

087

SUPREME COURT OF FLORIDA

Case No. 87,594

FILED

DO J. WHITE

JUN 28 1996

CLERK, SUPREME COURT

BY _____
Chief Deputy Clerk

QUINTON DRYDEN, et al.,

Petitioners,

vs.

1st DCA NOS.

95-466

95-978

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.

_____ /

LAKE COUNTY'S BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENT, MADISON COUNTY, FLORIDA

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INTEREST OF AMICUS CURIAE, LAKE COUNTY, FLORIDA

Lake County is a non charter county which currently levies special assessments for fire protection and solid waste (collection and disposal) as well as other special assessments related to construction of roads and maintenance of facilities within individual subdivisions. Lake County has an interest in this matter because of Water Oak Management Corp. v. Lake County, 673 So. 2d 135 (Fla. 1996) in which the Fifth District Court of Appeal held that the special assessment levied by Lake County for fire protection was not a valid special assessment. In addition, the District Court of Appeal certified to the Supreme Court the issues of the validity of the Lake County fire special assessment and the Lake County solid waste special assessment. This case is currently pending acceptance of jurisdiction by the Supreme Court. The Supreme Court case number for this case is 88,218. Still pending in the Water Oak case is a claim by the plaintiffs for refunds of the special assessments imposed by Lake County over a several year period. Thus, the decision of the Court in this case may have substantial impact on the Water Oak case and Lake County.

STATEMENT OF THE FACTS AND CASE

Amicus, Lake County, adopts the statement of the facts and case of the Appellee, Madison County. However, to decide the issue certified by the First District Court of Appeal, Lake County asserts that the facts are not critical to the decision to be made by this court. In fact, in considering the certified question, it would be appropriate to consider facts where the equities lie totally with the respondent. For instance, consider the following facts. Suppose a county created an assessment program which was consistent with decisions of the supreme court at the time; which was instituted only after a referendum was held where the voters in the county approved the assessment program; which was instituted in compliance with all statutory rules; where the assessments collected by the county were expended to provide services to the property owners in the county; and which existed for several years at which time a district court of appeal or the supreme court determined that the earlier decisions approving this type of assessment were incorrect, and that the county's assessment program is invalid. Further the court's decision announced a new rule of law in this area and the court found that the county had acted in good faith reliance on existing case law and statutes. Should such

a decision operate retroactively or should the court have the opportunity to limit the application of its decision to the future?

SUMMARY OF THE ARGUMENT

In the instant case, the First District Court of Appeal has certified the following question as being one of great public importance:

"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)"

Madison County v. Foxx, 636 So. 2d 39 (Fla. 1DCA 1994).

The answer is yes for the following reason. McKesson, Kuhnlein and other recent United States Supreme Court cases in this area only apply to state laws or tax enactments which have been determined to be invalid because of a violation of a provision of the United States Constitution or federal law. State courts

continue to have discretion to determine whether or not their decisions are retroactive or prospective when only state law is involved.

ARGUMENT

In Great Northern Railway Co. V. Sunburst Oil and Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932) Justice Cardozo speaking for the court said:

"This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.

The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." (p. 364)

This principle of law, that it is within the discretion of state courts to choose retroactive or prospective operation of its decisions was recently affirmed in the United States Supreme Court cases of Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) and American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990). This has been the case even as the U.S. Supreme Court was moving toward limiting or otherwise destroying the ability of federal courts (or state courts deciding matters of

federal law) to issue forward looking or prospective decision making. See Harper.

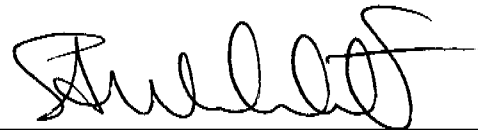
The Florida Supreme Court cited American Trucking with approval in the case of Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991), a case in which a Florida Statute was declared invalid because of conflict with the Florida Constitution. The court determined that in that instance its decision would operate only prospectively. This case was decided after McKesson but prior to Harper and James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, L. Ed. 2d 481 (1991). Also see City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994) for a similar result. A review of decisions from other states indicates that state courts are retaining the right to issue decisions which are prospective in operation based upon an analysis similar to Chevron Oil Company v. Hudson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). For example see Coleman v. Sandoz Pharmaceuticals Corp., 660 N.E. 2d 424 (Ohio 1996); ICI Americas, Inc. v. Banks, 460 S.E. 2d 797 (Ga. 1995); Burr v. Kulas, 532 N.W. 2d 388, 391 (N.D. 1995); Ales v. Ales, 650 So. 2d 482, 485 (Miss. 1995); Robinson v. Washington Internal Medicine Assoc.'s, P. C., et al, 647 A. 2d 1140, 1146 (D.C. 1994); New Bern v. New Bern-Craven Bd. of Educ., 450 S.E. 2d 735, 743 (N.C. 1994); State v. Nakata, 878 P. 2d 699, 717 (Hawaii

1994); Beavers v. Johnson Controls World Services, Inc., 881 P. 2d 1376 (N.M. 1994); Rivers v. State, 889 P. 2d 288, 291 (Okla. 1994); Labrum v. Utah Board of Pardons, 870 P. 2d 902, 912 (Utah 1993); Montells v. Haynes, 627 A. 2d 654, 660 (N.J. 1993); People v. Favor, 624 N.E. 2d 631, 635 (N.Y. 1993); Kincaid v. Mangum, 432 S.E. 2d 74, 84 (W.Va. 1993). All of these state decisions hold that when matters of state law are at issue state courts retain the right to issue decisions which are prospective in operation. Mississippi was the only state which adopted the retroactive only rule and even then announced that the rule would not apply when a government party was involved. See Ales, at 485. But see the case of Waller v. Truck Insurance Exchange, Inc., 900 P. 2d 619 (Cal. 1995).

It is clear that the recent line of cases from the U.S. Supreme Court, including American Trucking, McKesson, Beam, and Harper have not affected the right of state courts, when matters of state law are at issue, to determine whether their decisions will be prospective, selectively prospective, or retroactive, and that this is a matter of state and not federal law.

CONCLUSION

The certified question should be answered in the affirmative. It is unclear that in cases not involving the United States Constitution or federal law, state courts have the discretion to determine whether their decisions operate retroactively or prospectively. The analysis and reasoning of this court in Gulesian remains valid and was properly applied by the Fifth District Court of Appeal in this case.



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I HEREBY CERTIFY that a copy hereof has been furnished to **LARRY E. LEVY, ESQUIRE**, and **LOREN E. LEVY, ESQUIRE**, Law Offices of Larry E. Levy, Post Office Box 10583, Tallahassee, Florida 32302; **EDWIN B. BROWNING, JR., ESQUIRE**, and **GEORGE T. REEVES, 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. MELLICAMP, III, ESQUIRE**, Senior Assistant Attorney General, and **ERIC J. TAYLOR, ESQUIRE**, Assistant Attorney General, and **THOMAS B. CRAPPS**, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050; **KEITH C. HETRICK, ESQUIRE**, 201 East Park Avenue, Tallahassee, Florida 32301; **ROBERT M. RHODES, ESQUIRE** and **VICTORIA L. WEBER, ESQUIRE**, Steel, Hector & Davis LLP, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301; **ROBERT L. NABORS, ESQUIRE** and **VIRGINIA SAUNDERS DELEGAL, ESQUIRE**, Nabors, Giblin & Nickerson, P. A., 315 S. Calhoun Street, Barnett Bank Building, Suite 800, Tallahassee, Florida 32302; **HERBERT W. A. THIELE**, President, Florida Association of County Attorneys, Inc., Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301; by U. S. Mail this 26th day of June, 1996.



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