IN THE SUPREME COURT
OF THE STATE OF FLORIDA

QUINTON DRYDEN, et al.,

Petitioners,

vs.

MADISON COUNTY, FLORIDA, political subdivision of the State of Florida, and WES KELLEY, as his official capacity as Tax Collector, MADISON COUNTY, FLORIDA,

Respondents.

ON APPEAL FROM THE
FIRST DISTRICT COURT
OF APPEAL
CASE NO. 87,594

RESPONDENTS' ANSWER BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

George T. Reeves
Fla. Bar ID# 0009407
Edwin B. Browning, Jr.
Fla. Bar ID# 009562
DAVIS, BROWNING & SCHNITKER, P.A.
Post Office Drawer 652
Madison, Florida 32341
(850) 973-4186

and

Ken Van Assenderp
Fla. Bar ID# 0592919
Post Office Box 1833
Tallahassee, Florida 32302-1833

ATTORNEYS FOR RESPONDENTS

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

TABLE OF CONTENTS

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

TABLE OF CITATIONS

CASES — PAGES

STATE OF FLORIDA AUTHORITIES:

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

FEDERAL AUTHORITIES:

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

OUT OF STATE AUTHORITIES:

STATUTORY AUTHORITIES:

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

INTRODUCTORY NOTES

The Appellants below, QUINTON DRYDEN, et al., will be referred to in this Brief as "Petitioners".

The Appellees below were MADISON COUNTY, FLORIDA, and WES KELLEY, Tax Collector of Madison County, Florida. As WES KELLEY, Tax Collector, and will be referred to collectively as "Respondents." MADISON COUNTY will be referred to as "County."

References to the Record shall be referred to by an "R" followed by the appropriate volume and page number of the Record.

References to the Record on Cross-Appeal shall be referred to by an "R-CA-" followed by the page number.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

STATEMENT OF THE CASE AND FACTS

The facts and statement of the case are partially stated in the Petitioners' brief. However, Respondents wish to bring to this court's attention certain facts and the posture of this case which were not presented and need to be disclosed in the interest of clarity.

This case had originally been decided in favor of the Petitioners by the Trial Judge, who ordered refunds of invalidly levied special assessments for all years involved. Respondents appealed to the First District Court of Appeal, whereupon, in *Madison County v. Foxx*, 636 So. 2d 39 (Fla. 1st DCA 1994), that court affirmed the Trial Judge's Order in part, but reversed in part. In that opinion, the District Court reversed the Trial Judge's determination that the special assessments in question were impermissible taxes as premature. *Id.* at 33. The District Court also reversed the order of the Trial Judge who had ordered a refund of the special assessments, remanding the refund issue for further proceedings. *Id.* at 34-35.

The District Court determined that there remained factual and legal issues which should be decided by the Trial Judge regarding refunds in this cause. It identified several unanswered questions which relate to the determination of refunds, including whether Respondents acted in good faith,

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

whether a refund was fiscally possible for Respondents and whether the cost of processing such refunds would be prohibitive. In identifying these factual issues to be determined on remand by the Trial Judge, the District Court stated its reliance on and directed the Trial Judge to apply *Gulesian v. Dade County School Bd.*, 281 So. 2d 325 (Fla. 1973), and *Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978). Further, the District Court rejected Petitioner's reliance on *Mckesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, (1990) by denying Petitioner's Petition for Rehearing. The Petitioners did not attempt to appeal this decision.

On remand, the Trial Judge, taking into consideration *Gulesian*, as directed, determined to allow refunds for the years 1991, 1992, and 1993, but decided that because Respondent acted "within the good faith parameters of *Gulesian*," the Petitioners were not entitled to refunds for 1989 and 1990. (R-I-101-124) Not content with this semi-victory, the Petitioners decided to appeal this second Order of the Trial Judge. (R-I-125-150)

The Trial Judge also heard testimony that the fiscal impact of a refund would be great and also the cost of a refund to Respondent (R-II-225; 275-276; 304) would be of tremendous economic impact on Respondent, because of the expense estimated at $153,000., and $10,000., per year for the refund checks.

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

(R-II-224)

Respondents Cross-Appealed based upon Petitioners' challenge to the identical special assessment ordinances for the assessment years 1991, 1992, and 1993, that were the subject of the District Court's decision in *Madison County v. Foxx, supra*, and that resulted on remand to the lower court in a refund being ordered with interest from the dates of the payments of the assessments and before the entry of a money order or money judgment. (R-CA-52-75).

The parties while *Madison County v. Foxx, supra* was pending in the First District Court entered into stipulations for the years 1991 and 1992, holding the subject case in abeyance with the understanding that the decision there would be binding precedent, and further provided that tax certificates would not be issued during the time that the case was being considered and ruled upon by the District Court. This was the only effect of the parties' stipulation.(R-CA-15-18; 32-35). A stipulation was never entered for the year 1993.

On remand from the District Court's decision in *Madison County v. Foxx, supra*, a hearing was held on the refund issue as per the Mandate. After hearing testimony directed to the propriety of a refund the Trial Judge entered an Order on Remand directing refunds for the years 1991, 1992, and 1993, and provided that the plan for the implementation of the

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

refunds would be determined by a separate order after suggestions by the parties. (R-CA-75) However, the Trial Judge levied interest against the amount of the assessments previously paid from the dates of their payment as post judgment interest. (R-CA-74) The exact amount of the refund has not yet been determined, and thus a final money judgment has not been entered on the refund. (R-CA-75)

Because the Trial Judge levied interest retroactive to the dates of the payments of the assessments by Petitioners, Respondents filed their cross-appeal challenging the levy of interest by the Trial Judge as actually prejudgment interest and under any labeling previous to the entry of a final money judgment as required for the support of a levy of post judgment interest. (R-CA-76-101)

The First District Court of Appeal once again heard argument in this case on the appeal and cross-appeal of the parties. The District Court issued its ruling on these matters in *Dryden v. Madison County,* 672 So.2d 840 (Fla. 1st DCA 1996).

In this opinion the District Court upheld the Trial Judge's order in all respects except the award of interest. *Id.* The District Court found that the Trial Judge's determination that the Respondent acted "within the good faith parameters of *Gulesian*" was based upon its findings that the Respondent's actions were based upon information obtained from the State

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

Association of County Commissioners meetings and "expert" outside counsel who helped draft the state legislation on special assessments. *Id.* at 842. The District Court found that the Trial Judge's conclusion that the Respondent acted in good faith was supported by substantial competent evidence. *Id.* at 843.

The District Court further found that the Petitioners were not entitled to any interest and reversed the Trial Judge's order as it pertained to interest. *Id.* at 588. The District Court cited this Court's opinion in *Kuhnlein v. Dep't of Revenue*, 662 So. 2d 308 (Fla. 1995) as authority for the proposition that there is "no entitlement to prejudgement interest in a tax refund case" and that "postjudgment interest could only run from the time of a final judgment." *Dryden* at 843. It should be noted that the Trial Judge did not have the benefit of this Court's opinion in *Kuhnlein, supra* when he ruled.

The District Court then considered the assertion by the Petitioners that this Court's decision in *Gulesian* had been overruled by the United States Supreme Court's decision in *Mckesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S 18 (1990) as well as this Court's decision in *Kuhnlein v. Dep't of Revenue*, 646 So. 2d 717 (Fla. 1995). The District

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

Court rejected this contention stating that the assessments were "invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case." *Dryden* at 843.

However, the District Court did recognize this question as being one of great public importance and certified the question of refunds to this court.

Upon appeal, this court affirmed the opinion of the First District Court of Appeal. *Dryden v. Madison County*, 696 So.2d 728 (Fla. 1997) This court, like all the courts to hear this case before, found no impediment in the United States or Florida Constitutions to denying refunds of the special assessments collected before the trial court initially ruled. *Dryden*, 696 So.2d 728 at 729-730.

This court's opinion in the instant case properly addresses Federal due process principles:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. McKesson Corp. V. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

> refund. Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e. they provided garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further the county acted in good faith in imposing these assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden, 696 So.2d 728 at 729-730

Upon issuance of this court's final order the Petitioners timely submitted their Petition for writ of certiorari to the United States Supreme Court asking that the decision of this court be overturned. The Respondents timely submitted their Brief in Opposition opposing the relief requested.

After the submittal of the Petition and Brief in Opposition, but prior to the submittal of the Briefs on the Merits, the United States Supreme Court issued its order of March 2, 1998 which stated in total:

> On petition for writ of certiorari to the Supreme Court of Florida. Petition for writ of certiorari granted. Judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S.----,118 S.Ct. 904,---L.Ed.2d---(1998)

Dryden v. Madison County, Florida, 118 S.Ct. 1162 (1998)

After rendition of the order of the U.S. Supreme

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

Court this court established a briefing schedule pursuant to which the Petitioners submitted their Petitioner's Brief on the Merits on Remand from the United States Supreme Court. This brief is submitted by the Respondents in answer thereto.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

ISSUES

Does the decision of the United States Supreme Court in *Newsweek v. Florida Department of Revenue*, 118 S.Ct. 904 (1998) alter or in any way change the law relied upon by this court in reaching its decision in *Dryden v. Madison County*, 696 So.2d 728 (Fla. 1997) thus requiring modification of this court's opinion therein.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

SUMMARY OF ARGUMENT

This court is bound only to reconsider its decision in light of the U.S. Supreme Court's decision in *Newsweek v. Florida Department of Rev.*, 118 S.Ct. 904 (1998). This court is not bound to change its opinion as the U.S. Supreme Court's opinion only requires further consideration. *Lawrence v. Chater*, 516 U.S. 163 (1996). And the U.S. Supreme Court does not take a position on whether the cited case [*Newsweek*] applies. *U.S. v. M.C.C. of Florida Inc.*, 967 F.2d 1559 (11th Cir. 1992).

When applying the *Newsweek* case the court must find that *Newsweek* does not require the court to change its opinion in any way. *Newsweek* concerned whether the State would be allowed to deny a postdeprivation remedy to a taxpayer, because there was, at the time he paid the tax, a predeprivation remedy he could have elected.

The First District Court held that the state was not required to provide a postdeprivation remedy because the state had provided a predeprivation remedy which the taxpayer could have utilized.

The U.S. Supreme Court held that the state could not "bait and switch" the remedies. It could not deny a postdeprivation refund on the basis of the availability of a predeprivation remedy, unless it was clear at the time the tax

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

was paid that the predeprivation remedy was the exclusive remedy available to the taxpayer. To deny the taxpayer the ability to request a refund after he paid his tax in reliance on the availability of a refund would deny the taxpayer due process of the law.

This is completely dissimilar to the situation at bar. In court's holding in the instant case is not dependant upon whether the remedy is predeprivation or postdeprivation. In the case at bar the court reasoned that the special assessments in this case, unlike taxes, provided a commensurate benefit to the Petitioners at least equal to the amount of the assessment and thus due process considerations did not apply.

Additionally, as explicitly recognized by the First District in its opinion and as implicitly recognized by this court, *Mckesson v. Div. of Alcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), and more recently *Newsweek, Inc. v. Florida Department of Revenue,* 118 S.Ct. 904 (1998) apply to levies which are in violation of the United States Constitution and United States Laws. The instant case does not involve anything other than procedural irregularities in the enacting of the ordinances levying the assessments, thus the state may fashion its own remedy.

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

ARGUMENT

I.

THIS COURT IS NOT BOUND TO MODIFY ITS DECISION IN ANY WAY DUE TO THE "GRANTED, VACATED AND REMANDED" DECISION OF THE UNITED STATES SUPREME COURT.

In this case the United States Supreme Court granted certiorari, vacated the decision of this court and remanded for further consideration in light of that court's recent holding in *Newsweek v. Florida Department of Rev.*, 118 S.Ct. 904 (1998). This type of decision is discussed in *Lawrence v. Chater*, 516 U.S. 163 (1996).

In the *Chater* decision the U.S. Supreme Court held that when it issues a Granted, Vacated and Remanded (GVR) decision for reconsideration in light of an intervening decision, the lower court is not required to change its ruling. "[B]ecause they require only further consideration, the standard we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard ..." (Emphasis added) *Chater*, 516 U.S. 163 at 168

The U.S. Supreme Court's requirements for the lower court's treatment of a GVR decision are reflected in a recent decision of the Court of Appeals for the Eleventh Circuit, *U.S. v. M.C.C. of Florida, Inc.*, 967 F.2d 1559 (11th Cir. 1992) In this case the court held that in granting a GVR decision the

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

U.S. Supreme Court does not take a position as to whether the cited case applies but is instructing the court to which the case is remanded to make that determination.

This court has also implicitly recognized that a GVR decision from the U.S. Supreme Court does not mandate modification of the original decision. Similarly to the instant case, in *Shell Oil Co. v. Department of Rev.*, 540 So.2d 107 (Fla. 1989) this court considered a GVR decision of the U.S. Supreme Court which remanded for further consideration in light of an intervening U.S. Supreme Court decision concerning the State of Iowa. In its review of the remand this court stated:

> In our original opinion we answered a similar question as it relates to Florida in the negative. All parties agree that the United States Supreme Court answered the same question in the same way. We are therefore uncertain as to why that Court vacated the judgement approved in our opinion

Shell, 540 So.2d 107 at 108

The court went on to reaffirm its original decision. Thus, this court is not bound to change or in any way modify its original decision in this case.

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

II.

THE UNITED STATES SUPREME COURT'S DECISION IN *NEWSWEEK, INC., V. FLORIDA DEPARTMENT OF REVENUE*, 118 S.CT. 904 (1998) DOES NOT CHANGE THE EXISTING LAW CONCERNING REFUNDS OF SPECIAL ASSESSMENTS NOR DOES IT MANDATE REFUNDS IN THIS CASE.

In its decision rendered in the case of *Newsweek, Inc., v. Florida Department of Revenue*, 118 S.Ct. 904 (1998) the U.S. Supreme Court did not change the law existing at the time of this court's opinion in the instant case. In *Newsweek*, the petitioner was engaged in the business of selling magazines and had paid its state sales tax on the sale of its magazines. In reaction to this court's ruling in *Department of Rev., v. Magazine Pub. Of America*, 604 So.2d 459 (Fla. 1992), the Petitioner applied for a refund of the taxes it had paid. In *Magazine*, this court had determined that the State of Florida's sales tax scheme for periodicals, newspapers, magazines and similar publications impermissibly burdened the magazine publisher's rights under the First Amendment of the United States Constitution. *Magazine*, did not address the issue of refunds.

Upon the magazine publisher's application for refund, the Florida Department of Revenue denied the request for refund and the case proceeded to Circuit Court where the trial court

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

entered summary judgement against the magazine publishers. On appeal to the First District court of Appeal, that court affirmed the grant of summary judgement against the magazine publishers on the basis that the publishers failed to exercise their right to contest the tax in question prior to paying the tax. *Newsweek Inc., v. Department of Revenue*, 689 So.2d 361, at 363-364 (Fla. 1st DCA 1997)

The magazine publishers cited *McKesson Corp., v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) as authority for the proposition that the state was required to provide meaningful backward looking relief. The First District Court however agreed with the Department of Revenue:

> We agree that *McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a meaningful opportunity to secure post payment relief when a state penalizes the taxpayer for failing to pay first and obtain review of the taxes validity later in a refund action.

Newsweek, 689 So.2d 361, at 363

> In the present case, the taxpayer could have availed itself of the predeprivation remedy under section 72.011, Florida Statutes (1987)

Newsweek, 689 So.2d 361, at 363

> Thus, the coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case.

Newsweek, 689 So.2d 361, at 364

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

The First District Court affirmed the opinion of the trial court in all respects, and the magazine publishers petitioned for a writ of certiorari to the United States Supreme Court.

In its review of the First District Court's opinion, the U.S. Supreme Court stated that the First District Court failed to consider the court's decision in *Reich v. Collins*, 513 U.S. 106 (1994). *Newsweek v. Florida Department of Revenue*, 118 S.Ct. 904 at 904. In its discussion of *Reich*, the U.S. Supreme Court said:

> There, the Georgia Supreme Court had rejected a taxpayer's refund claim filed pursuant to a general refund statute, dismissing any due process concerns because a predeprivation remedy was available. (citations omitted) While assuming the constitutional adequacy of Georgia's predeprivation procedures, we nonetheless reversed because "no reasonable taxpayer would have thought that [the predeprivation procedures] represented, in light of the apparent availability of the refund statute, the exclusive remedy for unlawful taxes.(emphasis added)(citations omitted)

Newsweek, 118 S.Ct. 904 at 904-905

> We emphasized a State "has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as the scheme is `clear and certain.'" (citations omitted) But 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 are paid, that no such remedy exists."

Newsweek, 118 S.Ct. 904 at 905

The court concluded that the First District Court's

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

decision constituted just such a "bait and switch." In other words the Florida scheme was impermissible because it held out two alternative remedies to the taxpayer. One being a prepayment remedy, a suit under § 72.011, Fla.Stat., which could be brought prior to paying the tax with no penalty. While the other was a postpayment remedy, a suit for refund pursuant to § 215.26, Fla.Stat., which could be brought after payment of the tax. The court reasoned that Florida could not now deny the chance for a refund after the taxpayers paid the tax relying on the availability of a refund if the tax was found unlawful.

> Under Florida law there was a long standing practice of permitting taxpayers to seek refunds under § 215.26 for taxes paid under an unconstitutional statute.
>
> 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. 904 at 905

It was on the basis of this apparent "bait and switch" that the U.S. Supreme Court vacated the opinion of the First District Court and remanded the case to the First District for further proceeding not inconsistent with the court's opinion in *Newsweek v. Florida Department of Revenue*, 118 S.Ct. 904 (1998).

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

The factual and legal circumstances in *Newsweek* are completely dissimilar to the situation in the instant case. In the instant case the County does not contest that the Petitioners are equally as entitled to a postdeprivation remedy as they are a predeprivation remedy. Rather the County asserts that, as stated by this court:

> Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulisian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973)
>
> In the present case, the 1989 and 1990 assessments fall into the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing the assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden, 696 So.2d 728 at 730

Newsweek does not change these findings or the law that is to be applied. The holding of this court set out above is equally applicable to the instant case whether applied as part of a predeprivation or postdeprivation analysis.

Whether the petitioners received commensurate benefits which preclude refund can be decided in either a pre or post deprivation setting.

Further as stated by the District Court in the

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

instant case:

> ... [T]he requirement of the United States Supreme Court concerning meaningful remedies are inapplicable in this case.

Dryden, 672 So.2d 840 at 843

This is so because this case does not involve a situation where a tax, much less a special assessment, violates Federal law. Here the special assessments, enacted by county ordinance of the Board of County Commissioners of Madison County, Florida were not determined to be illegal, but merely void for not meeting the procedural requirements for ordinances enacting special assessments under the laws of the State of Florida. The instant special assessments were not and have not to this day been determined to violate any provision of Federal law or the Federal Constitution. In fact, the same type of special assessments, which did not have the same procedural irregularities, have been recently upheld by this court as proper under the law. *Lake County v. Water Oak Management Corp.*, 695 So.2d 667 (Fla. 1997); *Harris v. Wilson*, 693 So.2d 945 (Fla. 1997); *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 (Fla. 1995)

Thus, *McKesson*, in which the taxes were invalidated based on inconsistencies with the United States Constitution does not mandate refunds.

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

The State Supreme Court of Utah has recently considered this issue in the case of *Kennecott v. State Tax Com'n,* 862 P.2d 1348 (Utah 1993). In the *Kennecott* case the Supreme Court of Utah struck down a Utah State statute for violating its State Constitution. The petitioners sought refunds of the amount of the assessments paid pursuant to the stricken law, and cited the *McKesson* case as authority for the proposition that the Federal Constitution mandated such refunds. The Utah Court flatly rejected such assertion:

> *McKesson* is inapplicable here. In *McKesson*, the Court repeatedly stated that its decision was based on Florida's violation of the Commerce Clause. In this case, the tax scheme was stricken as a violation of the Utah Constitution's prohibition against unequal taxation. No Federal law was involved. This court has repeatedly recognized that `[t]he purely prospective application of a state court decision overruling prior authority in a civil case [involving state law] violates no right under the United States Constitution.' Thus, federal law does not govern the question of whether a state court decision involving state law should be applied retroactively or prospectively.

Kennecott, 862 P.2d 1348 at 1353

In reaching this conclusion the Utah Supreme Court relied upon this Court's opinion in the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932) in which Justice Cardozo stated:

> [T]he Federal Constitution has no voice upon the subject [of retroactivity versus prospectivity]. A state in defining the limits of adherence to precedent may make a choice for itself between the

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

> principle of forward operation and that of relation backward....
>
> 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. We review, not the wisdom of their philosophies, but the legality of their acts.

Kennecott, 862 P.2d 1348, at 1353, and *Great Northern Railway*, 287 U.S. 358, at 364-365

Since the Federal Constitution has no voice on the subject, *Great Northern Railway, supra,* the petitioners' due process and equal protection arguments cannot apply.

This position, as well as the continued vitality of the *Great Northern Railway* case are supported by *McKesson's* companion case *American Trucking Association, Inc. v. Smith*, 496 U.S. 167 (1990),

> When questions of State Law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]").

American Trucking, 496 U.S. 167, at 177.

The Court of Appeals for the Fifth Circuit has also addressed this proposition of law in its opinion of *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993) This case concerned whether customers of a rural electric cooperative would receive a refund of rate increases which

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

allegedly violated the Louisiana Constitution, but did not violate the laws or Constitution of the United States. The court of appeals approved the order of the trial court which abstained from considering the case in favor of state-court review. The court's decision was based in part on the recognition that:

> There are only state law issues in this case. These are, first, whether the Louisiana Supreme Court's decision in *Cajun Electric* [*Cajun Elec. Power Coop., Inc. v. Louisiana Pub. Serv. Comm'n*, 544 So.2d 362 (La. 1989), *cert. denied*, 493 U.S. 991 (1989)] should apply retroactively, and, second, if so, whether it invalidates prior rate increases. The Supreme Court has declared: "When questions of State Law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148 (1990) (plurality opinion)(citing *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932))

Wilson v. Valley Electric Membership Corp., 8 F.3d 311, at 314 (5th Cir. 1993)

Further this distinction between laws invalidated on Federal and State law grounds seems to be supported by the case which was given as the basis of the U.S. Supreme Court's decision in *Newsweek*, *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich* this Court explained *McKesson* and the cases on which it was based as follows:

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

> Reich then petitioned the Georgia Supreme Court for reconsideration of its decision on the grounds that even if the Georgia tax refund statute does not require a refund, federal due process does-due process, that is, as interpreted by *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. Of Business Regulation,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), and the long line of cases upon which *McKesson* depends. See *id.*, at 32-36, 110 S.Ct., at 2247-2250, citing *Iowa-Des Moines Nat. Bank v. Bennet*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931); *Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed. 673 (1928); *Carpenter v. Shaw,* 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 265 (1930); *Ward v. Board of County Commr's of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Atchinson, T. & S.F.R. Co. v. O'Conner*, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912); see generally Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv.L.Rev. 1733, 1824-1830 (1991). As we said, these cases stand for the proposition that "a denial by a state court of a recovery of taxes <u>exacted in violation of the laws or constitution of the United States</u> by compulsion is itself a contravention of the Fourteenth Amendment," *Carpenter, supra,*(emphasis added)

Reich v. Collins, 513 U.S. 106 at 109

Thus, *Reich*, and therefore *Newsweek,* are inapplicable due to the fact that they deal with violations of the Federal Constitution or Federal law. Thus, this Court should not mandate refunds here because the instant case is free of Federal Constitutional issues.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

III.

REFUSING TO REQUIRE REFUNDS DOES NOT RESULT IN ANY TYPE OF APPLICATION OF PRIOR CASE LAW CONDEMNED BY THE UNITED STATES SUPREME COURT NOR DOES IT DENY THE PETITIONERS THEIR RIGHTS SECURED BY THE EQUAL PROTECTION CLAUS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In answering the last two sections of the Petitioner's Brief it must first be realized that nowhere in either section does the Petitioner cite or reference either *Newsweek v. Florida Department of Revenue*, 118 S.Ct. 904 (1998) or *Reich v. Collins*, 513 U.S. 106 (1994), on which *Newsweek* was based. Thus it can only be assumed that the Petitioners are straying from the sole directive of the United States Supreme Court that there be "further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. ----, 118 S.Ct. 904, ---L.Ed.2d----(1989)" *Dryden*, 118 S.Ct. 1162 (1998) However in an abundance of caution the Respondents will address the issues raised in therein.

The Petitioners assert that the denial of refund will result in selective prospectivity which is not allowed under Federal Law and cite two main cases for this proposition. The first case is *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

In *Beam*, the U. S. Supreme Court decided whether the

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

courts of the State of Georgia could deny a refund to the distillers who paid a Georgia State tax which violated the Commerce Clause of the United States Constitution. This was the same type of tax which this Court invalidated because it violated the Commerce Clause of the United States Constitution in *Division of Alcoholic Bev. and Tobacco v. McKesson*, 574 So.2d 114 (Fla. 1991), and for which the U.S. Supreme Court ordered the State of Florida to provide a remedy in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

The U.S. Supreme Court, in *Beam,* found that the State did in fact have to give a refund and, as the petitioners assert, disapproved selective prospectivity. This however does not mean that the *Beam* decision is in conflict with this Court's decision in the instant case.

Beam, dealt with issues of federal law and the remedies which states must give to persons who have had their federal rights violated. This makes *Beam* completely dissimilar from the case at hand as the instant case only involves issues of state law. As the Court stated in *American Truck Assoc. v. Smith*, 496 U.S. 167 (1990),

> When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great*

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

> *Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ("We think the federal constitution has no voice on the subject [of whether a state court may decline to give its decisions retroactive effect]"). The retroactive applicability of a constitutional decisions of this Court, however, "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."

American Truck Assoc. v. Smith, 496 U.S. 167 at 177-178 (1990)

Therefore the *Beam* opinion, as it concerns selective prospectivity or any other issue of retroactivity is binding precedent on State Courts only when deciding Federal issues. As this case does not involve the violation of any Federal right or other Federal issue, this Court is not bound to follow the reasoning of *Beam* as it concerns prospectivity.

Further, even if this Court were bound to follow the reasoning of *Beam* as it pertains to prospectivity, the opinion in *Beam* is not inconsistent with the opinion issued in this case.

As interpreted by the U.S. Supreme Court's later opinion in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) this Court's opinion in *Beam* does not mandate refunds of taxes in all cases. In *Harper* the state courts of the State of Virginia refused to apply an opinion of this Court retroactively. The issue in *Harper* concerned the disposition

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

of the taxes levied by the State of Virginia on federal employees' retirement benefits. The United States Supreme Court decided that the taxing of federal employees' retirement benefits, under the then existing laws of the State of Virginia, violated the protections of the United States Constitution.

In *Harper,* this Court ruled that all court's would have to give the United States Supreme Court's application of a rule of federal law retroactive effect.

> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of the Justices in *Beam:* When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 at 97

However, after ruling that the decision would apply retroactively, the Court refused to order a refund of the taxes at issue.

> Because we have decided that *Davis* applies retroactively to the tax years at issue in petitioners' refund action, we reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund. Rather the Constitution requires Virginia "to provide relief consistent with

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

> federal due process principles." *American Trucking*, 496 U.S., at 181, 110 S.Ct., at 2332 (plurality opinion)

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 at 100

The Petitioners likewise cite *Reynoldsville Casket Co. v. Hyde*, 115 S.Ct. 1745 (1995) In this case, as stated by the Petitioner, the Ohio Supreme Court sought to avoid following Federal law by couching its decision in terms of remedy. The U.S. Supreme Court rejected this by stating:

> Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply federal law an effort to create a remedy.

Hyde, 115 S.Ct. 1745 at 1749

The Respondents agree with this assertion that a state may not avoid federal law by calling it a remedy. Also a state when deciding issues of Federal law must apply the U.S. Supreme Court's decisions in determining whether to apply its decisions prospectively or retroactively. In the instant case however no Federal issue exists thus *Hyde* is inapplicable.

Thus, even under the opinions cited by the Petitioners, which require retroactive application of rules of Federal law, the U.S. Supreme Court has not mandated refunds in this case. Rather that the courts provide relief consistent with the Federal due process principles when deciding issues

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341
(850) 973-4186

of Federal law.

Finally it cannot be overstated that this court addressed the due process and equal protection concerns of the Petitioners, and the case cited by U.S. Supreme Court in its remand did not challenge this court's reasoning. This court said:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. *McKesson Corp. V. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973).

Dryden, 696 So.2d 728 at 729-730

In the instant case the property owners all received the benefit of the services provided by the assessments and should not be heard now, after they have enjoyed those benefits to request a refund.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

IV.

THE PETITIONERS ARE NOT ENTITLED TO INTEREST FOR ANY AMOUNTS TO BE REFUNDED

In their conclusion as well as elsewhere in their brief the Petitioners request that refunds be made with interest. Citing *Kuhnlein v. Department of Revenue*, 662 So.2d 308 (Fla. 1995) this court held that the Petitioners were not entitled to interest for any refunds.

> The issue in this case is whether those individuals who are due a refund are entitled to prejudgment and postjudgment interest. We answer the question in respect to prejudgment interest in the negative, finding that there is no entitlement to prejudgment in a tax refund. We answer the question in respect to postjudgment interest by determining the there is not a final money judgment, and therefore there is not at present an entitlement to postjudgment interest in this case under these circumstances. *Kuhnlein v. Department of Revenue*, 662 So.2d 308, 308 (Fla. 1995)

Dryden, 696 So.2d 728 at 730

The Petitioners have not cited, in their brief, any change in circumstances or the law which would now entitle them to interest.

Thus any request for interest, either prejudgment or postjudgment, should be denied.

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

CONCLUSION

The original ruling of this court should be reaffirmed in all respects.

George T. Reeves
Fla. Bar ID# 0009407
Edwin B. Browning, Jr.
Fla. Bar ID# 009562
DAVIS, BROWNING & SCHNITKER
Post Office Drawer 652
Madison, Florida 32340
(904) 973-4186

and

Ken Van Assenderp
Fla. Bar ID# 0592919
Post Office Box 1833
Tallahassee, Florida 32302-1833

ATTORNEYS FOR RESPONDENTS

LAW OFFICES OF
Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to LARRY E. LEVY, Post Office Box 10583, Tallahassee, Florida 32302, 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, KEITH HETRICK, 201 East Park Avenue, Tallahassee, Florida 32301, ROBERT M. RHODES, and VICTORIA L. WEBER, 251 South Monroe Street, Suite 601, Tallahassee, Florida 32301, SANFORD A. MINKOFF, Post Office Box 7800, Tavares, Florida 32778, WILLIAM J. ROBERTS, Post Office Box 1386, Tallahassee, Florida 32302, HERBY W.A. THIELE, 301 South Monroe Street, Tallahassee, Florida 32301, and DANIEL C. BROWN, 106 East College Avenue, Tallahassee, Florida 32301, by regular U. S. Mail this 11th day of May, A. D. 1998.

George T. Reeves

LAW OFFICES OF

Davis, Browning & Schnitker, P.A.
P. O. Drawer 652
Madison, Florida 32341

(850) 973-4186