SUPREME COURT OF FLORIDA

CASE NO. 91,055

MIAMI TIRESOLES, INC., a Florida corporation, M2J CORP., a Florida corporation d/b/a HOMESTEAD AUTO SERVICE CENTER, and MARTINO TIRE CO., a Florida corporation,

Petitioners

vs.

THE STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Respondent

(District Court of Appeal, Third District Case #96-3213)

Petitioners' Corrected Initial Brief

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PREFACE

This case is before the Court on a certified question of great public importance and on certified express conflict among certain District Courts of Appeal. The question of great public importance is:

> Whether *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994), cert. denied, 115 S. Ct. 2608 (1995), overruled or receded from *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954)?

The certified conflict involves *Nemeth v. Department of Revenue*, 686 So.2d 778 (Fla. 4th DCA 1997), review pending, No. 89,909 (Fla. Feb. 24, 1997) and *Public Med. Assistance Trust Fund v. Hameroff*, 689 So.2d 358 (Fla. 1st DCA 1997), which have both ruled that *Kuhnlein* makes it unnecessary to follow the tax refund application procedure provided by *Fla. Stat.* § 215.26 when the basis for the claimed refund is a constitutional challenge. On the other hand, this case, *Westring v. State Department of Revenue*, 682 So.2d 171 (Fla. 3d DCA 1996), review denied, 686 So.2d 583 (Fla. 1996) and *Department of Revenue v.Bauta*, 691 So.2d 1173 (Fla. 3d DCA 1997) do not recognize *Kuhnlein* as standing for the above proposition but, rather, follow *Gay* and its holding that the tax refund application procedure provided by *Fla. Stat.* § 215.26 must be exhausted even where the basis for the claimed refund is a constitutional

challenge.

The conventions used in this brief are as follows:

- Miami Tiresoles, Inc. , M2J Corp. and Martino Tire Co. will be referred to collectively as the "Tire Dealers."

- Appellee, State of Florida, Department of Revenue will be referred to as the "Department."

- References to the Record shall be designated as "R. at ____."

- References to the Appendix and corresponding tabs shall be designated as "A1 at ____, A2 at ___," etc.

INTRODUCTION

The certified question must be answered in the affirmative for both policy and constitutional reasons. The certified conflict must likewise be resolved in favor of the Tire Dealers for these same reasons. What the court below misapprehended in its failure to follow this Court's decision in *Kuhnlein* was the rationale behind this Court's holding: that fundamental principles of separation of powers render the Department impotent to consider constitutional questions. As a result, an application for refund on a constitutional ground is a pointless exercise because of the constitutional restraints upon the Department, as part of the executive branch, to engage in judicial review which is constitutionally reserved to the judicial branch of government. Here, the Department has made it very clear that it agrees it is powerless to consider the constitutional basis upon which the Tire Dealers seek a refund.

The Tire Dealers also assert nonconstitutional grounds in support of their refund claim. The Department has also rejected these claims and considers the subject waste tire fee proper, due and payable. As a result, the settled "Useless Act Doctrine" excuses the Tire Dealers from having to file a refund application

before bringing their constitutional and nonconstitutional claims in circuit court.

Last, the Tire Dealers will demonstrate that modern class action litigation is uniquely unsuited to administrative review.

STATEMENT OF THE CASE AND FACTS

The Waste Tire Fee

The Tire Dealers are franchisees of the Goodyear Tire Corp. of Akron, Ohio ("Goodyear") and are in the business of selling automotive tires at all distribution levels. (R. at 3-4 and A1 at 2-3.) Before January 1, 1989, Goodyear and the State of Florida entered into an exclusive purchase and sale contract for tire sales to be made by Goodyear and its franchisees to the State of Florida, its agencies and political subdivisions ("State Tire Contract"). (R. at 4-5 and A1 at 3-4.) The Tire Dealers also sold tires to the State under subsequent state tire contracts. On January 1, 1989, *Fla. Stat.* §403.718 became effective and imposed a fifty cent ($0.50) per tire fee on all persons making retail sales of new motor vehicle tires sold in Florida (the "Waste Tire Fee"). (R. at 5 and A1 at 4.) The Waste Tire Fee was increased to one dollar ($1.00) per tire by legislative amendment effective on January 1, 1990. (R. at 5 and A1 at 4.)

Pursuant to *Fla. Stat.* §403.718, the Department is obligated

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to collect the Waste Tire Fee, audit dealers, make assessments, and otherwise enforce the fee. (R. at 5 and A1 at 4.) The Tire Dealers have regularly paid the fee to the Department for each new tire sold to the State of Florida since January 1, 1989. (R. at 6 and A1 at 5.)

The J&B Circuit Court Action

In June 1993, the Department audited J&B Operating Company I, Inc. ("J&B"), a Goodyear franchisee not a party to this appeal or the proceedings below. (R. at 6 and A1 at 5.) J&B, like the Tire Dealers, was a Goodyear franchisee subject to the rights and obligations of the State Tire Contract. (R. at 6 and A1 at 5.) As a result of the audit and the position adopted by the Department regarding the applicability of *Fla. Stat.* §403.718 to tire sales made under the State Tire Contract, the Department issued a Notice of Assessment against J&B for fees, penalties and interest for failure to pay the Waste Tire Fee on these sales. (R. at 6 and A1 at 5.)

In November, 1993, J&B filed a complaint in the Circuit Court in and for Dade County, Florida challenging this assessment. (R. at 6 and A1 at 5.) Following thorough briefing on the application of *Fla. Stat.* §403.718 to sales made under the State Tire Contract, the trial court entered a final summary judgment in favor of J&B

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and against the Department, ruling that the Waste Tire Fee did not and could not apply to such sales because:

1. Such application would unconstitutionally impair J&B's rights under the Sate Tire Contract for sales made from January 1, 1989 through July 1, 1993;

2. Sales of tires by J&B under the State Tire Contract do not constitute "retail" sales; and

3. Sales of tires by J&B under the State Tire Contract were exempt from taxation pursuant to *Fla. Stat.*, Chapter 212.

(R. at 6, A1 at 5 and A6-A7.)

The First J&B Appeal

The Department appealed the final summary judgment to the District Court of Appeal, Third District of Florida. (R. at 7 and A1 at 6.) In its Initial Brief, the Department maintained that the trial court erred in each of its alternative holdings in favor of J&B and that *Fla. Stat.* §403.718 applied as a matter of constitutional law and statutory construction to sales made under the State Tire Contract.(R. at 7 and A1 at 6.) The Third District disagreed, affirming *per curiam* the final summary judgment on any and all of the grounds articulated by the trial court. *Department of Revenue v. J&B Operating Co., I, Inc.*, 663 So.2d 10 (Fla. 3d DCA 1995).

The Second J&B Appeal

On remand from the Third District, the trial court awarded J&B attorneys' fees pursuant to *Fla. Stat.* §57.111. (A2.) The Department also appealed this ruling, arguing that if it was not correct on the merits, it was at least "substantially justified" in each of its positions and that, therefore, J&B was not entitled to fees.(A2.) Again, the Third District disagreed and affirmed the trial court's award *per curiam* on July 23, 1997.

This Case

The Tire Dealers' and Class Claims

Relying upon the rulings adopted in *J&B Operating Co., I, Inc.*, the Tire Dealers filed this declaratory action against the Department challenging the application of *Fla. Stat.* §403.718 to sales made under the State Tire Contract. (R. at 2 and A1.) The Tire Dealers sought refunds for all mistaken payments of the fee to date as well as injunctive relief against the future enforcement of *Fla. Stat.* §403.718 on behalf of themselves and as representatives of two potential classes. (R. at 2-16 and A1 at 1-15.) One class, known as the "Constitutional Class," alleges, consistent with the teachings of *J&B Operating Co., I, Inc.*, that *Fla. Stat.* §403.718 as applied to sales made under the State Tire Contract from

January 1989 through July 1993 represents an unconstitutional impairment of the Tire Dealers' rights under the State Tire Contract. (R. at 7 and A1 at 5.) The second class, known as the "General Class," consists of all those that have sold tires to the state under any state tire contract and have paid the Waste Tire Fee since January 1, 1989. (R. at 11 and A1 at 10.) This class action complaint is patterned on the rulings in *J&B Operating Co.*

Count I of the complaint alleges that *Fla. Stat.* §403.718 is unconstitutional as applied to sales made under the State Tire Contract from January 1, 1989 through July 1, 1993. (R. at 11-12 and A1 at 10-11.) Count II of the complaint alleges that *Fla. Stat.* §403.718 has no application to sales made under any state tire contract because such sales are not "retail" sales to which the statute applies. (R. at 12-13 and A1 at 11-12.) Finally, Count III alleges that tire sales made under any state tire contract are otherwise exempt from application of *Fla. Stat.* §403.718 pursuant to *Fla. Stat.*, Chapter 212. (R. at 14-15 and A1 at 13-14.) Both classes seek a declaratory judgment on each of the three counts, a refund of all fees paid, and an injunction against the future application of *Fla. Stat.* §403.718 by the Department to tire sales made to the State of Florida, its agencies, political subdivisions and municipalities. (R. at 15-16 and A1 at 14-15.)

The Department Continues to Deny any Entitlement to Relief

The Department filed two separate answers to the allegations contained in the complaint. (R. at 33-93) Consistent with its position articulated throughout the history of *J&B Operating Co.* the Department denied that any of the Tire Dealers' claims had merit. (R. at 33-152.) In effect, the Department expressed its continuing refusal to recognize *J&B Operating Co.* as law and refused the Tire Dealers' entitlement to a refund and their entitlement to the injunctive and the declaratory relief sought. (R. at 33-152.)

The Summary Judgment Motions and the Judgment Appealed

Notwithstanding the Department's denial of the Tire Dealers' claim to a refund, it filed a motion for summary judgment contending that, because the Tire Dealers had not filed a refund application pursuant to *Fla. Stat.* §215.26, they are not entitled to maintain this action. (R. at 153-155.) The trial court denied summary judgment relying upon *Kuhnlein, supra* and *Westring v. Department of Revenue*, 20 Fla. L. Weekly D 2604 (Fla. 3d DCA 1995), 1995 WL 699903 ("*Westring II*"). (R. at 218-219 and A2.) The Third District later withdrew *Westring I* on rehearing, reversing itself on the basis of *Gay, supra*, ruling that even constitutionally based refund claimants are required to exhaust the

administrative procedures contained in *Fla. Stat.* §215.26 before filing a refund claim in circuit court. *Westring v. Department of* Revenue, 21 Fla. L. Weekly D1432, 1996 WL 334224 ("*Westring II*"), vacated, superseding opinion on rehearing, *Westring v. Department of Revenue*, 682 So.2d 171 (Fla 3d DCA 1996) ("*Westring III*"). Following *Westring III*, the Department refiled its motion for summary judgment. (R. at 220-233 and A3.) This time the trial court agreed and entered a final summary judgment against the Tire Dealers. (R. at 530-535 and A at 3.) As a result, only the Tire Dealers' claims for injunctive relief remain in the trial court. (R. at 530-535.)

The Department again Denies the Tire Dealers' Claim in the Trial Court

On October 4, 1996, the Tire Dealers moved for summary judgment on these remaining claims arguing that, consistent with the rulings made in *J&B Operating Co.*, tire sales made under any state tire contract are not "retail" sales and, in the alternative, are otherwise exempt from taxation pursuant to *Fla. Stat.*, Chapter 212. (R. at 234-250.) In response, the Department filed a comprehensive memorandum denying the Tire Dealers' entitlement to the relief sought on these remaining claims. (R. at 325-328 and A4.) The trial court denied the Tire Dealers' motion. (R.

at 522.)

Proceedings in the District Court of Appeal, Third District

On November 18, 1996, the Tire Dealers perfected their appeal of the trial court's final summary judgment in favor of the Department which ruled that the Tire Dealers' refund claims could not be maintained because of their failure to file an application for refund pursuant to *Fla. Stat.* §215.26. Following briefing on the merits and an oral argument on June 18, 1997, the Third District Court of Appeal affirmed *per curiam* the final summary judgment entered below, following its precedent in *Westring III* and *Bauta, supra*. The Court, however, recognized this Court's decision in *Kuhnlein* and the conflicting decisions in *Nemeth v. Department of Revenue,* 686 So.2d 778 (Fla. 4th DCA 1997) and *Public Med. Assistance Trust Fund v. Hameroff,* 689 So.2d 358 (Fla. 1st DCA 1997) and certified conflict to this Court and certified the following question of great public importance:

> Whether *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994), cert. denied, 115 S. Ct. 2608 (1995), overruled or receded from *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954)?

(A5.) On July 31, 1997, this Court postponed its decision on jurisdiction and ordered a briefing schedule.

SUMMARY OF ARGUMENT

This Court must answer the certified question in the affirmative and resolve the certified conflict in favor of the Tire Dealers. This Court unmistakably held in *Kuhnlein*, in contrast to its decision in *Gay*, that constitutionally based refund actions need not comply with the procedures set forth in *Fla. Stat.* §215.26. The rationale behind *Kuhnlein* is separation of powers, which recognizes that administrative agencies simply do not have the power to pass upon constitutional questions. As a result, the time and expense of administrative exhaustion need not be endured and the Constitutional Class is entitled to maintain its refund action in circuit court, notwithstanding *Fla. Stat.* §215.26.

In addition, because of the consistent and unequivocal expression by the Department that the Tire Dealers are entitled to no refund, the Useless Act Doctrine excuses both the Constitutional Class and General Class from compliance with *Fla. Stat.* §215.26. For the last four (4) years, the Department has engraved its position in stone and is "in denial" that the Tire Dealers have any right to a refund.

Finally, policy considerations require that, at least in this case, an acknowledged exception to administrative exhaustion be applied. The irreparable harm and practical constraints that

accompany *Fla. Stat.* §215.26 administrative procedures in this class action setting render administrative exhaustion entirely inappropriate.

ARGUMENT

I. THE CONSTITUTIONAL CLASS NEED NOT FILE A REFUND APPLICATION PURSUANT TO FLA. STAT. §215.26 PRIOR TO FILING SUIT ON THEIR REFUND CLAIMS IN CIRCUIT COURT BECAUSE *DEPARTMENT OF REVENUE V. KUHNLEIN*, 646 SO.2D 717 (FLA. 1994) OVERRULED OR RECEDED FROM *STATE EX REL. VICTOR CHEMICAL WORKS V. GAY*, 74 SO.2D 560 (FLA. 1954).

To the extent *Gay* holds that refund claims based upon constitutional challenges must first travel through the refund application procedure set forth in *Fla. Stat.* §215.26[1], the certified question must be answered in the affirmative. *Kuhnlein* very clearly adopted the contrary approach in holding that the *Fla. Stat.* §215.26 refund application procedure need not be exhausted where a refund claim is made in connection with a constitutional challenge to tax legislation. The District Courts of Appeal for the Fourth and First Districts followed suit in *Nemeth* and *Hameroff*, respectively, as did the District Court of Appeal for the Third District in *Westring I*. The Third District later reversed

[1]The issue in *Gay* was when the taxpayer's right to collect a refund under the statutory application procedure accrued for purposes of the limitation period. The issue presented here was not presented in *Gay*.

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itself in *Westring III*[2] finding this Court's aging decision in *Gay* controlling. See also Bauta, *supra* (following *Westring III*). Because *Kuhnlein* was not followed in this case, *Westring III*, and

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[2]Perhaps foreshadowing this case, Judge Jorgenson offered the following observations in his dissenting opinion in both *Westring II* and *Westring III*:

In *Westring II*:

> I respectfully dissent.
>
> The court's opinion today overlooks the long-accepted precept that "the law does not require a futile act." *C.U.Assocs., Inc. v. R.B. Grove, Inc.*, 472 So.2d 1177, 1179 (Fla. 1985); *Haimovitz v. Robb*, 130 Fla. 844, 178 So. 827 (Fla. 1937); *Hoshaw v. State*, 533 So.2d 886 (Fla. 3d DCA 1988). At oral argument, counsel for the Department of Revenue candidly and unequivocally announced that if Westring applied for a refund in accordance with section 215.26, Florida Statutes (1993), the Department would deny his application. In my view, the court should not make this futile act a prerequisite to reaching the merits of the important constitutional issue presented by this appeal.

In *Westring III*:

At the very least, this court, as the taxpayer has requested, should certify to the Florida Supreme Court this question of great public importance:

> MUST A PLAINTIFF CHALLENGING THE CONSTITUTIONALITY OF A SPECIFIC TAX FIRST REQUEST A REFUND BEFORE A COURT OF COMPETENT JURISDICTION CAN ENTERTAIN A CHALLENGE TO THAT TAX, WHEN THE DEPARTMENT OF REVENUE HAS UNEQUIVOCALLY STATED THAT THE APPLICATION FOR REFUND WOULD BE DENIED?

Bauta, the certified conflict must be resolved in favor of *Nemeth* and *Hameroff*.

Kuhnlein is the most recent authority from this Court on the issue presented. In *Kuhnlein*, a class of state residents filed an action against the Department for a full refund of all taxes paid pursuant to vehicle impact fee legislation on the ground that such legislation was an unconstitutional violation of the Commerce Clause of the United State Constitution. The Department, as here, contended that the refund claims were barred because none of the class representatives had filed a refund application pursuant to *Fla. Stat.* §215.26(2). This Court expressly rejected the Department's argument:

> We . . . do not believe there is any requirement that the plaintiff must . . . request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.
>
> * * *
>
> The State . . . argues that the cause below was barred by the State's sovereign immunity, by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida refund statutes. Even if true, these are not a proper reason to bar a claim based on

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> *constitutional* concerns. Sovereign immunity does not exempt the state from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the state's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.

Id. at 720, 721 (emphasis in original).

What this Court implicitly acknowledged in *Kuhnlein*, and the *Gay* and *Westring III* courts overlooked, is the reason why a constitutional claim need not be first advanced to an administrative agency: an administrative agency, like the Department, is powerless to pass upon the constitutionality of state legislation[3]. *Article II, §3, Fla. Const.* The constitutionality of state legislation is for the judicial branch, and only the judicial branch, to consider and determine. *Article*

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[3]So fundamental is this example of academic separation of powers that it finds its origin in *Marbury v. Madison*, 5 US 137 (1903). The refund application procedure offered by *Fla. Stat.* §215.26 does not and could not impair the judicial function to determine constitutional disputes. *Butler v. Department of Insurance*, 680 So.2d 1103 (Fla. 1st DCA 1996); *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976). Moreover, constitutional questions are not within the Department's special expertise such that policy considerations dictate that the Department should first be presented with the Tire Dealers' constitutional claims.

V, §§1 and 5, Fla Const.[4] As a result, *Fla. Stat.* §215.26 as applied to constitutionally based refund claims represents a pointless expenditure of time and expense in a futile administrative effort.

This Court's decision in *Key Haven Assoc. Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982) sets forth the constitutional and policy considerations through which this Court can resolve the certified question and certified conflict. In *Key Haven*, this Court developed a comprehensive discussion on two lines of rationale with regard to a claimant's necessity to exhaust administrative processes before seeking judicial review. On the one hand, where administrative procedures are in place, and these procedures provide both an adequate and available remedy, a court should refrain from entertaining an action where the available administrative remedy has not been sought. On the other hand, if the administrative procedures do not provide an adequate or available remedy, then the administrative procedures can have no

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[4]See also, *Fla. Stat.* §26.012(2)(e) which provides that circuit courts shall have exclusive original jurisdiction "of all cases involving legality of any tax assessment or toll or denial of a refund, except as provided in §72.011." As a result, the circuit court has jurisdiction to consider both the legality of any tax *or* the denial of any refund.

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effect and, need not be pursued. In such circumstances, it would be "pointless to require applicants to endure the time and expense of full administrative proceedings." *Key Haven, supra* at 157. In *Key Haven*, this Court employed this analytical framework in ruling that where an action challenged the facial constitutionality of a state statute, the administrative procedures as provided by *Fla. Stat.*, Chapter 120 need not be utilized because the administrative agency, as a matter of constitutional law, is powerless to pass upon such a question. *Id at 157.*

Likewise, the *Key Haven* principles support this Court's holding in *Kuhnlein* that constitutionally based refund claims need not follow the procedures set forth in *Fla. Stat.* §215.26. Simply, it would be pointless to require claimants like the Tire Dealers to follow the refund application procedures set forth in *Fla. Stat.* §215.26, because the Florida Constitution dictates that nothing can be accomplished in this administrative setting.[5]

The Tire Dealers acknowledge that, unlike the residents in *Kuhnlein*, they are not challenging the facial constitutionality of *Fla. Stat.* §403.718. However, their constitutional claims are

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[5]Nor does the language of *Fla. Stat.* §215.26(1) empower the Comptroller to refund taxes, fees or assessments where a constitutional challenge upon the fee legislation is made.

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analytically identical to those presented in *Key Haven*, because the Department admits it is powerless to pass upon the constitutional issue. The Department very clearly believes it has no authority to apply *Fla. Stat.* §403.718 other than as written and enforce the Waste Tire Fee from January 1, 1989 forward, regardless of the circumstances. Hear the Department in this case:

- "The question of what constitutes an 'impairment of contract' is a judicial question." *See* Department's Response to Plaintiff's Motion for Attorney's Fees pursuant to *Fla. Stat.* §57.111 in *J&B Operating Co., I, Inc.*, at p. 5 (A. at 5.)

- "Only the courts [have] the authority to declare statutes unconstitutional or construe the words of [§403.718] to exempt [J&B] from the [Department's] collection duties ... the Department had no option but to conduct a routine audit under the authority of a statute presumed to be valid." *See* Department's Initial Brief on trial court's award of *Fla. Stat.* §57.111 fees, at p. 7 (A9.)

- "If fees are awarded against the State agencies for their defense of acts of the Legislature, it will place a chilling effect on an agency's conduct in the enforcement of presumably valid statutes." *Id.* at p.8

- "Statutes are presumed to be constitutional... Executive officials are required to follow the laws as enacted into law..., the question of what constitutes an impairment of contract is a judicial question." *Id.* at p.p. 13 and 19-20

- "The unconstitutionality of a statute is not part of [the State's] discretionary process. Defense of a statute on constitutional grounds is a constitutional imperative imposed on the part of the State officials. As stated before, statutes are presumed to be constitutional. Because of this presumption, executive officials are

> required to follow the laws as enacted into law. With rare exception, public officials lack standing to challenge the constitutionality of a state statute. Thus, in this case the Department had, at the time of assessment was issued, no option but to assume *Fla. Stat.* §403.718 constitutional and apply the law as written. Further the question of what constitutes an 'impairment of contract' is a judicial question. **It is not for the Department to determine if a particular statute impairs a particular contract."**

Id. at p.p. 21-22 (emphasis added).

These public (and accurate) admissions refute any possibility that there is or was an available remedy available to the Tire Dealers in the refund application procedures provided by *Fla. Stat.* §215.26. The Department's posture places the factual setting confronting the Tire Dealers within the second line of rationale in *Key Haven*. The Department's belief that it is without authority to pass upon the constitutional question presented by the Tire Dealers informed them that no adequate or available remedy existed, making it pointless to exhaust the refund procedures provided by *Fla. Stat.* §215.26.[6]

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[6]Although, in theory, an adequate and available remedy may have been available to the Tire Dealers because it appears the Department may have the power to apply a statute mindful of constitutional influences, the Department's endless expression that it was impotent to be pass upon the Tire Dealers' constitutional claims demonstrated that, *in fact*, no adequate or available remedy existed. An administrative remedy that is neither available nor adequate is no administrative remedy at all. *Butler v. Department of Insurance*, 680 So.2d 1103,1107 (Fla. 1st DCA 1996).

II. NEITHER THE CONSTITUTIONAL CLASS NOR THE GENERAL CLASS ARE SUBJECT TO THE PROCEDURES SET FORTH IN FLA. STAT. §215.26 BECAUSE THE LAW DOES NOT REQUIRE ONE TO PERFORM A USELESS ACT.

The Department has been a model of consistency for the past four (4) years. In each of the following pleadings, motions, papers, and court appearances, the Department has expressly rejected each of the grounds asserted by the Tire Dealers for a refund:

J&B Operating Co., I

- Department's Answer and Affirmative Defenses;
- Department's Response in Opposition to Plaintiff's Motion for Summary Judgment;
- Department's Motion for Rehearing or Clarification following lower court's Order Granting Motion for Summary Judgment;
- Department's Initial Brief appealing lower court's Summary Final Judgment against the Department;
- Department's Reply Brief;
- Department's oral argument and presentation to the District Court of Appeal, Third District, on October 31, 1995;
- Department's Response to Plaintiff's Motion for Attorneys' Fees pursuant to *Fla. Stat.* §57.111;
- Department's Initial Brief appealing lower court's award of attorneys' fees pursuant to *Fla. Stat.* §57.111;
- Department's Reply Brief;

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- Department's oral argument and presentation to the District Court of Appeal, Third District on June 4, 1997.

This Action

- Department's Answer and Affirmative Defenses to the allegations made by Miami Tiresoles, Inc. and Martino Tire Co.;

- Department's Answer and Affirmative Defenses to the allegations made by M2J Corp.;

- Department's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment.

In addition, and following the trial court's ruling that the Tire Dealers needed to make an application for a refund pursuant to *Fla. Stat.* §215.26, Miami Tiresoles, Inc. submitted an application for refund with the Department. To date, and despite the passage of ten (10) months, the Department has not responded to this application. The law simply does not require more by way of the evidence of futility.

For more than 175 years, Courts have recognized the application of the Useless Act Doctrine. "The law does not require anyone to do a vain or useless act." *Green v. Liter*, 12 U.S. 229 (1814); See also, *Behrman v. Max*, 102 Fla. 1094, 1098 (Fla. 1931); *Haimovitz v. Robb*, 178 So.827, 830 (Fla. 1937) ("this principle is so well established that it is not necessary for us to cite any authorities in support of the same"). The Useless Act

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Doctrine is a recognized exception to the requirement to exhaust administrative remedies. *Southern Bell & Tel.Co. v. Mobile American Corp., Inc.*, 291 So.2d 199, 201 (Fla. 1974); *Gulf Pines Memorial Park, Inc. v. Oak Lawn Memorial Park, Inc.*, 361 So.2d 695, 699-700 (Fla. 1978); *Barry Cooke Ford, Inc. v. Ford Motor Co.*, 616 So.2d 512 (Fla. 1st DCA 1993); *Hillsborough County v. Twin Lakes Mobile Homes Village*, 153 So.2d 64 (Fla. 2d DCA 1963); *Mayflower Property, Inc. v. City of Fort Lauderdale*, 137 So.2d 849 (Fla. 2d DCA 1962). The Useless Act Doctrine has been held to excuse administrative exhaustion where an administrative agency is either powerless to grant an administrative remedy or where an administrative agency has demonstrated by its actions or inaction that a particular administrative remedy would not be provided. The useless act doctrine exception to administrative exhaustion is directly applicable to this case. *See Reynolds Fasteners, Inc. v. Wright*, 197 So.2d 295, 297 (Fla. 1967) (tax refund application procedure falls within policy of administrative remedy exhaustion).

Under *Fla. Stat.* §215.26, when a taxpayer submits a refund application to the Department, the Department can take only one of two paths. It can either approve the application and authorize the refund, or it can deny the refund application and explain the reasons why. The history of this case, together with the history

of *J&B Operating Co., I, Inc.*, along with the Department's refusal to make a determination on Miami Tiresoles, Inc.'s application for refund, clearly demonstrate the position of the Department with regard to the Tire Dealers' entitlement to refunds. The Department has clearly chosen to deny the refund claims of the Tire Dealers and has therefore in effect done everything required by *Fla. Stat.* §215.26 to trigger the Tire Dealers' right to bring a refund action in circuit court. Compare *Department of Environmental Protection v. P.Z. Const.Co., Inc.*, 633 So.2d 76 (Fla. 3d DCA 1994) (where no showing that the Department could not be persuaded to change their ruling, administrative procedures must be exhausted). Where, as here, the facts demonstrate that pursuit of administrative procedures would be useless or futile, their exhaustion is excused. *See Miami Beach v. Jonathon Corp.*, 238 So.2d 516 (Fla. 3rd DCA 1970) (when chief building inspector denied permit pursuant to political instruction rather then enforcement or interpretation of zoning ordinances, administrative exhaustion unnecessary); and *Cook v. Di Domenicio*, 135 So.2d 245 (Fla. 3rd DCA 1961) (property owner need not pursue administrative remedies where no action has been taken on city resolution for a period of nine (9) years). Though nine (9) years have not elapsed, the Department has made painfully clear that the Tire Dealers' refund application would be denied and

that it would not be persuaded otherwise.

As a result, both the Constitutional Class and the General Class should be excused from having to comply with the administrative procedure set forth in *Fla. Stat.* §215.26. The Tire Dealers submit that the Third District Court of Appeal got it right in *Westring I* when it ruled:

> [T]he Department of Revenue to which the application for refund must be made under the statute, has in this every case taken the position that the tax was properly imposed so that any such claim would obviously be denied. In these circumstances "a demand for ... for refund of such tax would be a useless act." *Hansen v. Port Everglades Steel Corp.*, 155 So.2d 387, 391 (Fla. 2d DCA 1963). Legal wheel spinning is not necessary or appropriate. See *State v. Rucker*, 613 So.2d 460, 462 (Fla. 1993) (disapproving judicial "churning").

Westring I, supra. To endure the time and expense of such procedures would be a useless and futile act against which the law has admonished for centuries.

III. THE DECISION OF THE THIRD DISTRICT MUST BE REVERSED, BECAUSE EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD BE FUTILE AND PURSUIT OF THE ADMINISTRATIVE PROCESS WOULD CAUSE IRREPARABLE HARM.

For legal, jurisprudential and policy reasons, this action should be permitted to proceed to class certification without resort to exhaustion of administrative remedies. First, a class

action is an efficient way to resolve the pending controversy and has been expressly authorized in refund cases. *Kuhnlein, supra; Nemeth, supra; Hammeroff, supra.* See also *Devlin v. Dickinson*, 305 So.2d 848 (Fla. 1st DCA 1974). Second, exhaustion of administrative remedies would be futile and cause the Tire Dealers and class members irreparable injury. Third, and as evidenced here by the Department's conduct in literally ignoring Miami Tiresoles, Inc.'s refund application, the class members' right to proceed in court would mature at different times depending upon the efficiency of the Department considering the application. The combination of the class action mechanism and the Useless Act Doctrine require that the matter proceed as a class action without resort to the futile administrative forum.

a. Application of class action considerations.

Class actions are governed by *Fla.R.Civ.P.* 1.220, and require four factors to be met: numerosity, commonality, typicality and adequacy of representation. See, e.g. *Broin v. Philip Morris Companies, Inc.*, 641 So.2d 888 (Fla. 3d DCA 1994); *Arrowsmith v. Broward County*, 633 So.2d 21 (Fla. 4th DCA 1993). One of the reasons at the core of class actions is to permit maintenance of claims on behalf of class members who, either because of the amount in controversy or personal constraints, would not otherwise have

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the incentive or ability to prosecute a claim on their own. *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). This salutory aim is defeated by the Department's *ad hominem* claim that resort to the administrative process must first be had, even though the Department eschews (and ignores) the efficacy of that forum.

First, there are limitations on the ability of counsel to contact putative class members pre-certification. See *Deltona Corp. v. Estate of Bobinger*, 582 So.2d 736 (3d 1991). Thus, many of the class members sought to be represented by plaintiffs would likely not file refunds under the mechanism offered by *Fla. Stat.* §215.26 because of ignorance of their right to do so.[7] Second, many class members with nominal or small claims would not wish to expend the cost or time involved in prosecuting their refund claims absent the availability of a cost-effective alternative. As this Court recognized in *Kuhnlein*, a constitutionally based claim for refund appears tailor-made for the class action vehicle.

The class action remedy is uniquely suited to claims of the nature presented here. The trial court has already certified both

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[7]In *Devlin*, the agency sent the requisite form to all affected persons. The Department has neither taken this step nor deigned to pass on the Miami Tiresoles refund application.

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the constitutional and general classes on a go-forward basis to determine the very issues which would give rise to the refund - whether the sales to the State, its agencies, political subdivisions and municipalities are "retail sales" or exempt. There is no good reason that such a determination should not also decide whether the Tire Dealers are entitled to a refund.

b. The administrative remedy is futile and will cause irreparable damage.

An administrative procedure is a fundamentally flawed vehicle in the class action context. All of the factors for which class actions were created are defeated by a requirement to make administrative claims. For example, there is no authorized mechanism to bring a class action in an administrative setting. *Medley Investors Ltd. v. Lewis*, 465 So.2d 1305 (Fla. 1st DCA 1985).[8] In this case, that means 300 or more separate claims: the very evil sought to be exorcized by class certification.

In addition, because of the statute of limitations under *Fla. Stat.* §215.26, different members of the class would be entitled to

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[8]But see *Bauta, supra,* suggesting in dicta that the trial court should consider same. However, there is no authority procedurally or administratively for this "suggestion" and, the Third District's "flip-flops" in *Westring* spanning seven months have assured that the "suggestion" - while well-intended - comes far too late for the Tire Dealers.

widely different refund periods. The statute permits a refund of only three years' payments immediately preceding the date of the application. Allowance of the class action would fix the date on which the general class members may be entitled to a refund at three years before the date of filing suit.[9]

Several courts have considered a balancing of sorts in determining whether a court should excuse the exhaustion of administrative remedies. The factors to be considered are: (1) that the claim is collateral to a demand for benefits; (2) that exhaustion would be futile; and (3) that plaintiffs would suffer irreparable harm if required to exhaust administrative remedies. *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996); *Crisci v. Shalala*, 169 F.R.D. 563, 569 (S.D.N.Y. 1996)[10].

The requirements for judicial waiver are obvious in this case.

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[9]Because the constitutional claims are not subject to §215.26, the applicable statute of limitations for those claims is four years under §95.11, *Fla. Stat.* See the trial court's original ruling in this cause to that effect. (A2.)

[10]In *Kenner Firefighters Assn. Local No. 1427 v. City of Kenner*, 685 So.2d 265, 268 (La.App. 1996), the court stated the rule somewhat differently but with the same result. When the agency shows that an administrative remedy exists, the burden is upon the plaintiff to show that he has exhausted those remedies. However, this requirement is subject to two exceptions; where the plaintiff is threatened with irreparable injury and when the administrative procedures are proven useless.

Indeed, if they are not present here it would be difficult to find a case where the requirements are met. It has been demonstrated that an application to the Department would be useless and futile. The Department denies not only the merits of the refund claims, but also its very ability to decide the issues in an administrative setting. See, *supra* at p.p. 15-16.

There will be irreparable damage if the case is not returned to its status before *Westring II*. Because the 3-year time limit for filing refund claims is a "moving target," which is fixed at the time of filing the refund claim, at least seven months of claims will have been lost because of the Tire Dealers' justifiable reliance on the law as represented by *Kuhnlein, Westring I* and *J & B Operating Co.* from the time this suit was filed until the Third District decided *Westring II* and the trial court was compelled to follow it. Many millions of dollars were wrongly collected during this hiatus. Indeed, delay itself is the Department's ally as the hundreds of class members have yet to file claims and literally years of wrongful collections may go without remedy absent the "relation back" afforded in the class setting. *Crisci v. Shalala, supra, Crown, Cork & Seal Co., Inc. v. Park*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed. 2d 628(1983), *Marquis v. U.S. Sugar Corp.*, 652 F.Supp. 598 (S.D.Fla. 1987). Should the class action proceed, this

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harm will be ameliorated.

Finally, a failure to permit the action to proceed in court flies in the face of the very essence of class actions. What possible reason exists for there to be several hundred administrative claims, all of which are destined for certain denial? If and when the Department ever rules on those claims, they will matriculate into different courts around the state at different times. Those cases may result in conflicting circuit and appellate court decisions on the merits. Rule 1.220, *Fla.R.Civ.P.*, and the Useless Act Doctrine were designed to avoid all of this. Requiring the Tire Dealers and each class member to exhaust the administrative process under *Fla. Stat.* §215.26 would unnecessarily defeat this class action and cause needless waste of time and expense to the parties, the courts, and the very agency which seeks to shoulder the burden of again denying all those claims.

CONCLUSION

Kuhnlein overrules *Gay*. Therefore, the certified question must be answered in the affirmative and the certified conflict be resolved in favor *Nemeth* and *Hameroff*. In addition, the Department's position with regard to *Fla. Stat.* §403.718 requires application of the Useless Act Doctrine. As a result, both the Constitutional Class and General Class should be excused from

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compliance with the administrative procedures set forth in *Fla. Stat.* §215.26. This Court should reverse the Order appealed and instruct the trial court to allow the refund claims to stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy hereof was mailed on September 12, 1997 to Eric J. Taylor, Esq., Asst. Attorney General, Tax Section, Capitol Bldg., Tallahassee, FL 32399-1050.

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