoe, Post Office Box 1833, Tallahassee, Florida 32302; and **JOSEPH C. MELLICHAMP, III**, Senior Assistant Attorney General, and **ERIC J. TAYLOR**, Assistant Attorney General, Department of Legal Affairs, Tax Section, The Capitol, Tallahassee, Florida 32399-1050 on this 24TH day of May, 1996.

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