IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DOYLE CONNER, et al.,	)	
	)	
Appellants/Defendants,	)	
	)	DOCKET NO. 88-2014
V.	)	FL BAR NO 398292
	)	
RICHARD O. POLK, d/b/a RICHARD POLK NURSERY,	)	
	)	
Appellee/Plaintiff.	)	

ANSWER BRIEF OF CROSS-APPELLEE

On Cross-Appeal From
The Circuit Court of the Tenth Judicial Circuit
In and For Polk County, Florida

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

Beverly S. McLear
Assistant Attorney General
Special Projects Section
Suite LL04, The Capitol
Tallahassee, FL 32399-1050
(904) 487-3852

MALLORY HORNE
General Counsel
Department of Agriculture
and Consumer Services
Mayo Building, Room 512
Tallahassee, FL 32399-0800
(904) 488-6851

ATTORNEYS FOR CROSS-APPELLEES

PREFACE'

References to record pages will be shown by "R." followed by the record page number, e.g. "R. 31." References to exhibits admitted in evidence at the liability and damages trials will be shown by an abbreviation of the subject trial (L. = Liability, D. = Damages), followed by an abbreviation of the exhibit's sponsor (Pl. = Plaintiff, Def. = Defendants). These will be followed by "Ex. #" and "p. #" where appropriate. Citations to transcripts will be cited "LT: p.#", for the liability trial, "DT: p.#" for the damages trial, and "PTC: p.#" for the pre-trial conference.

STATEMENT OF THE CASE

Cross-Appellees ("State") adopt the Statement of the Case as set forth in its Initial Brief in the main appeal. The State disagrees with the Statement of the Case submitted in Cross-Appellant's ("Polk") Initial Brief on Cross-Appeal ("Brief") on the following specific grounds:

1. On page 2, Polk erroneously states that the damages trial took place on May 31-June 2, 1988. The trial took place on May 24-25, 1988. [R. 1-363]. Similarly, Polk states that the jury reached a verdict on June 2, 1988. [Brief, p.2]. The jury reached its verdict on May 25, 1988. [DT: 3601.

2. Also on p. 2, Polk asserts "[a]fter Cross-Appellant presented his case and rested, Cross-Appellee, as defendant, rested." Prior to resting its case, the State proffered evidence on the value of the plants in the infected nursery. [DT: 271-72].

The court had previously ruled that this value testimony would be excluded. [PTC: 18-26].

3. Contrary to Polk's assertion [Brief, p.2], neither the motion for directed verdict on the value of the mature budded, immature budded, and potted trees, nor the judge's order thereon, made any reference to the "mean value of the trees." [DT: 293-3041. Polk's motion for directed verdict was based on the assertion that the State had not introduced evidence of a specific value to rebut an asserted presumption that Polk's estimated value of $4.50 (less some costs) was correct. Id. In response to this motion, the State extensively argued it did not have to present evidence of any particular price to rebut Polk's figure. Id. A range of values from $3.00-6.00 was in evidence which the jury should have been allowed to consider. Id.

4. Finally, Polk asserts that the jury's verdict was in the sum of $1,045,834.00. [Brief, p.2]. More accurately stated, the jury's verdict had two parts: $441,731.00 for the value of the liners and $604,103.00 for loss of production. [DT: 3601. Together, these figures total $1,045,834.00.

STATEMENT OF THE FACTS

The State adopts the Statement of the Facts set forth in its Initial Brief in the main appeal. Additionally, the State disagrees with the Statement of the Facts set forth in Polk's Initial Brief on Cross-Appeal on the following specific grounds:

1. Contrary to Polk's assertion that "there was no indication that the balance of over 510,000 trees were infected" [Brief, p.3], all of the available scientific evidence indicated that other trees in the nursery were probably infected. [LT: 148, 209, 557, 721]. It was uncontroverted that trees could be infected and still not exhibit physical signs of disease for at least one year. [LT: 300, 624-6251. It was also uncontroverted that it was impossible to inspect every tree so thoroughly as to guarantee every tree with symptoms had been located. [LT: 148, 557, 721].

2. To clarify the rules under which the State acted, all of Polk's trees were destroyed in September, 1985, pursuant to Emergency Rule 5B-49, F.A.C. [LT: 428-4301; [L Pl. Exs. 3, 4, 5]. In December, 1985, new rules were adopted (called "Risk Assessment") which modified treatment procedures in accordance with the newly available scientific evidence. [L Pl. Ex. 9]; [LT: 498]. Prior to this time, the new scientific evidence wasn't generally accepted by scientists as sufficient to warrant changing the eradication methods. [LT: 622, 643, 654]. Under Risk Assessment, each nursery was independently assessed to determine the action necessary to control the disease. [LT: 136, 326-3271.

3. Polk asserts that the trial judge made a factual finding that trees within 125 feet of known diseased trees had no value. [Brief, p. 4]. What the court found, however, was that the burning all of Polk's nursery plants was arbitrary and capricious. [R. 322]. However, because the scientific evidence supported the destruction of trees within 125 feet of known diseased trees, those trees were properly destroyed. [PTC: 16]. The value of those trees was then a matter of law.

SUMMARY OF ARGUMENT

All of Polk's arguments in its Initial Brief are predicated on the notion that the trial court determined that destruction of trees within a 125 foot radius amounted to a taking. At the end of the liability trial, the court found that the application of the Emergency Rule to Polk's nursery was arbitrary and capricious because it went beyond the actions actually necessary to deal with the disease. [R. 322]; [LT: 432]. Polk admits [Brief, p. 3], that the Risk Assessment Rules, adopted subsequent to the destruction of all of Polk's trees, were reasonable, supported by scientific evidence and "conformed to the actual level of threat posed . . ." [R. 324-25]; [PTC: 16]. The methods of classifying and treating the disease through Risk Assessment were thus appropriate. The scientific evidence, held the court, showed it was necessary to destroy all plants within 125 feet of the known diseased plants. [PTC: 161.

The court's finding, as a matter of law, that those trees have no value is consistent with the law in this state, and elsewhere, that diseased food, animals, or plants are valueless. State Plant Board v. Smith, 101 So.2d 401, 407 (Fla. 1959) ("Smith"). Moreover, Polk expressly conceded this point in the Complaint [R. 58] and failed to object when the court readdressed the very portion of the judgment about which Polk now complains. [PTC: 14-16]. Any argument that the court's judgment is in error has thus been waived.

ARGUMENT

I.
THE TREES DESTROYED WITHIN THE 125 FOOT INFECTION ZONE WERE NOT COMPENSABLE.

Polk argues that the court found the destruction of all of his nursery plants was a taking and that the court then erred by declaring that certain of the destroyed plants had no value. It is clear however, upon consideration of the pleadings, the arguments of counsel, the evidence presented, and the statements of the trial court, that the trial court found the following: 1) the application of the Emergency Rule to Polk's nursery was arbitrary and capricious because the destruction of all of the plants was not consistent with the scientific evidence reasonably available at the time; 2) the scientific evidence which should have been relied on was that used to support the rule amendments ("Risk Assessment") adopted just a few months subsequent to the

burning of all of Polk's nursery stock; 3) Risk Assessment was reasonable and based on the available scientific evidence; 4) Risk Assessment would have required the destruction of plants within 125 feet of the known diseased plants; 5) the destruction of the plants within that zone was reasonable, is supported by current scientific evidence and did not constitute a taking; therefore, 6) no compensation is required. Though the court's findings in this regard are less than clearly articulated, they are supported by competent substantial evidence in the record and should be affirmed.

In determining whether destruction of property by the government amounts to a taking, the court looks to, among other things, the necessity for the destruction.[1] As explained in Corneal v. State Plant Board, 195 So.2d 1, 4 (Fla. 1957) ("Corneal"),

> [t]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity unless the State chooses to pay compensation.

"Limits of actual necessity" appears to require the state to use only those procedures mandated by the available scientific evidence. Id. This conclusion is supported by numerous decisions wherein courts have analyzed the scientific information available at the time of destruction to determine the need for destruction of property. Campoarnor v. State Livestock Sanitary Board, 136 Fla. 456, 182 So. 277, 279-80 (Fla. 1938)("Campoamor");

---

1 Indeed, Polk's entire case was predicated on the asserted lack of necessity for destruction of the plants.

Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed.2d 568 (1928)("Miller"); Conner v. Carlton, 223 So.2d 324 (Fla. 1969).

When the dispute is merely over a choice of different methods of exercising the police power to abate a public harm, the courts are loathe to substitute their judgment for that of the state. Hadachek v. Sebastian, 239 U.S. 394, 413, 36 S.Ct. 143, 60 L.Ed. 348 (1915)(court rejected the argument that something less than prohibition would have sufficed); Campoamor, 182 So. at 277, 279-80 (dairyman argued that Board should have quarantined instead of slaughtered infected cows; court rejected this argument because the detection and treatment methods used were those generally employed and accepted at the time); Louisiana State Board of Agriculture and Immigration v. Tanzmann, 140 La. 756, 73 So. 854, 857 (La. 1917)("Tanzmann")(court rejected argument that government should have controlled outbreak of citrus canker by means other than burning). However, if the scientific evidence available at the time of the destruction indicated something less than destruction was all that was necessary, the courts have sometimes found a taking. In Corneal and Smith, the court found there had been a taking because, at the time the citrus trees were destroyed, it was known that burrowing nematodes move slowly and could be stopped by less severe means than immediate destruction of all citrus trees. Corneal, 95 So.2d at 5; Smith, 110 So.2d at 403. Moreover, the disease caused by burrowing nematodes (spreading decline) had been present for over thirty years without significant effect.

Id. There was no evidence in the record that all the trees needed to be destroyed. Id.

Similarly, in Dep't of Agriculture v. Mid-Florida Growers, 521 So.2d 101, 104 (Fla. 1988)("Mid-Florida") the pivotal factor both in the trial court and on appeal was the fact that no infestation had been found in the subject nursery. Based on this factor, the trial court came to the legal conclusion that there was no canker in the nursery and that the state had failed to reasonably ascertain the presence of infection or disease. Mid-Florida, 521 So.2d at 102. Because there was no scientific evidence to show destruction of the trees was necessary, the trees were presumed to be healthy and compensation was required when they were destroyed. Id.

The facts of the instant case are quite the contrary. The evidence shows, and the court found, that the available scientific evidence supported, at minimum, the destruction of all trees within a 125 foot radius of trees actually exhibiting the disease. [LT: 136, 209-10, 213, 218, 232-234, 303, 306, 372-73, 622-23, 643]. The evidence presented at trial, as argued by Polk and accepted by the court below, was that the destruction of all the plants in the nursery was not necessary given the reasonably available scientific evidence. [R. 316-3251; [LT: 7501. In support of this argument, Polk demonstrated that just three months after all the plants in the nursery were burned, new rules were adopted under which not all of the plants would have been burned. [R. 332-333, 567-5681; [L Pl. Ex 91 [LT: 7391; [See

also, Brief, p.3]. The new rules, referred to as Risk Assessment, modified the procedures used to deal with the nursery strain on the basis of the newly available scientific evidence. [R. 643, 6541. Put simply, the question posed by the trial court was: was the scientific information which justified the Risk Assessment modifications (including destruction within a 125 foot zone) reasonably available prior to the burning of all of Polk's trees yet ignored by the State? [R. 316-3251.

At the conclusion of the trial, the court answered this question affirmatively. The court determined that the State had ignored the available scientific evidence and needlessly burned all of Polk's nursery. On this basis the court found that as applied to Polk's nursery, the Emergency Rules were arbitrary and capricious, failed to promote the public health, safety and welfare, and didn't prevent a public harm. [R. 322]. Finally, the court found, had the State heeded the newly available scientific evidence, it could have taken the actions ultimately available under Risk Assessment. [R. 3251; [PTC: 14-16]. Thus, everything within 125 feet of the known diseased trees would have been properly destroyed. Id.

There was argument at the Pre-trial Conference preceeding the damages trial over the proper application of the court's ruling on the 125 foot zone. Polk stated that if the court's ruling was as to all trees within 125 feet of the known diseased plants, he would stipulate to 28,000 trees. The State, however, argued that the correct application included all plants within

125 feet of the **block** in which the known diseased plants were found.[2] The court clarified its ruling, emphasizing that it was the trier of fact and found that, in light of "today's knowledge" the necessary burning or eradication would be 125 feet from the known diseased trees. [PTC: 16].

Applying the analysis of Corneal, Smith, and other cases, to the facts of the instant case, it is clear that the available scientific evidence supported, at minimum, destruction by burning of all plants within 125 feet of the known diseased plants. Such action was "reasonably necessary to meet the situation" and did not constitute a taking. Campoamor, 182 So. at 280. In short, the court found that the available scientific evidence showed that those plants inside the 125 foot zone needed to be destroyed, whereas those plants outside the 125 foot zone could be presumed healthy. Indeed, as Polk admits, the Risk Assessment modifications

> [c]onformed the use of quarantine and burning at any given nursery to the actual level of threat posed by the type of Xanthomonas bacteria found there.

[Brief, p. 3]. Under Risk Assessment then, destruction of all trees within 125 feet of the known diseased trees conformed to the "actual level of threat" posed by the infection; it was necessary.

---

[2] To illustrate the distinction, attached as Appendix A is a map of Polk Nursery, admitted into evidence at the Liability Trial as Plaintiff's Exhibit 7. Polk's argument is represented by the red line and the State's argument is represented by the blue line.

In Graham v. Estuary Properties, 399 So.2d 1374, 1381 (Fla. 1981)("Graham") the court held that prevention of

> the destruction of a mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant harm to the public, the exercise of police power would be reasonable.

Similarly, in the instant case, the scientific evidence clearly established, and Polk admitted, that the requirements under Risk Assessment (and thus, the burning of all plants within 125 feet of the known diseased plants) conformed to the actual level of threat, i.e., public harm, and were thus necessary and reasonable in dealing with this disease. Under the Graham analysis, the destruction of these unhealthy plants does not constitute a taking.

It has been repeatedly held by the courts of this state, and elsewhere, that the destruction of diseased or infected plants or animals, including those in the infection zone around the known diseased plants, does not constitute a taking. Mid-Florida, 521 So.2d at 104; Smith 110 So.2d at 405; Corneal 95 So.2d at 4; Campoamor 182 So. at 279-80; Miller, 276 U.S. at 278-79; Tanzmann, 73 So. at 857 (citrus trees with citrus canker); Durand v. Dyson, 271 Ill. 382, 111 N.E. 143 (1916)(cattle exposed to hoof and mouth disease); Balch v. Glenn 85 Kan. 735, 119 P. 67 (1911)(entire orchard containing trees infected with San Jose scale); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920)(red cedar trees within one mile radius of red cedar trees infected with cedar rust destroyed to prevent infection of nearby apple orchards); Wallace v. Feehan, 206 Ind.

522, 190 N.E. 438 (1934) (destruction of entire oat crop infected with European corn borer).

If there has been no taking, no compensation is required. The reasoning behind the conclusion that there is no taking revolves around the maxim "sic utere ut alienum non laedas" (use your own property in such manner as not to injure that of another). Smith, 110 So.2d at 405. Property destroyed because of its unwholesomeness or its threat to the public has no value. Id. at 406-07; Mid-Florida, 521 So.2d at 104. The property is valueless because it is not healthy; it is a source of public danger and cannot be lawfully used. Id. Contrary to Polk's assertions, the fact that those trees have no value is attributable to the disease and the fact that the plants cannot be used without injuring the rights of others. Mugler v. Kansas 123 U.S. 623, 665, 8 S.Ct. 273, 31 L.Ed. 205 (1887); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. ____ , 107 S.Ct. 1232, 94 L.Ed.2d 472, 490 (1987).

In the instant case, having found scientific support for destruction of trees within the 125 foot perimeter as minimally necessary to prevent public harm, the court concluded, as a matter of law, that those plants had no value. Indeed, Polk admitted that trees within a reasonable perimeter of the known diseased trees had no value in the First Amended Complaint:

> [W]ith the exception of the few infected trees in a reasonable perimeter around the infected trees the remainder of the nursery stock at Polk had a fair market value. . .

[R. 581.

In inverse condemnation actions, the trial court's determination of liability is presumed correct; if supported by competent, substantial evidence, its findings will not be disturbed on appeal. Mid-Florida, 521 So.2d at 104. Additionally, where, as here, the trial court's logic or thought processes are less than clearly articulated, and even when the trial court has gotten the right result through the wrong reasoning, the judgment entered should be upheld. Smith, 110 So.2d at 405. There is competent substantial evidence in the record to support the trial court's judgement that no compensation is required for destruction of 28,000 trees in Polk's infected nursery. This is especially true when coupled with the Polk's express acknowledgement that plants within a reasonable perimeter of the known diseased plants had no value. Therefore, the court's exclusion of the 28,000 trees stipulated to be within the 125 foot zone should be affirmed.

II.
POLK WAIVED *ANY* ARGUMENT THAT THE COURT ERRED IN EXCLUDING FROM COMPENSATION THE 28,000 TREES WITHIN THE 125 FOOT INFECTION ZONE.

A party cannot complain on appeal of a judgment entered in accordance with the theory upon which he tried the case. Bould v. Touchette, 349 So.2d 1181, 1186 (Fla. 1977). Moreover, a party cannot assert as error action by the trial court in which he acquiesced. Karl v. David Ritter, Sportservice, Inc, 164 So.2d 23 (Fla. 3d DCA 1964). The Complaint in the instant case made the following statement of fact:

> [W]ith the exception of the few infected trees in a reasonable perimeter around the infected trees the remainder of the nursery stock at Polk had a fair market value. . .

[Complaint, R. 58]. The position of Polk throughout the liability trial, and that ultimately adopted by the trial court, is in accordance with this assertion. No evidence whatsoever was introduced to show that the Risk Assessment requirements were not correct. Polk's emphasis was that those very requirements should have been followed sooner and applied to his nursery. [R. **739, 7491.** As discussed previously (supra, p. 10), Polk has conceded the appropriateness of the Risk Assessment procedures,

> [U]nder the terms of the amended rules, a program called "Risk Assessment" was adopted, which conformed the use of quarantine and burning at any given nursery to the actual level of threat posed by the type of Xanthomonas bacteria found there.

[Brief, **p.** 3] (emphasis in original). Polk goes on to state that the expert testimony showed that under Risk Assessment, "either no burning of trees. . . or minimal burning close to the actual diseased trees. . . would have occurred." Id. At the conclusion of the trial, the court agreed with Polk and held that trees within 125 feet of the known diseased trees were not healthy, were appropriately burned, and had no value. Polk cannot now complain that the trial court erred when that court's judgment is in accordance with Polk's case. Bould, **349** So.2d at **1186;** Roe v. Henderson, **139** Fla. **386, 190 So. 618,** 620 (Fla. **1939).**

Neither can Polk assert as error actions taken by the trial court to which he never objected. Karl, supra; Sundale Associates, LTD. v. Southeast Bank, N.A., **471** So.2d 100, 102

(Fla. 3d DCA 1985); Motor Club of America Insurance Company v. Landa, 388 So.2d 10 (Fla. 4th DCA 1980); American Mortgage Corporation v. Lord, 253 So.2d 922 (Fla. 2d DCA 1971). Polk never once objected to the court's liability judgment in spite of opportunities to do so. At the Pre-trial Conference for the damages portion of this bifurcated case, there was argument over what the court intended by the reference to the 125 foot perimeter. The relevant portions of the transcript of this discussion is attached hereto as Appendix B. Counsel for Polk stated

> [I]f the court's order specified that it was those actual diseased trees plus those trees within 125 foot perimeter around those diseased trees, then the parties have stipulated that number of trees within that area is 28,000. If the court rules that his final judgment did not specify that, but instead according to the statement (sic) 125 foot perimeter around the entire block. . . the State probably wants to address it.

[Appendix B, p. 1]; [also found at PTC: 14-16].

The court clarified exactly its order, and the basis therefore, saying,

> [S]o when I determined this, in the order I was relying on my specific recollection of the testimony of very sundry (sic) witnesses in their definitions of what would have occurred in light of today's information. . . I had witnesses, I'm satisfied, who testified that in light of today's knowledge that the burning or eradication would be 125 feet around the trees not around blocks.

[Appendix B, p. 2-3].

Counsel for the State expressly preserved its objection to the court's ruling on the 125 foot rule and stipulated to the number of trees subject to that objection.[3] Nowhere, did Polk object or indicate any disagreement with the court's ruling.

Having conceded that plants within a reasonable perimeter of the known diseased trees had no value and having acquiesced in the application of this theory in the court's liability judgment, Polk has waived any argument that that portion of the liability judgment is in error. Accordingly, the trial court's judgment that the plants within **125** feet of the known diseased plants were properly destroyed and had no value should be affirmed.

CONCLUSION

The State respectfully asserts that this court should affirm that portion of the liability judgment which holds that the **28,000** trees, appropriately subject to destruction under the Risk Assessment rule, were without value.

Respectfully submitted this _____ day of November, **1988.**

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

Beverly S. McLear
Assistant Attorney General
Special Projects Section
Suite **LL04,** The Capitol
Tallahassee, FL **32399-1050**
(904) 487-3852

ATTORNEY FOR CROSS-APPELLEES

---

[3] The State still maintains that the 125 foot r le was not applied properly by the court. To the extent the court's order finds the scientific evidence supports, at minimum, destruction within 125 feet of known diseased plants, the State supports that finding and has so argued herein.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. Mail to Harry Lewis Michaels, Esq., Department of Agriculture and Consumer Services, Room 513, Mayo Building, Tallahassee, FL 32399-0800; Douglas A. Lockwood, III, Esq., Peterson, Myers, Craig, Crews, Brandon, and Mann, P.A., Post Office Drawer 7608, Winter Haven, FL 33883; and J. Davis Connor, Esq., Post Office Box 1079, Lake Wales, FL 33859-1079, this _____ day of November, 1988.

attorney