IN THE SUPREME COURT
OF THE STATE OF FLORIDA

QUINTON DRYDEN, et al.,

Petitioners,

v. CASE NO. 87,594

MADISON COUNTY, FLORIDA,

Respondent.

_____/

AMICI CURIAE BRIEF OF
FLORIDA ASSOCIATION OF COUNTIES AND
FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

On Remand From The United States Supreme Court
Case No. 97-625

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PRELIMINARY STATEMENT

This brief is submitted by Amici Curiae Florida Association of Counties and the Florida Association of County Attorneys in support of Madison County, Florida (the "County").

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts of the Respondent, Madison County, Florida.

SUMMARY OF THE ARGUMENT

This Court should not alter its original decision in Dryden v. Madison County, 696 So. 2d 728 (Fla. 1997). In this decision, it was correctly determined that the unconstitutional tax refund analysis from McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990), did not apply to the Madison County special assessments. Procedurally invalid special assessments were determined to be distinguishable from unconstitutional, discriminatory taxes that provide no commensurate benefit to the taxpayers. This original decision was correctly decided, and the United States Supreme Court's latest addition to the McKesson line of cases, Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998), does not change this result. The Newsweek case adds no new reasoning or analysis as the situation in that case is legally and factually distinct from the Madison County case. Newsweek, which, like McKesson, involved an unconstitutional tax, merely instructs that when a taxpayer relies on an available postpayment remedy, the state may not deny recourse to that remedy. In this case, however, the Madison County property owners had no reliance interest in an available postpayment remedy.

ARGUMENT

I. THIS COURT'S ORIGINAL DECISION IN DRYDEN V. MADISON COUNTY WAS CORRECTLY DECIDED.

This Court correctly decided the case of Dryden v. Madison County, 696 So. 2d 728 (Fla. 1997), and its original decision should not be altered. This Court's original decision accurately determined that the unconstitutional tax refund analysis from McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990)("McKesson") and Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994)("Kuhnlein"), did not control the present case. This determination was well founded and remains valid today. Nothing in the United States Supreme Court decision of Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998), changes this result.[1]

The Madison County case began when the County imposed special assessments for solid waste management, ambulance services and fire protection in 1989. The assessments for 1989 and 1990 were challenged and declared invalid by the circuit court because the County failed to follow the statutory procedure that was referenced in its ordinances. See Dryden v. Madison County, 672 So. 2d 840, 841 (Fla. 1st DCA 1996). While the appeal of this decision was pending, the County continued to impose these assessments in 1991, 1992 and 1993. See id. at 842. Eventually, all of the assessments

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[1] The Newsweek case is discussed in section II., on page 17 of this brief.

were declared invalid by the circuit court because of the procedural error, and the court ordered refunds for the assessments imposed in the years 1991, 1992 and 1993. Id. However, the trial court did not order refunds for the 1989 and 1990 assessments because those assessments were imposed in good faith under Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973) and Coe v. Broward Co., 358 So.2d 214 (Fla. 4th DCA 1978). See Dryden v. Madison County, 672 So. 2d at 842.

The First District Court of Appeal upheld the trial court's denial of refunds for the 1989 and 1990 assessments. Id. at 843. The First District agreed with the trial court that the 1989 and 1990 special assessments were imposed in good faith under the Gulesian and Coe cases. Id. at 842-43. Further, the First District determined that the unconstitutional tax refund analysis from McKesson and Kuhnlein did not control in the present case.

> In addition, in the present case, the tax in question was invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. In both McKesson and Kuhlein I, the taxes were invalidated based on inconsistencies with the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case.

Id. at 843. However, despite this determination, the First District certified a question of great public importance to this Court, asking whether Gulesian is still valid after the decisions in McKesson and Kuhnlein. Id. at 844.

This Court answered the certified question and affirmed that Gulesian was still valid law. See Dryden v. Madison County, 696 So. 2d at 729. Moreover, this Court determined that the unconstitutional tax refund rules of McKesson and Kuhnlein did not apply to the present case because the Madison County special assessments were distinguishable from unconstitutional taxes. Id. at 729-30. Specifically, this Court stated the following:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund.

Id. at 729-30. Therefore, because Madison County acted in good faith in imposing the special assessments, which were non-discriminatory and conferred a benefit upon the assessed properties, this Court upheld the denial of refunds for 1989 and 1990. Id. at 730.

A. This Court Correctly Held That Invalid Special Assessments Are Not Equivalent To Discriminatory, Unconstitutional Taxes.

This Court previously distinguished McKesson and its progeny from the Madison County case because those cases do not involve special assessments, but rather concern unconstitutional, discriminatory taxes that provide no benefit to the taxpayer. See Dryden v. Madison County, 696 So. 2d at 729-30. This distinction

between taxes and special assessments is still significant and controlling.

The courts in Florida, and elsewhere, have long recognized the differences between taxes and special assessments. Valid special assessments must confer a special benefit upon the assessed property. See City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). On the other hand, "[a] tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government." Dressel v. Dade County, 219 So. 2d 716, 720 (Fla. 3rd DCA 1969). As one early case stated:

> A "tax" is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A "special assessment" is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefitted, is not governed by uniformity, and may be determined legislatively or judicially.
>
> * * *

> [I]t seems settled law in this country that an ad valorem tax and special assessment, though cognate in immaterial respects, are inherently different in their controlling aspects. . . .

Klemm v. Davenport, 129 So. 904, 907, 908 (Fla. 1930).[2] Unlike taxes, special assessments are imposed upon the theory that the assessed properties receive a special benefit as a result of the service funded by the proceeds of the assessment. A special assessment "is limited to the property benefitted, is not governed by uniformity, and may be determined legislatively or judicially." Id. Thus, while taxes and special assessments may be similar in certain immaterial respects, they are entirely different in all aspects relevant to this case.

As was previously recognized by this Court, the revenue sources involved in both McKesson and Kuhnlein were not special assessments nor were they even purported or invalidated special assessments. Rather, both cases involved taxes which the courts invalidated because the taxes violated provisions of the United States Constitution. Specifically, in McKesson, this Court and the United States Supreme Court struck a liquor excise tax imposed on manufacturers, distributors, and vendors of alcoholic beverages as violating the Commerce Clause of the United States Constitution. The tax scheme unconstitutionally discriminated against interstate commerce because it provided preferences for certain local

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[2] That assessments and taxes are different revenue sources is demonstrated in Article X, section 4, Florida Constitution, which excepts from the homestead exemption "the payment of taxes and assessments."

products. See McKesson, 496 U.S. at 25. Furthermore, in Kuhnlein, the Supreme Court of Florida struck a tax imposed only on vehicles which were purchased or titled in other states and then registered in Florida. This tax also facially violated the Commerce Clause of the United States Constitution. See Kuhnlein, 646 So. 2d at 724.

The invalidated special assessments involved in this case are different from the unconstitutional, discriminatory taxing schemes in McKesson and Kuhnlein. For example, here, the property owners received the benefit of the services funded by the special assessment programs. Throughout the contested period, the County continued to provide the solid waste, fire and rescue services for which the special assessments were imposed. However, the payment of a discriminatory tax provides the taxpayer with no special services or improvements; the expenditure of tax revenue, absent statutory direction otherwise, carries with it no obligation to expend the taxes collected for a special purpose. Special assessments, like the ones imposed in this case, must be expended for the very purpose they were collected.

In addition, the County's special assessments were not deemed invalid because they are discriminatory or because they violated the federal Constitution or federal law. The County's special assessments are not even invalid because they failed to provide a special benefit or were not fairly and reasonably apportioned. Instead, the County's special assessments were invalidated because of procedural flaws; the County failed to follow the correct statutory procedures that were referenced in its implementing

ordinances. This Court correctly recognized that a procedural flaw is not the same as a violation of organic law. In fact, but for the procedural mistake, the purposes for which the County imposed the assessments have been upheld on several occasions by the courts in Florida. See, e.g., Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) (this Court upheld special assessments for solid waste disposal); Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997) (this Court upheld fire rescue special assessment); South Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380(Fla. 1973)(this Court upheld a special assessment for fire and rescue services); and Fire Dist. No. 1 of Polk County v Jenkins, 221 So. 2d 740 (Fla. 1969)(this Court upheld special assessments for fire protection and control services); Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977) (court upheld solid waste special assessment). Thus, based upon these distinctions, this Court correctly found that the County's special assessments were not controlled by the cases of McKesson and Kuhnlein.

In fact, not only were the County's special assessments not constitutionally infirm as in McKesson and its progeny, but the problem with the County's special assessment program could have been cured merely by subsequent legislative action. The principle that governmental bodies are allowed to cure perceived errors by subsequent legislative act was recognized in an early Supreme Court of Florida case, New Smyrna Inlet District v. Esch, 137 So. 1 (Fla. 1931). There this Court remarked that "Where a tax levy is made .

. . under defective legislative enactments, or without complying with prescribed statutory requirements, such administrative levy may be ratified by a proper statutory validation if the administrative levy could have been authorized by a proper statute when the defective statutory authority was given." Id. at 4. More recently, in Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), this Court invalidated an impact fee, imposed to fund the expansion of its water and sewer utility system because the implementing ordinance failed to sufficiently "earmark" the expenditure of the impact fee proceeds to meet the costs of the required improvements. The Supreme Court, however, specifically recognized the City's ability to cure its invalid fee program. The Supreme Court stated, "Nothing we decide, . . ., prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces." Id. at 322. The Supreme Court further advised that "Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected." Id.; see also Sullivan v. Volusia County Canvassing Board, 679 So. 2d 1206, 1207 (Fla. 5th DCA 1996)("If the thing wanting, or which failed to be done, and which constitutes the defects . . ., is something . . . which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent act."); Collier County v. Freui, 635 So. 2d 145, 146 (Fla. 2d DCA 1997)("where the authority exists in the first instance to confer

the taxing power, the tax thereafter imposed is not void. . . . If the tax was not void, then the legislature may ratify the tax.")(citations omitted). Accordingly, unlike the constitutional defects of the McKesson line of cases that could never be ratified or cured, the County's procedural infirmity could have been corrected by mere legislative act because there was no violation of organic law. Thus, this Court correctly held that the unconstitutional tax refund analysis from McKesson and its progeny does not apply to the Madison County special assessments. The procedurally invalid special assessments were adequately and correctly distinguished from unconstitutional, discriminatory taxes.

B. This Court Correctly Determined That Refunds, Under The Reasoning of McKesson And Kuhnlein, Were Not The Appropriate Remedy For Procedurally Deficient Special Assessments.

This Court rightly found that refunds were not an appropriate remedy for the County's procedurally invalid special assessments. A procedural flaw in a special assessment program is not the type of legislative infirmity which requires complete and full refunds of all paid special assessments. Thus, the cases of McKesson and Kuhnlein did not dictate the appropriate remedy for this case.

For example, in McKesson, this Court struck the liquor excise tax at issue as violating the Commerce Clause of the United States Constitution. The liquor tax was imposed upon manufacturers, distributors and vendors of alcoholic beverages, however, the State

of Florida provided preferential rate reductions for beverages that were manufactured from certain Florida crops and bottled in state. See McKesson, 496 U.S. at 21-22. The United States Supreme Court agreed that the tax was discriminatory and further declared that retroactive relief was necessary. This holding was clearly based upon the fact that the liquor tax was "unconstitutional because discriminatory" against interstate commerce. McKesson, 496 U.S. at 47. The Supreme Court concluded its opinion with the following:

> In this case, Florida may satisfy its obligation for any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 51-52 (emphasis added).

Likewise, in Department of Revenue v. Kuhnlein, 644 So. 2d 717 (Fla. 1994), this Court, when faced with another discriminatory tax scheme, followed the reasoning of McKesson in fashioning an appropriate remedy. In this case, the State of Florida imposed a fee on cars purchased or titled in other states that are then registered in Florida. No such tax was imposed upon used cars imported from other states but sold by Florida auto dealers. See Kuhnlein, 646 So. 2d at 719. This Court found that the auto taxing scheme discriminated against interstate commerce.

> Here, there can be no question but that a burden is placed on some out-of-state economic interests. Specifically, Florida has erected a financial barrier that gives Florida used-

> car sellers a substantial advantage over similar out-of-state sellers.... This situation unquestionably favors in-state interests over out-of-state interests.

Id. at 724. Because of these constitutional infirmities, this Court declared that the auto tax was "void from its inception because the legislature acted wholly outside its constitutional powers." Id. at 726.

Additionally, jurisdictions beyond Florida have recognized that McKesson and its progeny are limited in their mandate of refunds to cases that are factually and legally similar. For example, in Kennecott Corp. v. State Tax Commission of Utah, 862 P.2d 1348 (Utah 1993), a taxpayer challenged a local tax assessment as violating the unequal taxation provisions of the state constitution, seeking a full refund of taxes paid. The Utah Supreme Court concluded the assessment was invalid under that provision but stated, "[W]hen we concluded that there has been justifiable reliance on the prior state of the law or that the retroactive application of the new law may otherwise create an undue burden, the court may order that a decision apply only prospectively." Id. at 1352. Recognizing the McKesson case, the Utah Supreme Court commented that "[i]n McKesson, the Court repeatedly stated that its decision was based on Florida's violation of the Commerce Clause, but [that in this case,] the tax scheme was stricken as a violation of the Utah Constitution's prohibition against unequal taxation." Id. The court concluded simply, "No federal law was involved." Id. Thus, "federal law does not govern the question of whether a state court decision

involving state law should be applied retroactively or prospectively." Id.

Accordingly, as was recognized by the Kennecott court, the decisions in both McKesson and Kuhnlein were based upon violations of the federal constitution and the discriminatory nature of the taxing schemes at issue -- the remedies necessary in both cases had to "cure any unconstitutional discrimination." McKesson at 51-52. In its prior decision in this case, this Court aptly recognized that the procedurally inferior special assessments created no discriminatory classifications, did not run afoul of any constitutional protections, and actually provided benefits despite their procedural flaws. These distinctions removed the County's special assessment programs out of the realm of automatic, full and complete refunds, making the results of McKesson and Kuhnlein inapplicable. Consequently, this Court correctly held that McKesson and Kuhnlein did not obligate the County to provide refunds in this case.

C. This Court Correctly Recognized The Florida Case Law That Considers Equitable Considerations When Determining The Appropriate Remedy.

Finally, in its prior decision, this Court correctly recognized that certain equitable considerations weighed against providing full refunds of the Madison County special assessments for 1989 and 1990. This Court acknowledged Florida's more than 20-year history of disfavoring refunds for revenue sources which are imposed in good faith. See Gulesian v. Dade County School Board,

281 So. 2d 325 (Fla. 1973), and Coe v. Broward County, 358 So. 2d 214 (Fla. 4th DCA 1978).

The case of Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973), began when Jacob Gulesian filed suit against the Dade County School Board for a refund to all Dade County taxpayers of .82 mills over the limit of 10 mills of tax collections, amounting to $7,300,000 levied for Dade County school purposes. The trial court denied this relief and held that section 236.25, Florida Statutes, authorizing school districts to levy ad valorem taxes in excess of 10 mills without a vote of the electors conflicted with Article VII, section 9(b), Florida Constitution. The trial court also concluded that notwithstanding the holding that section 236.25 was unconstitutional, the holding would not operate retroactively to invalidate the excess mills nor require the refunds sought because of equitable considerations. Specifically, the court noted first that a retroactive application of refunds would "work great hardship on the School Board out of proportion to the interests of the individual taxpayers, as compared to the needs of the school children of the county." Id. at 326. In addition, the trial court found that "the School Board in adopting the mill excess levy acted in good faith reliance on a presumptively valid statute . . ., and has since faced increasingly critical budgeting problems and a refund would greatly compound these problems." Id. Based on these factors, this Court agreed with the reasoning of the trial court and its resort to equitable considerations in deciding to deny refunds.

Furthermore, in Alsdorf v. Broward County, 373 So. 2d 695 (Fla. 4th DCA 1979), the court faced the issue of "the validity of certain county taxes as levied against incorporated and unincorporated areas of the county." Id. at 696. The plaintiffs, many municipal mayors in their official capacities and as individual taxpayers, challenged county property taxes levied on real estate within municipal boundaries under Article VIII, section 1(h), Florida Constitution. The plaintiffs contended that many county expenditures for various services, especially libraries, parks and recreation, sheriff patrol, and emergency medical services, were of no "real and substantial benefit" to the residents of the municipalities and that taxing land within the municipalities was, therefore, improper under Article VIII, section 1(h). The court ultimately found that the only taxes which were improperly collected were in the area of emergency medical services and neighborhood parks.

As to these taxes, the plaintiffs sought refunds of the improperly collected amounts. At trial, the court denied the request for refunds. On appeal, the court addressed this question first by recognizing that "the trial court properly exercised its inherent equitable powers. One of the major considerations in such a determination is whether the taxing authority acted in good faith." 373 So. 2d at 701. The court further cited to both Gulesian and Coe and noted that "the evidence is clear that the County exercised good faith and there is no assertion to the

contrary." Consequently, the court upheld the conclusion that refunds were not necessary. Id.

In recognition of this long history of disfavoring refunds for revenue sources imposed in good faith, this Court correctly determined that Madison County acted in good faith reliance on valid law when it imposed its assessments and, therefore, was not obligated to refund the 1989 and 1990 special assessments to the property owners.

II. THE UNITED STATES SUPREME COURT'S DECISION IN NEWSWEEK, INC. V. FLORIDA DEPARTMENT OF REVENUE, DOES NOT APPLY TO THE PRESENT CASE.

A. The Madison County Property Owners Did Not Rely On A Postpayment Remedy.

This Court's prior decision in Dryden v. Madison County is not affected by the United States Supreme Court's decision in Newsweek, Inc. v. Florida Department of Revenue, 118 S.Ct. 904 (1998)("Newsweek"). Newsweek is legally and factually distinct from the present case, and this difference makes Newsweek inapplicable here.

The Newsweek case began when this Court determined that a sales tax exemption that applied to newspapers but not magazines was unconstitutional under the First Amendment to the United States Constitution. See Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992). Pursuant to this decision, Newsweek filed a claim for a refund of the sales tax it paid during a two-year period when only magazines were subject to the tax. Newsweek relied on McKesson for the proposition that the

Due Process Clause requires a meaningful retroactive remedy when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality. Both the trial court and the First District Court of Appeal denied Newsweek's refund request and distinguished the McKesson case. These courts determined that no retroactive remedy was necessary under McKesson because an adequate predeprivation remedy existed under section 72.011, Florida Statutes, which provides taxpayers with the option of filing suit in circuit court to contest the legality of a tax and paying the contested amount into the registry of the court. See Newsweek, Inc. v. Department of Revenue, 689 So. 2d 361, 363 (Fla. 1st DCA 1997). The First District found that Newsweek could have availed itself of the procedures in section 72.011 and, therefore, was accorded adequate due process. Id. at 363.

Newsweek appealed this decision to the United States Supreme Court. The United States Supreme Court vacated the First District Court of Appeal's decision and held that when a taxpayer relies upon a clear and certain postdeprivation remedy, the State may not deprive the taxpayer of recourse to that mode of relief. See Newsweek, 118 S.Ct. at 905. In Florida, section 215.26, Florida Statutes, specifically allows taxpayers to seek refunds of taxes that were erroneously paid into the state treasury. See § 215.26(1), Fla. Stat. Pursuant to this statutory section, the Supreme Court determined that under Florida law there is a long standing practice of permitting taxpayers to seek postpayment refunds for taxes paid under an unconstitutional statute. See

id.(citing § 215.26, Fla. Stat.). The United States Supreme Court further determined that Newsweek relied upon section 215.26, Florida Statutes, as a clear and certain postdeprivation remedy, by paying its sales tax prior to challenging the taxing statute. Accordingly, because of the existence of this postpayment statute, the State of Florida was estopped from denying Newsweek this recourse. Id.

The United States Supreme Court's decision in Newsweek was expressly predicated upon the taxpayer's reliance on the existence of a clear and certain postpayment remedy; Newsweek had paid the tax, knowing that it could later sue for a refund under section 215.26, Florida Statutes. See § 215.26, Fla. Stat. On this point, the United States Supreme Court stated:

> [A] State may not "bait and switch" by hold[ing] out what plainly appears to be a "clear and certain"' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.
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> * * *
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> The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to § 215.26. While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek, 118 S.Ct. at 905.

Unlike in Newsweek, the Madison County property owners did not rely on a postdeprivation refund remedy. There is no state or local statutory procedure that provides for refunds of special

assessment payments, and section 215.26, Florida Statutes, does not apply to special assessments paid to a local government. By its plain wording, section 215.26 only provides for the Comptroller of the State to refund taxes, licenses or accounts that are erroneously paid into the state treasury. In fact, the Eleventh Circuit in Zipperer v. City of Fort Myers, 41 F.3d 619, 622 (11th Cir. 1995), expressly determined that the Florida statutory provisions which afford taxpayers remedies when challenging taxes do not apply to citizens challenging special assessments. See id. at 622. In making this determination, the court referred specifically to section 215.26, Florida Statutes, as being unavailable to those seeking a refund of special assessments. See id. at 622 n. 3. Accordingly, unlike the situation in Newsweek where the magazine paid the sales tax in reliance upon section 215.26, Florida Statutes, the Madison County citizens did not rely on any postpayment remedy because there was no such specific and certain remedy available. This significant difference itself distinguishes the Madison County case from Newsweek. The precise problem with the Newsweek case -- reliance on a postpayment remedy -- is not present in this case and therefore this Court's prior decision in Madison County should not be upset as a consequence of any analysis in Newsweek.

B. Newsweek Is Further Distinguishable From This Case Because It Involved A Discriminatory, Unconstitutional Tax That Conferred No Benefit Upon The Taxpayer.

In addition to the lack of a reliance interest in the Madison County case, further distinctions between the present matter and the Newsweek case exist. As was recognized by Petitioners in their brief on remand that was filed with this Court on May 1, 1998, the Newsweek case is just the latest addition to the McKesson line of cases concerning unconstitutional taxes. (Petitioners' Brief on Merits at 14, 17). As was stated above, this Court previously distinguished McKesson and its progeny because those cases do not involve special assessments, but rather concern unconstitutional, discriminatory taxes that provide no benefit to the taxpayer. All of these distinctions, which were recognized by this Court in its original Madison County decision, also serve to distinguish the Newsweek case from the present matter.

As with McKesson and Kuhnlein, the Newsweek case involved a general tax, not a special assessment. The sales tax revenue was paid into the State Treasury for the general benefit of the State of Florida; no special services or improvements were provided to the taxpayers in Newsweek. In direct contrast, in this case, the Madison County property owners received and enjoyed the benefit of the services funded by the special assessment programs. All of the special assessment revenues were used to provide the Madison County property owners with garbage services, landfill closure, ambulance services and fire protection.

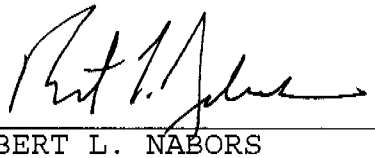
Also as with McKesson and its progeny, the Newsweek case concerned a tax that was found to violate the United States Constitution. Specifically, the sales tax in Newsweek violated the First Amendment because it discriminated between magazines and newspapers. In contrast, the County's special assessments have not been deemed to be invalid because they were discriminatory or because they violate any other protections of the United States Constitution. Rather, the County's special assessments were struck on procedural grounds. This flaw is simply not the same infirmity as a tax that violates provisions of the United States Constitution.

Accordingly, the holding in Newsweek, like the McKesson decision, does not apply to the present factual situation. Most importantly, the Madison County property owners did not have a reliance interest as no state or local statutory procedure provided a postpayment remedy nor have the Madison County citizens alleged as such. Further, the invalidated special assessment did not run afoul of any federal law or constitutional protections, created no discriminatory classifications, and actually provided benefits despite its alleged procedural flaws. These distinctions make the specific results of Newsweek inapplicable to the present case.

CONCLUSION

This Court's original reasoning and conclusion in Dryden v. Madison County was well founded and correct. While McKesson and its progeny may be controlling within the realm of unconstitutional, discriminatory taxes, it clearly does not apply to procedurally invalidated special assessments. The United States Supreme Court's latest addition to the McKesson line of cases, Newsweek v. Florida Department of Revenue, is equally distinguishable and does not change this result. Consequently, this Court should not alter its original decision in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry E. Levy, Esq., Law Offices of Larry E. Levy, Post Office Box 10583, Tallahassee, Florida 32302; George T. Reeves and Edwin B. Browning, Jr., Esq., Davis, Browning & Schnitker, Post Office Drawer 652, Madison, Florida 32341; Kenza van Assenderp, Esq., Young, van Assenderp & Varnadoe, Post Office Box 1833, Tallahassee, Florida 32302; Joseph C. Mellichamp, III, Esq. and Eric J. Taylor, Esq., Department of Legal Affairs, Tax Section, The Capitol, Tallahassee, Florida 32399; Keith C. Hetrick, Esq., Florida Home Builders Association, 201 East Park Avenue, Tallahassee, Florida 32301; and Robert M. Rhodes, Esq. and Victoria L. Weber, Esq., Steel, Hector & Davis, LLP, 251 South Monroe Street, Suite 601, Tallahassee, Florida 32301, this 11th day of May, 1998.

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