73,842 53

IN THE DISTRICT COURT OF APPEAL
OF THE SECOND DISTRICT
STATE OF FLORIDA

DOYLE CONNER, et al.,	)	
	)	
Appellants/Defendants,	)	
	)	
vs.	)	Docket No. 88-2014
	)	
RICHARD O. POLK, d/b/a RICHARD POLK NURSERY,	)	
	)	
Appellee/Plaintiff	)	

ANSWER BRIEF OF APPELLEE

On Appeal From

The Circuit Court of the Tenth Judicial Circuit

In and For Polk County, Florida

PETERSON, MYERS, CRAIG, CREWS,
BRANDON & MANN, P. A.

By: J. Davis Connor, Esq.
P. O. Box 1079
Lake Wales, FL 33859-1079
(813) 676-7611
Fla. Bar No. 0714313

and, Douglas A. Lockwood, III
P. O. Drawer 7608
Winter Haven, FL 33883-7608
(813)294-3360
Fla. Bar No. 0286834

ATTORNEYS FOR APPELLEE

RECORD CITATION FORM

For purposes of consistency, Appellee will use the record citation form used in Appellant's Initial Brief. Citations to the transcript of the trial on liability will be abbreviated: L.T., pg. ____. Citations to the trial on damages will be abbreviated: ;D.T., pg. ____. Citations to the Transcript of

the pretrial conference will be abbreviated: P.T.C., pg. ___. References to the Clerk's record will be shown by R., pg. ___. Exhibits will be cited by the appropriate trial abbreviation, followed by the sponsor of the exhibit and exhibit number (e.g., L.T., Pltf. Exh. #1 for Plaintiff's Exhibit #1 admitted at the trial on liability).

TABLE OF CITATIONS

I.

STATEMENT OF THE CASE

Appellee's complaint for damages for inverse condemnation was filed on October 9, 1986, and Appellee's case for liability for inverse condemnation was tried to the Court, Hon. J. Tim Strickland, Judge of the Circuit Court for the Tenth Judicial Circuit presiding, on November 30 through December 3, 1987. R., 1-28, 56-58. The Circuit Court rendered judgment in favor of Appellee on January 6, 1988 and supported the judgment with an opinion containing findings of fact and conclusions of law. R., 316-325. After Appellant voluntarily dismissed an interlocutory appeal of the liability judgment (R., 338), trial of the issue of damages was held before Judge Strickland, with a jury, on May 31 through June 2, 1988. After Appellee presented his case and rested, Appellant, as defendant, rested without presenting any evidence or testimony whatsoever. By and with the express consent of Appellant, the Circuit Court granted a partial directed verdict in favor of Appellee in the amount of $1,613,214.00 for Appellee's mature budded trees, immature budded trees and potted nursery trees. D.T. 301-304, R., 400. The trial judge submitted Appellee's remaining damages, on which there was bona fide dispute to the jury, and the jury reached a verdict on June 2, 1988 in the sum of $1,045,834.00 R., 397. Final judgment for Appellee's combined damages, plus interest, was rendered on June 10, 1988 by the Circuit Court in the total sum of $3,003,455.30. R., 404. Appellant's Motion for new trial was denied June 14, 1988, and Appellant noticed this appeal July 12, 1988.

II.

STATEMENT OF FACTS

Appellant has submitted a self-serving and inaccurate statement of facts, and Appellee therefore restates the facts.

A. Liability

1. Over 510,000 Healthy Trees at Polk Nursery Burned

Commencing on September 27, 1985, and continuing for three weeks, Appellant destroyed all of the 510,059 citrus nursery trees at Appellee's flourishing nursery. **L.T., 504, Pltf. Exhs. #6 and #7.** Of these trees, less than ten (10)[1] had shown any symptoms of bacterial disease. **L.T., 307, 398-399.** The experts who advised Appellant, and who were familiar with the particular bacteria isolated at. Polk Nursery, have all admitted that this destruction was "inappropriate", "unnecessary","too extreme" and simply "wrong". **L.T., 214, 221, 322, 387, 567, 643, 682-683.** Within three months of this burning, the wholesale destruction of citrus nurseries under Appellant's "Canker Eradication Program" stopped, and guidelines instituted under which the healthy trees **at** Polk Nursery would not have been destroyed. **L.T., 310, 325-326, 567-568.** Yet, Appellee was left with the utter, uncompensated loss of **his** thriving nursery -- in excess of $2,000,000.00. **R., 397, 404-405.** The causes of this constitutionally repugnant event are found in the history of Appellant's "citrus canker eradication program".

2. Citrus Canker Type "A" - The Premise of Eradication

Before 1984, throughout the citrus-producing world, "citrus canker" referred to the disease produced by the "A" or "Asiatic" strain of the bacteria Xanthomonas Campestris pathovar Citri ("XCpv.C."). **L.T. ,148,183, 487.** Not all

---

[1]Estimates of the witnesses ranged from six **(6)** to ten (10) trees. **L.T. 216, 307, 398, 699.**

strains of the bacteria XCpv.C. produce dangerous plant diseases which present a threat to citrus. L.T., **198-200, 225-226, 630-631.** The various extreme measures carried out by Appellant's program, including burning, were clearly premised on the contagion or virulence associated with the "A" strain of the disease ("Canker A"). **L.T., 147,173-175.** Thus, the logic underlying Appellant's Rule 5B-49 (**L.T. Pltf. Exh. #5**), applied to destroy Polk Nursery was based upon the danger supposedly posed by "Canker A". L.T., **223-223,**

Unfortunately, most of the scientific assessments of "Canker A" considered by Appellant's regulators were quite old, stemming from an outbreak of the disease in Florida some sixty years ago (1914-1927), and not particularly reliable. L.T., **148-149, 554-555.** Well before Polk Nursery was burned in September 1985, Appellant's scientists and industry men, who had the opportunity to view the effects of "Canker A" in other countries, had informed Appellant's regulators that Canker "A" was not as dangerous as once thought. **R.T., 302, 402-411.** Even if Appellant had been dealing with "Canker A" at Polk Nursery, it would have been faced with a disease responsible scientists rank last in degree of importance among diseases affecting Florida citrus -- a disease which can be 95% controlled with copper sprays already in use in Florida groves. **L.T., 88-94, 96, 126-131, 286-288.**

And what was found at Polk Nursery on a half-dozen trees wasn't even "Canker A"!

3. The "Florida Nursery Strains" of XCpv.C.

Within a few days of the first appearance of what Appellant carelessly calls "citrus canker" at Ward's Nursery in August, 1984, it was clear from both the symptoms of the infection, arid genetic testing, that the bacteria present was not the dread "Canker A" upon which the terms of eradication would be based.

L.T., 53-60, 177-179, 188, 277-278. The distinct strain of XCpv.C. found at Ward's, and the other distinct strains of the bacteria found at subsequent nurseries came to be termed "the Florida nursery strains" ("FNS"), to distinguish them from "Canker A". L.T. **306, Pltf. Exh. #14.** By the time Polk Nursery was burned a year after the Ward's discovery, it was clear to scientists both within and without Appellant's eradication program that FNS generally posed even less risk than "Canker A" to citrus in Florida. L.T. **280-281, 310, 366, 379.** Unlike "Canker A", FNS had shown no ability to infect mature, fruit-bearing citrus groves or their fruit -- which are obviously the mainspring of the citrus industry. L.T. **193.** In fact, the survey of the entirety of mature groves in Florida had shown no infection of FNS in them. **L.T. 425.** Based on these facts known before September 1985, at the moment the torch touched the trees at Polk Nursery, scientists in Appellant's Technical Advisory Committee ("TAC") were seriously questioning whether Appellant should be burning nurseries found with FNS at all. L.T. **280-281, 549.**

4. The Unique Polk "Isolate"

The bacteria isolated at Polk Nursery ("the Polk Isolate") was a strain of the bacteria XCpv.C. which was completely unique genetically; it was unlike either "Canker A" or *any* of the other isolates of FNS taken from previous nurseries. L.T. **184, 200, 231.** This was known within 2 - 3 days of its discovery in early September 1985. L.T. **185-186, 217.** The Polk Isolate belonged to a sub-category of FNS isolates which were known to be, and called, "non-aggressive strains" within Appellants TAC prior to September 1985. L.T. **187, 215, 562.** The "pathogenetic", or disease-producing capability of "non-aggressive strains" such as the Polk Isolate was far less than "Canker A" or other

aggressive strains of FNS, such as that isolated at Ward's Nursery earlier.[2] **L.T. 169-170, 185-186, 633.** The clear inability of the Polk Isolate to spread, multiply or cause disease was made manifest by the following testimony below **of** Appellant's scientists who personally examined the nursery and specimens:

a) Symptoms were still. isolated in the southwest corner or the nursery after 6 months **of** infection during the normal period of peak contagion. **L.T. 309-310, 624-628, Pltf. Exh. #7.**

b) No stem lesions or dead trees were seen among the few trees infected. **L.T. 307, 320, 639.**

c) The Polk Isolate couldn't produce lesions or blemishes on citrus fruit, even under laboratory conditions. **L.T. 634.**

d) Of the over **42,000** trees sold by Appellee immediately prior to September 1985, none ever showed any symptom of infection. **L.T. 435-437, 526-527.**

Based on these facts, all readily available to Appellant at the time of burning, Dr. Robert J. Stall, Chief of Appellant's TAC, testified at trial that there was no scientific reason why Polk Nursery couldn't have been merely quarantined and monitored, instead of destroyed. **L.T. 322.**

5. Other Factors Contributing to the Erroneous Burning of Polk Nursery

a. Willful Ignorance - Doubts about the seriousness of FNS among concerned scientists prompted requests to Appellant for "field research" several months before the actions at Polk Nursery. **L.T. 363-367, Pltf. Exh. #19. This** type **of** research involving studying **FNS** in natural conditions should have been

---

[2]Although Appellant notes that aggressive and non-aggressive strains had been found in the same nursery on occasion, this was certainly not the case at **Polk** Nursery. **L.T. 213.**

done beginning in 1984 to determine the true nature of the bacteria; it was bad scientific practice to rely on information, generated almost 70 years before. L.T. **321, 563.** Good field data, made available to Appellant's TAC, would have no doubt produced a more rational and lenient program much earlier. L.T. **553.** Despite the lack of any good reason for Appellant not to order such "field research", it was never done prior to September 1985. L.T. **225, 367, Pltf. Exh. #20.** Indeed, no field research had been done by the time of trial in this case, two years and $20,000,000.00 worth of destroyed private nursery stock later. L.T. **365, 420.** Appellant's failing in this regard contributed heavily to the burning of Polk Nursery. As one scientist/member of Appellant's TAC put it, the lack of reliable information on **FNS** rendered the rationale of dire emergency upon which the burnings were based "a fairy tale". L.T. **569-570.**

b. Politics - Appellant's eradication program which burned **Polk** Nursery was also strongly influenced by politics. The TAC which "advised" Appellant on destruction by vote, was composed of scientists, regulators and industry representatives. L.T. **361, 545, 580-581.** Due to political forces, the TAC became less a technical committee, and **more** an industry committee which advised an eradication measures. **L.T. 377, 543.** Nurserymen, such as Appellee, were severely under-represented on the TAC relative to the large number of power and processor representatives. **L.T. 361, 576.** Not surprisingly, the brunt of the burden of eradication -- the burning -- fell primarily on the nurserymen. **L.T. 548-549.**

B. Damages

1. Polk Nursery - In September 1985, Appellee Richard Polk owned a prospering commercial citrus nursery in South Polk County. **D.T.** 151. Polk Nursery was a "field nursery", as opposed to a "greenhouse nursery"; that is, all

the nursery trees were grown in an open field, rather than a climate-controlled greenhouse. **D.T. 112.** Because the nursery trees are unprotected in a "field nursery", cold protection is critical to successful production. **D.T. 113.** Appellee's success was attributable, in large measure, to his adeptness at cold protection in the record-breaking freezes of the **mid-1980's. D.T. 114.** Due to this and Appellee's long experience in citrus cultivation **(D.T. 105-107),** and a generally good market for nursery trees in the early **1980's (D.T. 109-115),** Polk Nursery grew from an operation producing **9,000** trees in **1977** to one having a capacity for **1.1** million trees in **1985 (D.T. 116).** At the time the nursery was destroyed, there were over 1/2 million trees in the ground **(D.T. 117),** and another 1/2 **million** seedlings on order to move the nursery toward its maximum capacity **(D.T. 130, 200).**

2. The Mature, Budded Plants - Of the **510,059** trees destroyed, **303,615** were mature budded trees, which were ready-to-sell in September **1985. D.T. 128, 139, Pltf. Exh. #S.** All mature, budded nursery trees Appellee sold on any contract executed in **1985,** prior to the burning sold for a minimum of $4.50 per tree. **D.T. 136, 149-150.** At trial, Appellee admitted into evidence his invoices for the 9-month period prior to September **1985,** which showed that Appellee in many instances received as high as $6.00 per tree. **D.T. 133-135, 194-196, 198-199, Pltf. Exh. #4.** Appellant's counsel cross-examined Appellee with these invoices as to fact that some showed purchase prices of **$3.00** per tree, but Appellee explained that these invoices were for trees purchased on contracted executed in the previous year, but delivered in **1985. D.T. 172-173.** Eventually, Appellant's trial counsel stipulated to both the number of mature budded trees burned **(303,615)** and their fair market value of **$4.50** per tree. D.T. 204, **301-303.** On this basis, the trial court entered a directed verdict for their total

value at that unit value along with the potted trees and immature budded trees discussed below (D.T. **304; R. ,400**) , based on the following calculation (**D.T. Plff. Exh. #6**):

1) Number of field grown budded trees destroyed that were ready for sale	303,615	
2) Value at market @ $4.50		$1,366,268
3) Cost of maintaining trees until market opened:		
Fertilizer, lime pesticide	.0528	
Fuel oil	.0139	
	.0667	
4) Costs saves (303,615 x .0667)		20,251
5) Net loss, field grown trees ready for market		$1,346,017

3. The Potted or "Containerized" Trees - In addition to the regular field-grown budded trees, Appellee grew 1,829 budded trees to maturity in 7 gallon pots. **D.T. 140.** These trees were sold for retail distribution for house or ornamental use, and brought $8.00 per tree in September 1985 when they were burned. **D.T. 140-141.** Appellant didn't question Appellee concerning the value of these trees or present any contrary evidence. Again, Appellant stipulated to the number and value of these potted trees as set forth below and they were included in the Directed Verdict. D.T. **204, 301-3-4, Plff. Exh. #6; R. 400.**

1) Number of budded trees in 7 gal. container destroyed	1,829	
2) Value of trees in 7 *gal.* container (1,829 x $8.00)		14,632
3) Less cost saved (1,829 x .0667)		122
4) Net loss container trees		14,510

4. Tmmature Budded Trees - At the time of taking, Appellee had 89,181 immature trees which had just been budded and were a year away from maturity and sale. D.T. **139-149.** Appellee testified that the minimum mature value of these trees was also $4.50 per tree at September 1986 prices. D.T. **152-153.** This testimony was corroborated by that of Peter A. Hutchinson, another

nurseryman who testified as to the prices for which he actually sold such trees for delivery in September 1986, one year later. **D.T. 264-266.** There was no appreciable change in the market price for mature trees between September 1985 and September 1986. **D.T. 137-138.**

From the total mature value of these 89,181 trees, Appellee deducted the reasonable costs of production to bring the trees to maturity, excluding overhead. **D.T. 142, 146-148, Plff. Exh, #6.** These cost figures were derived from Appellant's own agency publication, and adapted to reflect practices at Polk Nursery. **D.T. 143-145, 183-184, Plff. Exh. #5.** The final total value for these trees was thus calculated based on mature value **minus** cost.

Appellee presented no evidence at all to contradict either the total number of trees, their mature value, or the validity of Appellee's cost figures. Instead, Appellant stipulated to all of these facts as set forth in Appellee's summary and consented to a directed verdict based on the following calculations **(D.T. 204, 301-304, Pltf. Exh. #6,** R. 400)

1)	Number of newly 'budded trees destroyed		89,181	
2)	Less adjustment for suspected plants		-28,000	
3)	Net trees destroyed		61,181	
4)	Value at market @ $4.50			$275,314
5)	Cost of maintaining trees until market opened:			
	Labor	.2500		
	Fertilizer, lime, pesticides	.1055		
	Fuel oil	.0139		
		.3694		
6)	Costs saved (61,181 x .3694)			22,600
7)	Net loss newly budded trees			$ 252,714

5. The "Liners" - "Liners" are simply immature nursery trees that have not yet 'been budded. **D.T. 120.** They are called "liners" because they are set in rows ("lined out") in a field nursery. **D.T. 120.** At Polk Nursery, Liners were not grown from seed -- seedling plants were bought from another greenhouse nursery and grown in the field to a suitable age for budding (the process

whereby a fruit bearing citrus stock is grafted onto the immature tree), **D.T. 118-119, 123.** Budding usually occurs when the liner is **4-6** months old. **D.T. 122-123.**

Polk Nursery contained **115,434** liners which were burned. **D.T. 121,141.** They were being budded in September **1985** and would have thus been ready for sale by late September **1986. D.T. 130, 139-140.**

Because the date of saleable maturity for the liners was sometime in September **1986,** just like the immature budded trees discussed above, Appellee used the same mature value of #4.50 per tree. **D.T., Pltf. Exh. #6.** The same costs were subtracted to reflect the production costs Appellee would have paid if the liners hadn't been destroyed. **D.T., Pltf. Exh. #6, 142-148.** Appellant attempted to establish that there was a market for unbudded liners at **$.15** to $.18 each based on the price for which the seedlings from which the liners were grown were purchased **(D.T. 158-159),** and argued this to the jury **(D.T. 341-343).** However, Appellee consistently testified there was no market at all for liners **(D.T. 130, 205-206)** and the jury believed him because they rejected Appellant's argument and returned a verdict for mature value minus costs (R., **397**), even though they were instructed that they could give the lesser value suggested by Appellants if they believed a market existed for liners on the date of taking. **D.T. 352.** The calculations submitted ta the jury by Appellee which they accepted were:

1)	Number of liners destroyed	115,434	
2)	Value at market @ $4.50		$ 519,453
3)	Cost to bring to maturity		
	Labor	.2500	
	Budding	.1813	
	Budwood	.1226	
	Fertilizer, lime, pesticides	.1055	
	Fuel oil	.0139	
		.6733	

4)	Less costs saved (115,434 x .6733)	77,722
5)	Net loss of liners	$ 441,731

6. Lost Production Damages - Immediately after the destruction of his nursery, Appellee was ordered by Appellant not to plant any new citrus trees for one year as a part of the eradication measures. D.T. 137-138, 174. This order was separate and distinct from the quarantines against sale or movement of trees to which Appellee had been subjected as a nurseryman intermittently since September 1984. D.T. 189-190, 269-271.

Appellee testified that he was ready, willing and able to replant his nursery in September 1985. He had 500,000 seedlings on order from a greenhouse nursery (D.T. 130), and Polk Nursery was being readied for plantings of 1.1 million trees to bring it to capacity (D.T. 208). Appellee could have replanted and sold at least 300,000 trees in 1986, based on his experience in 1985. D.T. 151. This conclusion was reinforced by the fact that the market for nursery trees continued to be strong through 1986 (D.T. 131-132) and the demand would have still been strong when the trees planted were ready for sale (D.T. 153). Appellee always sold all the trees he grew (D.T. 190) and had, for that reason experienced a growth of 24% per year in his business up to September 1985. D.T. 151. Finally, the expert testimony of a trained economist supported the conclusion that Appellee would have sold at a level of 300,000 trees in 1986 as 1985, at the same price of $4.50 per tree if he had been allowed to replant. D.T. 259-260. Subtracting the accepted costs (D.T. 152) Appellee arrived at the figure of $981,930.00 that was submitted to the jury (D.T. 153; Pltf. Exh. #8), as follows:

1) Capacity of nursery is 300,000 plant sales per year.
2) Market value lost **(300,000** x **$4.50)** **$1,350,000**
3) Costs saved per plant:

Salaries	.2500
Budding	.1813
Budwood	,1226
Liners	.5536
Fertilizer , Lime, pesticides	.1055
Fuel oil	.0139
	1.2269

4) Costs saved **(300,000 x 1.2269)** **$368,070**
5) NET **LOSS** when operations were not permitted: **$ 981,930**

Appellant argued to the jury, with some success, that Appellee could have replanted trees in May **1986** by agreement with Appellant ("Compliance Agreement"). **D.T. 174-179, 340.** Rased on their instruction that they were to compensate Appellee for the damages caused only to the extent he was prevented by Appellant's Order from replanting **(D.T. 352-353)**, the jury returned a verdict less than Appellee's demand, in the amount of **$604,103.00 (D.T. 360, R. 397).**

III.

SUMMARY OF **ARGUMENT**

Sovereign Immunity was discarded long ago as a defense to "takings" such as the destruction of Appellee's nursery. The judgment of liability may be affirmed based on the recent decision in Dept. of Agriculture **v.** Mid-Florida Growers, **521 *So.*** 2d 101 (Fla. **1988)** since all trees for which compensation was ordered were "healthy, but suspect", or, based on the specific rationale of the trial court that the application of Appellant's administrative rules was "arbitrary and capricious" and thus a taking. Alternate grounds for affirmance are also presented by the lack of "actual necessity" for the burning of the trees. As regards damages, Appellant stipulated *to* all items of damage contained in the partial directed verdict and thus waived any assertion of error in it. Use of nature value minus the costs of production by the jury was proper **far** the immature plants in the nursery, as the only recognized feasible method of

evaluation. Exclusion of "fear evidence" from the jury was proper, since the Court determined that it would allow Appellant to unilaterally render the taken property valueless. As a means of compensation for the prohibition or Appellee's replanting his nursery after burning, the verdict for "lost production" damages was constitutionally justified.

IV.

ARGUMENT

A. Liability

1. SOVEREIGN IMMUNITY IS NO DEFENSE TO THIS TAKING

Appellant claims that the liability judgment is barred by the State's sovereign immunity from tort actions, thus bringing into play the terms of F.S. §768.28(1). This claim is made despite the fact that the case was not pleaded or argued in tort, but rather in inverse condemnation. **R.,** 56-58; **L.T. 31-32, 737.**

It is established beyond questioning that there is no sovereign immunity to an action for taking by the state. State Road Dept. v. Tharp, 1 *So.* 2d 868 (Fla. **1941)** ("Tharp") ; State Road Dept. v. Bender, 2 So. 2d 298 (Fla. **1941)** ("Bender"). The grounds are explained with clarity by Justice Terrell in the Tharp opinion:

> "If a State agency can deliberately trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State For suit, then the constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country and head it into a blind alley." (emphasis added)

1 so. 2d at 869-870.

This result does not change because the state action might otherwise be characterized as a common law tort -- whether negligence, trespass or nuisance.

State Road Dept. v. Darby, 109 So. 2d 591, 592-593 (Fla. 1st DCA 1959) (Negligent destruction of real property by state is a "taking", no sovereign immunity available); State Road Dept. v. Harvey, 142 So. 2d 773, 774 (Fla. 2d DCR 1962) (intentional trespass by state is a "taking" to which no sovereign immunity may be claimed); Young v. Palm Beach County, 443 So. 2d 450-452 (Fla. 4th DCA 1984) (County airport overflight constituting a nuisance is a "taking", county's sovereign immunity not applicable). As the Third District has noted, in inverse condemnation suits:

> It would be anomalous to hold that the state could deprive a citizen of his property by wrongfully damaging it or taking it without allowing the citizen resort to the courts for relief when that right was available before the waiver of sovereign immunity. (emphasis added)

Kempfer v. St. Johns River Water Mgmnt. Dist., 475 So. 2d 920, 924 (Fla. 3d DCA 1985).

Despite these compelling precedents, and despite the express terms of the liability judgment which grounded it upon constitutional principles (R., 319), and nowhere mentioned tort or negligence, Appellant evokes sovereign immunity. This position is meritless, and runs against not only the above-cited appellate law of this state, but also of the majority of states which reject the limitations of tort actions in inverse condemnation. See eg, Rose v. City of Coalinga, 190 Cal. App. 3d 1627, 1634-1635, 236 Cal. Rptr. 124, 127-128 (Cal. App. 5 Dist. 1987); see also, Nichols The Law of Eminent Domain (3d Ed. 1977) §8.1[4](a) (collecting American cases). It should therefore be rejected by this Court.

2. THIS CASE SHOULD BE AFFIRMED BASED UPON THE RECENT FLORIDA SUPREME COURT HOLDING IN DEPT. OF AGRICULTURE v. MID-FLORIDA GROWERS, DECIDED AFTER THE JUDGMENT HEREIN WAS RENDERED

a. Healthy, But Suspect Trees Were Burned

It is now the established law of this state that the destruction of healthy

but suspect citrus plants without compensation is a taking which violates Art. X, §6 of the Florida Constitution. Department of Agriculture v. Mid-Florida Growers, 505 So.2d 592 (Fla. 2nd DCA 1987), Aff'd, 521 So.2d 101 (Fla. 1988), cert. denied, ___ U.S. ___ (1988) ("Mid-Florida Growers"). Because the overwhelming majority of the appellee's nursery trees burned were "healthy but suspect" only, appellee argued at trial that the Mid-Florida Growers decision controlled this case and dictated that a taking had occurred. **R., 4-5; L.T., 754-755.** However, for jurisprudential reasons, while the trial judge stated that the Mid-Florida Growers holding would mandate compensation" for appellee's healthy trees, he declined to base his judgment solely on that ground. **R., 323-324.** Nevertheless, the application of Mid-Florida Growers to this case is clear.

All of the nursery trees for which compensation was ordered by the trial court fit squarely into the category "healthy, but suspect" established in Mid-Florida Growers. 505 So.2d at 597; 521 So.2d at 102.[4] The testimony at trial was uniform, from both appellee **(L.T., 504-506, 512-513)** and the appellant's pathologists and inspectors **(L.T., 188, 216, 307, 398, 699)**, that all but approximately six (6) of appellee's trees were blemishless, without any bacterial leaf-spotting. Of the six trees with leaf spotting, only one yielded any

---

"Evidently, because the decision of this Court in Mid-Florida Growers was currently pending before the Florida Supreme Court, the trial judge was concerned that use of the holding as his rationale would doom the judgment to automatic reversal if that case were reversed on appeal. **R., 323-324.** Appellant's statement (Initial Brief, pg. 19) that the trial judge found that Mid-Florida Growers "does not control the instant case," simply misstates the record.

[4]The trial court excluded from the requirement of compensation the trees showing symptoms of Xanthomonas Campestris, as well as a generous buffer zone of trees within 125 feet of the apparently diseased trees. **R., 325.**

identifiable specimen of the bacterium Xanthomonas Campestris. All other specimens taken were negative. **L.T., 692-695.** Appellee's over **510,000** unaffected trees were burned, rather, because they were deemed "exposed" to "citrus canker," and thus presumed infected, under the terms of appellant's Emergency Rule 5BER-49 and the Immediate Final Order to appellee predicated thereon. **L.T., 429, 689-690, 696; L.T., Pltf. Exh. #5, ¶1(i) & (t); Exh. #4, ¶11.**

The good health of appellee's over **510,000** unaffected trees burned was further shown at trial by:

a) Abundant expert testimony from eradication program pathologists that the strain of Xanthomonas Campestris found at Polk Nursery was a non-aggressive strain with little ability to spread within the nursery. **L.T., 185-186, 213, 215, 309-310, 624-628.**

b) Undisputed evidence that the few trees with leaf-spotting were isolated in the southwest corner of Polk Nursery, despite the appellant's experts' accepted estimate that the Xanthomonas Campestris found had been in the nursery for at least *six* (6) months **L.T., 216, 309; L.T., Pltf. Exh #7.**

c) The low percentage probability of actual infection among trees merely "exposed" to infected trees in a nursery setting. **L.T., 304, 370, 559.**

d) Undisputed evidence from appellee and appellant's officials that the **42,000** nursery trees sold by Polk Nursery during the estimated six *(6)* month period of exposure were monitored by appellant and none developed any form of citrus canker. **L.T., 435-437, 526-527.**

e) Actual photographs of flourishing citrus nursery trees taken at Polk Nursery immediately prior to the September, **1985** burning, which were viewed by the **trial** judge. **L.T., Pltf.** Exh. **#1.**

Na evidence of any type was presented at the liability trial which tended in

any way to contradict the unavoidable conclusion that appellee's trees burned were healthy. With this in mind, it is truly hard to understand how, as appellant claims (Initial Brief, pg. 19), Mid-Florida Growers is distinguishable from the case at bar.

In Mid-Florida Growers, the evidence showed that the plaintiffs purchased budwood for use in the grafting operations of their nursery from Ward's Nursery just prior to the outbreak of Xanthomonas Campestris infection there in 1984. 521 So.2d at 102. All trees in the nursery were deemed "suspect" pursuant to the Department's emergency rules, due to the exposure of the budwood to the disease at Ward's Nursery, and all plants were destroyed. 521 So.2d at 105. On review, the Florida Supreme Court rejected the Department's argument that "exposure" alone to infected plants justified the conclusion that the plants burned were not healthy, and subject to uncompensated destruction. Id., at 104. Rather, the Court stated, the evidence presented at trial on the issue of the trees' health determines that issue, and not the regulatory presumptions contained in the Department's emergency rules. Id., at 103, fn. 1, 104-105.

Similarly, in the instant case, the only justification for the uncompensated destruction of the over 510,000 healthy trees is their proximity or "exposure" to the small number of affected trees in the nursery. This case is governed by the clear rationale of Mid-Florida Growers: that healthy, but suspect, trees do not pose an "imminent danger" to Florida's citrus industry, and their destruction is thus a taking under the settled law of the Florida Constitution.[5] Id. Therefore, the record amply supports the conclusion that the burning of Appellee's healthy,

[5] See Corneal v. State Plant Brd., 95 So. 2d 1 (Fla. 1957), discussed infra.

but suspect, nursery trees should be compensated. The liability judgment should be affirmed on this basis alone.

b. Mid-Florida Growers Dictates Affirmance, Despite the Trial Court's Use of an Alternative Approach

In rendering his judgment for inverse condemnation below, the trial judge was faced with an issue of law which this Court has acknowledged is both complicated and novel. Mid-Florida Growers, 505 *So.* 2d at 592. Interpreting complex law and complex facts, the trial judge chose as the primary basis of his decision his finding that the destruction of appellee's nursery was arbitrary and capricious, based on the scientific evidence reasonably available to appellant at the time of the destruction. **R., 323.** As will be discussed infra, this conclusion, and the judgment based thereon, are correct. However, as has been discussed above, the same legal conclusion -- that a taking occurred -- is easily reached from the record below, based upon the decision in Mid-Florida Growers.

It is well-settled that a correct judgment may be affirmed on review on any legal theory supported by, and preserved in, the record, whether or not such theory was the expressed basis or rationale of the judgment. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 3.979); Chase v. Cowart, 1Q2 So.2d 147, 150 (Fla. 1958). Judgments in inverse condemnation have been specifically included within the ambit of this principle. *So,* for example, in State Plant Board v. Smith, 110 *So.* 2d 401 (Fla. 1959), the Florida Supreme Court affirmed the chancellor's decree of taking, despite the fact that he had grounded it upon the wrong Constitutional provision.[6] The Court stated:

---

[6]Evidently, the chancellor constructed his decision around 129, Art. 16 of the Florida Constitution of 1885. The Supreme Court determined that while this section was inapplicable to the claim for inverse condemnation, §12 of the Bill of Rights of the Florida Constitution of 1885 nonetheless dictated that a taking had occurred. Smith, 110 So.2d at 404-405.

> While the language of the Order appears to be referable only to a violation of §29 of Art. 16, the issue as to violation of §12 of the Declaration of Rights was made by the pleadings; this being so, this Court's decision, on appeal, must be made, not on the basis of whether the trial court or Chancellor traveled the proper route, used proper reasoning, or laid his conclusion on proper grounds, but rather on whether his conclusion is correct or incorrect. [emphasis added.]

110 So.2d at 405.

Indeed, this principle of appellate review is especially appropriate in takings cases, where there is "no settled formula" governing the issues, and the existing law is "easier to state than it is to apply". Graham v. Estuary Properties, 399 So.2d 1374, 1380 (Fla. 1981); Kendry v. State Road Dept., 213 So.2d 23, 27 (Fla. 4th DCA 1968). The arcane nature of the law of takings argues strongly for a broad latitude of review.

Thus, in the instant case, this Court may affirm the trial court's judgment of taking based either upon the expressed rationale of the judgment or on the other legally adequate ground of Mid-Florida Growers, which was presented by appellee to the trial court by evidence and argument.

3. THE TRIAL COURT'S SPECIFIC RATIONALE THAT THE APPELLANT ACTED ARBITRARILY AND CAPRICIOUSLY AND THUS COMMITTED A TAKING IS CORRECT AS A MATTER OF FACT AND LAW

The crux of the liability judgment is the finding that the application of Appellant's emergency rules to order destruction of healthy trees at Polk Nursery was arbitrary and capricious, given the scientific evidence reasonably available to Appellant on the date of taking. R., 319. Reasoning that such evidence showed that these trees posed no "actual threat" or "imminent danger", the trial judge found the burning constitutionally unwarranted and a taking. R, 322-232. As will be seen, this ruling is legally correct and supported by the evidence.

a. As a Matter of Fact

As a first attack on the judgment, Appellant argues with the factual findings made as to the degree of "threat" or "danger" presented by the bacteria isolated at Polk Nursery. Appellant boldly claims that the trial judge grossly misunderstood the evidence. Yet, it is clear that in an inverse condemnation case all such factual findings are presumed correct and not subject to de novo review. Pinellas County v. Brown, 420 So. 2d 308 (Fla. 2d DCA 1982), rev. denied 430 So.2d 450 (Fla. 1983). This being the case, Judge Strickland's findings may not be overturned by this court if they are supported by substantial, competent evidence in the record below. Mid-Florida Growers v. Dept. of Agriculture, 521 So.2d at 104. Although the Appellant might well wish to re-argue the facts here, this is not proper. Even the following cursory review of just a portion of the expert testimony supporting the factual conclusions (more thoroughly discussed in the above Statement of Facts) shows that they easily pass the substantial evidence test:

1) Finding - The eradication by burning provision of the emergency rules applied to Appellee as premised on the "A" (or "Asiatic") strain of the citrus canker bacterium (R., 320). Proof - this was the testimony of Dr. Edwin Civerolo, U.S.D.A./A.P.H.I.S. (L.T., 173-174); Dr. Salvadorc Alfieri, F.D.A.C.S.ID.P.I., (L.T., 469,487); Dr. Chancellor Hannon, Plant Pathologist and member of Appellant's Technological Advisory Committee (L.T., 540-541).

2) Finding - By September, 1985 when Polk Nursery was burned, the information reasonably available to Appellant diminished the level of actual threat posed by the "A" strain, the most aggressive form of the bacterium which affects citrus (R., 322). Proof - This was the indisputably qualified and competent opinion of both Dr. J. O. Whiteside (L.T., 88-94) and Dr. Robert J.

Stall **(L.T., 302)**, of the University of Florida, I.F.A. S.

3) Finding - The type of bacteria isolated at Polk Nursery was not the "A" strain and this was immediately apparent in September 1985 from genetic tests **(R., 322).** Proof - Dr. Civerolo, U.S.D.A./ A.P.H.I.S. confirmed this in his original September, 1985 testing **(L.T. , 185-186)**.

4) Finding - It was immediately clear in September 1985 the Polk Nursery strain of the bacteria was much less aggressive than the "A" strain, and that it had no apparent potential to spread to other citrus trees **(R., 323).** Proof - All three of the Appellant's expert pathologists who originally examined the Polk Nursery specimens agreed about this: Dr. Edwin Civerolo **(L.T., 186)**, Dr. Robert J. Stall **(L.T., 309-310)** and Dr. John Miller **(L.T., 280-281, 634).** It was also the inescapable conclusion the trial court drew from their testimony that, after 6 months of supposed infection during the season of peak contagion, only 6 out of roughly 510,000 trees were infected **(L.T., 216, 307, 309-310, 624-628).**

5) Finding - There was no necessity to burn the trees based on the negligible threat they posed **(R., 323).** Proof - Dr. Robert J. Stall testified that there was no scientific reason -- based on the facts known at the time of burning of Polk Nursery -- that the plants couldn't have been safely quarantined and monitored, instead of burned. **L.T., 322.**

Proceeding from these and other proofs, and following the standard of "actual necessity" set forth in Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), the trial judge concluded that the threat posed by the non-infected and healthy trees at Polk Nursery was so minimal as to render the application of the emergency rules arbitrary and capricious. Appellant argued in closing **(L.T., 769-770)** that, on the evidence, the agency acted reasonably and the trial judge decisively disagreed. It can hardly be said that there wasn't substantial evidence

to support that disagreement. Appellant's argument on this ground is therefore without merit.

b. As a Matter of Law

Barred from questioning the factual analysis underlying the liability judgment, Appellant offers the technical defense that the trial judge went beyond the established scope of review in finding the burning of Polk Nursery arbitrary and capricious. This argument is based on a misapprehension of the law.

i) The Lower Court Was Authorized to Find the Burning Arbitrary and Capricious, and Thus a Taking.

In Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied ~~sub nom~~ Taylor v. Graham, 454 U.S. 1083 (1981), the Florida Supreme Court provided a list of factors gleaned from the caselaw designed to assist trial courts in determining when a taking has occurred. These are as follows: (1) whether there has been a physical invasion; (2) the degree of diminution in value; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes public health, safety, welfare and morals; (5) whether the regulation is arbitrarily and capriciously applied; and (6) whether the regulation curtails investment-backed expectations. Graham, 399 So.2d at 1380-1381.

Applying the Graham holding, Judge Strickland found that three of the Graham factors must be assumed in the context of a case such as this, where destruction of property by the State is involved: destruction is a fortiori a physical invasion of property; diminution in value is complete; and the investment backed expectations of the owner are nullified. R., 319.

Accordingly, he then focussed his opinion on the fifth factor articulated in Graham, and found:

> Faced with the persuasiveness of the testimony presented at trial, this Court has no choice but to conclude that the disease for which Polk Nursery was destroyed, Canker A, did not constitute an imminent danger, and that the disease actually infecting Polk Nursery was even less of a threat. This Court must, therefore, conclude that the regulation as applied in the instant case was arbitrary and capricious (factor 5) of Graham, supra. .. That such an action constituted an unconstitutional taking is axiomatic. R., pg. 323. (Emphasis added.)

In short, the trial judge followed the "black-letter law" of the Florida Supreme Court.

ii) The Requirement Exhaustion of Administrative Remedies of Key Haven Assoc. v. Brd. of Trustees is Inapplicable Here.

Appellant now claims that the trial judge erred in his rather straightforward compliance with Graham, because he questioned "the propriety of the agency action." This argument is formed around an incorrect reading of Key Haven Assoc. Ent., Inc. v. Rrd. of Trustees, 427 So.2d 153 (Fla. 1982) which brings that opinion squarely into conflict with the earlier opinion of the Florida Supreme Court in Graham. However, this conflict is apparent only. A review of Key Haven, in conjunction with the case at bar, shows this.

Despite Appellant's contention to the contrary, Key Haven deals with the general requirement that a petitioner for a permit, license or other administrative entitlement exhaust his administrative remedies before seeking judicial relief.? Key Haven, 427 So.2d at 153. The Key Haven petitioner attempted to challenge the denial of his dredge-and-fill permit by the Department of Environmental Regulation as a taking. Id. D.E.R. had denied the permit after a full evidentiary hearing, in which petitioner offered his argument that the denial misapplied the agency rules. Id., at 155. Instead of pursuing its

---

?Likewise, Albrecht v. State, 444 So. 2d 8 (Pla. 1984), also cited by Appellant, only confirms the exhaustion requirement by holding that a petitioner who fails to exhaust must accept the agency action as proper. 444 So. 2d at 12-13.

appellate remedies within the executive branch, pursuant to F.S. § 253.76, petitioner filed suit for inverse condemnation in Circuit Court. Id. at 158. On review, the Florida Supreme Court affirmed dismissal of the suit and held:

> We conclude by holding that an aggrieved party must complete the administrative process through the executive branch which in this instance requires an appeal to the IIF trustees. Having completed review in the executive branch, if an aggrieved party does not wish to further contest the validity of the permit denial by seeking district court review, the party may accept the agency action under the statute being implemented in this case and file suit in circuit court on the basis that denial was proper but resulted in an unconstitutional taking of the party's property. Id., at 160 (Emphasis added).

The Court went on to reiterate:

> We emphasize that by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious .... Id. (Emphasis added.)

Thus, the holding on Key Haven is confined by its facts and express terms to permit denial cases where a Plaintiff has invariably been afforded some form of due process hearing pursuant to F.S. § 253.76 before the agency action.

In sharp contrast, in this case Appellee received no prior notice or hearing as to the propriety of the burning -- only an "Immediate Final Order" (L.T., Pltf. Exh #4) with "Emergency Action Notification" and cover letter (L.T., Pltf. Exh. #3). By declaring "emergency" and "immediate threat" in the Order, Appellant avoided any prior due process under the terms of F.S. § 120.59.[8] Lerro v. Dept. of Professional Regulation, 388 So.2d 47, 48 (Fla. 2d DCA 1980). Unlike petitioner in Key Haven, Appellee's executive branch remedies were exhausted ab

---

[8] F.S. § 120.59 states, in pertinent part:

> ... (8) If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

initio. Pursuant to F.S. § 120.59, and the term of the Order, the decision to burn the nursery was final and judicial review had to be sought by appeal to, or injunction from the Circuit Court or this Court. F.S. § 120.68; See also: Denny v. Conner, 462 So.2d 534, 535 (Fla. 1st DCA 1985); Nordmann v. Dept. of Agriculture, 473 So.2d 278 (Fla. 5th DCA 1985).[9]

Appellant's basic position is, therefore, that Appellee was required to exhaust administrative remedies which did not exist when Polk Nursery was burned! At bottom, Appellant's interpretation of Key Haven dictates that one situated as Appellee can never challenge the propriety of this type of property destruction. This is absurd to say the least. It is justly well-settled that Appellee must have some forum to dispute the propriety of such action, either before or after the taking. North American Co. v. Chicago, 211 U.S. 306, 53 L.Ed. 195 (1910).

iii) Footnote 1 of Mid-Florida Growers v. Dept. of Agriculture is Dicta

The only support Appellant can find for its proposed exhaustion requirement is the following footnote from the above-cited Mid-Florida Growers opinion;

> We, therefore, also reject the Department's argument that the trial court, in determining the trees were healthy, ignored agency rules which defined the trees as being suspect and subject to destruction and thereby improperly allowed a challenge to the propriety of agency action in an inverse condemnation proceeding. Although the Department correctly contends that the propriety of an agency's action may not be challenged in an inverse condemnation proceeding, section 253.763(2), Florida Statutes (1983), the fact that the action was authorized pursuant to agency rules does not, as noted above, preclude a determination that the action constituted a taking. A review of the

[9] "Significantly, the Denny and Nordmann cases, cited supra, had established as a matter of law, before Polk Nursery was burned, that judicial review of such Immediate Final Orders was futile because the appropriate scope of judicial review only demanded that the findings on the face of the Order support the conclusion of emergency. No meaningful hearing as to the actual threat was required pre-burning. Denny, 462 So.2d at 535-536.

record discloses that respondents were not permitted to challenge the propriety of the agency action. (Emphasis added.)

521 So.2d at 103, f.n. 1. The highlighted portion of this language shows clearly that it is mere obiter dicta, since the Court was gratuitously addressing issues not presented on the facts of that case. State v. Fla. State Improvement Commission, 60 So.2d 747 (Fla. 1952). Dicta of that type is not binding precedent on this Court, on even the Florida Supreme Court who uttered it. Myers v. Atlantic Coast Line R.R. Co., 112 So.2d 263, 266-267 (Fla. 1959); Continental Assurance Co. v. Carroll, 485 So.2d 406, 408-409 (Fla. 1986).

Such dicta from any court, even the Florida Supreme Court, has no precedential value unless it is persuasive. State v. Fla. State Improvement Commission, cited supra at 750-751; Weisenberg v. Carlton, 233 So.2d 659, 661 (Fla. 2d DCA, 1970). As has been discussed the argument that the principal of Key Haven should be applied to the case at bar is not persuasive. It runs too afoul of the prior decisional law of the Florida Supreme Court in Graham, and the established law of the United States Supreme Court in North American Co. v. Chicago, cited above, as well as fundamental fairness to Appellee. This court should therefore address this issue on its merits, which dictate that Appellee prevail.

4. ADMISSION OF RETROSPECTIVE SCIENTIFIC OPINION, WHICH IS NOT EXPRESSLY CONSIDERED BELOW, WAS NOT ERROR, AND PROVIDES ANOTHER GROUND FOR AFFIRMANCE

Looking back at the time of trial, none of Appellant's experts considered the destruction of healthy trees at Polk Nursery to have been actually necessary. **L.T. 214, 221, 322, 387, 567, 643, 682-683.** Appellant now urges that the admission of this evidence was reversible error, because it was "hindsight". This position is confused, since the trial court expressly stated that its decision was based on the scientific evidence reasonably available to Appellant at the

time burning. **R., 320.** Thus, the argument is at best moot. However, far from being error, the retrospective opinion of Appellant's scientists mentioned above **is,** in fact, another alternative basis for affirmance, based on the principles of Applegate v. Barnett Bank of Tallahassee and State Plant Board v. Smith, cited above (pg. 18).

a. On Florida Constitutional Principles

In Corneal v. State Plant Board, 95 *So.* 2d 1 (Fla. 1957), the Florida Supreme Court held that the destruction of private property without compensation must be confined within the "narrowest limits of actual necessity". 95 *So.* 2d at 4. The choice of the word "actual" indicates that the Supreme Court was not concerned with whether destruction was "justifiable" or "reasonable", which Appellant urges as a defense to this taking. As Webster's states, actual means: ". . . existing in fact or reality . . . distinguished from apparent, nominal . . . real, genuine . . .". Webster's Third International Dictionary (Merriam - Webster, Inc. 1984). Thus, the phrase "the narrowest limits of actual necessity" used in Corneal to describe the proper level of scrutiny can only mean that this Court should go beyond the merely perceived or apparent threat posed by the bacterium isolated at Polk Nursery, and look to the virulence of the bacterium as it existed in reality at the time Yolk Nursery was burned. As mentioned above, the experts testified with one voice that such actual necessity did not exist in Appellee's case.[10]

In essence, what Appellant seeks to do through this argument is to conform the law of inverse condemnations to the law of torts and negligence,

[10]This case is, therefore, clearly distinguishable from cases such as Campoamor v. State Livestock Sanitary Board, 182 *So.* 277 (Fla. 1938), where the dangerous nature of the disease in question (brucellosis) was not questioned. 182 *So.* at 280.

where an actor's duty of due care is construed only in light of what he or she knew or could be reasonably expected to know at the time of the act complained of. See, Restatement (2d) of Torts, 6290. However, this principle is a Procrustean Bed upon which the law of takings will not fit. lnverse condemnation law has never focused on the issue of culpability or negligence, posed in the law of torts. Nichols, Law of Eminent Domain, (3rd Ed. 1987) §8.1[4](a). Rather, as this Court has occasion to state, governmental liability to pay just compensations for taking is predicated, not on fault or negligence, but on the policy of not "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". Mid-Florida Growers, cited supra, 505 So. 2d at 594; see also, Corneal, 95 So. 2d at 6-7. In sum, as was stated with clarity by the Colorado Supreme Court over sixty (60) years ago:

> "Abatement of nuisance is a governmental function . . . if certain property is in fact a nuisance, it's destruction as such may not give any right to compensation; but, if property is destroyed under a mistaken belief that it is a nuisance when it fact it is not a nuisance, it is taken for a "public use" within the meaning of the constitutional provision and the loss to the owner should be made good." (emphasis added)

McMahon v. Telluride, 79 Colo. 281, 284, 244 P. 1017, 1018 (1926); see also, Nichols, Law of Eminent Domain, cited supra, §142[15]. For these reasons, pursuant to Corneal, the judgment should be affirmed based on the lack of actual necessity shown at trial.

b. Federal Constitutional Principles

As the United States Supreme Court has had occasion to note:

> "[The] determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

Agins v. Tiburon, 447 U.S. 255, 260-261 (1980); see also, Penn. Cent. Trans. Co. v. N.Y., 438 U.S. 104 (1978). As the current Chief Justice of the Supreme Court has recently noted, the so-called nuisance or police power exception to the takings clause is at its narrowest where the complete destruction or "extinction" of the value of property is involved, as in the present case. Keystone Coal Assoc. v. DeBenedictis, 480 U.S. ___, 94 L. Ed. 2d 472, 506 (1987) (Renquist C.J., dissenting). While an individual may be expected to bear the burdens imposed by the policy power acts of the state designed to abate nuisances, as part of the general social contract or "reciprocity of advantage", the rationale breaks down where there is no actual nuisance or threat of injurious effect on the community presented. Id. at 492. The justification of the governmental activity is the key issue. Id. at 493 n.22.[11]

From the standpoint of common sense, and fundamental fairness, it is easy to interpret the public policy question involved in the destruction of Polk Nursery. It is not enough for the Appellant to say that citrus canker had to be eradicated to prevent economic damage to the citrus industry. The state bore the burden of showing that the complete destruction of the overwhelmingly healthy Polk Nursery was so urgently necessitated by the actual nature of the disease found that it is fair for Appellee to bear the enormous cost of destruction. This certainly is not the case, and it is fairer to place the burden on the State of Florida generally, where it will be borne more lightly.

---

[11] Miller v. Schoene, 276 U.S. 272 (1928), cited by Appellant, as distinguishable from the case at bar on this question, since the actual threat posed by "cedar rust" to the apple orchards the state sought to protect was never questioned. 276 U.S. at 278.

5. THIS COURT SHOULD ALSO CONSIDER POLITICAL INFLUENCES CONTRIBUTING TO THE BURNING OF POLK NURSERY AS A FURTHER FACTOR WARRANTING AFFIRMANCE

As has been discussed in the Statement of Facts, political factors bore on the burning of Polk Nursery. The composition of the Technical Advisory Committee (TAC), which advised Appellant by vote on eradication was composed overwhelmingly of growers and processors. Nurserymen, such as Appellee, were outnumbered 17 to 1, and Chancellor Hannon, a TAC scientist member, testified that this was one factor contributing to the end result of nurseries bearing the larger part of destruction. As Dr. James T. Griffiths noted, once it was apparent that the disease was not affecting mature groves, political support within the TAC for eradication by destruction vanished. **L.T. 378.** The Florida Supreme Court stated in Corneal, cited supra, that where political factors are substituted for actual scientific necessity in the destruction of property under the police power, this militates in favor of compensation. 95 ***So.*** 2d at 3. The presence of political influences acting at odds with actual necessity certainly weighs in favor of affirmance here.

B. Damages

1. THE PARTIAL DIRECTED VERDICT AS TO MATURE BUDDED TREES, IMMATURE BUDDED TREES AND POTTED TREES **SHOULD** BE AFFIRMED

At the close of **all** evidence Appellee was granted a partial directed verdict as to full compensation for only his mature budded trees, his immature budded trees, and his mature containerized trees. **R., 400-401.** Having consented to the entry of this Directed Verdict, and waived all appellate review thereof, Appellant **now** seeks to raise meritless assignments of error to attack it.

a. Appellant Has Waived **All** Asserted Error in the Directed Verdict

Appellant claims that the Directed Verdict should be reversed because: **1)** the trial court was prohibited from entering a directed verdict on damages (Initial Brief, pg. 39-41) ; 2) testimony concerning the effect of "fear" on the fair market value of all of the subject trees was erroneously excluded (Initial Brief, pg. **36-38); 3)** the Appellee was erroneously given mature fair market value for the immature budded trees (Initial Brief, pg. 35); and, **4)** the Appellee was erroneously given future market value for mature budded **trees** (Initial Brief, pg. 35-36). In an effort to escape their clear waiver of these issues on appeal, Appellant's counsel egregiously misstate the record.

At trial, Appellee made a motion for directed verdict as to all of his damages, including damages for unbudded liners and lost production damages (D.T., **293-295)** based on Wilkerson v. Division of Admin., 319 ***So.*** 2d 585 (Fla. 2d DCA 1975). The trial judge indicated his disinclination to grant the motion **(D.T., 299-300)** because of the Appellant's challenges to the proper value to **be** assigned to Appellee's "liners" and the amount of Appellee's "lost production damages". **(D.T., 296-297).** However, based on the following colloquy with Appellant's trial counsel (carefully omitted from Appellant's Statement of Facts), the trial judge granted the motion in part only:

> Mr. MICHAELS: Let me say, I think maybe there might be a little miscommunication here. The cross-examination as to market value as to market prices was because of the testimony **from** the stand by **Mr.** Polk. We have not challenged the figure that's placed on the chart of **$4.50.** Nor have we challenged the value as placed on the immature plants. The only challenge that we have made as to the budded plants, they're not lingers (sic). We are contending that there's a market for liners.
>
> THE COURT: Let me interrupt. Does that mean that he should be entitled to partial Directed Verdict on the unchallenged evaluations?

MR. MICHAELS: Well, we haven't challenged them.

THE COURT: *So* that the jury would not be charged with finding a value to those classes of property?

MS. McLEAR: To the extent that we have $4.50 less the costs.

THE COURT: In other words, the net figure that's demonstrated by **the summary** that **if** I were to grant a **partial** Directed Verdict as to that type of plant, that part of inventory, that would be then a finding of that damage figure and the jury would be charged really to look only to the **liners** and to the loss of production --

MR. MICHAELS: That's correct.

THE COURT: -- damages?

MR. MICHAELS: That's correct.

THE COURT: And they would not address the issue of the fully matured trees, the young budded trees and the seven-gallon containers?

MS. McLEAR: Right.

THE COURT: All right. Gentlemen --

MR. CONNOR: Your Honor, I would like to know how the Court is inclined in the first instance because I have one further observa-tion to make.

THE COURT: Well, the State seems to be conceding that they have not rebutted the mature trees, the unbudded trees and the seven-gallon containers. Except they want to be sure that the summary, upon which the computation deletes the 28,000 trees and the 125.

MR. CONNOR: It's already been done.

THE COURT: That being the case, the Court could consider a partial Directed Verdict on the valuations that apply to those three classes of plants. (emphasis added)

D.T., 301-303. Understandably relying on Appellant's attorney's representations that they did not challenge the valuations contained on Appellee's exhibit summary of values **(D.T., Pltf.** Exh. **#6),** the judge directed a verdict granting

Appellee $4.50 per tree for the mature and immature budded trees and $8.00 per tree on the mature containerized or .potted trees. (D.T., 304).[12]

It is truly too late in the day for Appellant now to say that this was error on various technical grounds. The long-standing law of this state will not allow Appellant's counsel to invite error as they did by telling the trial judge they didn't oppose the partial directed verdict and then attempt to profit on appeal. Roe v. Henderson, 190 So. 618, 620 (Fla. 1939); Bould v. Touchette, 349 So. 2d 1181, 1186 (Fla. 1977). As the court in Arsenault v. Thomas, 104 So. 2d 120 (Fla. 3d DCA 1958), the rationale for this rule is:

> Otherwise a litigant may inject error into the record and take advantage of it which he should not be permitted to do.

190 So. at 620. If the Appellant is allowed to predicate error on a partial directed verdict it invited, this is precisely what has been accomplished.

By way of comparison, this case strongly resembles two other cases where the consent or agreement to a ruling was deemed an "invitation" sufficient to waive appellate review of claimed error. In Sundale Assoc. v. Southeast Bank, 471 So. 2d 100 (Fla. 3d DCA 1985) ("Sundale Assoc."), defendant agreed on the record that the jury would determine the extent of a waiver of interest on a promissory note. 471 So. 2d at 102. The Third District therefore refused to consider the issue of whether this was properly the jury's province. Id. The same result was reached in Arnold v. Taco Prop., Inc., 427 So. 2d 216 (Fla. 1st DCA 1983), ("Arnold"), where plaintiff indicated that he had no objection to a venue change in the circuit court, and then attempted to reverse the judgment

[12]The numbers of these plants in each variety, had previously been stipulated by Appellant and Appellee during trial. D.T., 204.

on this ground in the District. Court - - the issue was held clearly waived. 427 *So.* 2d at 220. Just as the losing parties in Arnold and Sundale Assoc. attempted to evade a record agreement on appeal, Appellee herein seeks to avoid its patent consent to the partial directed verdict. See also, Jannach v. Dade Air Cond. Corp., 218 *So.* 2d 193 (Fla. 3d DCA, 1969).

If Appellant's position was that the directed verdict was improper for any reason, either due to the standards for consideration of such a motion in an eminent domain case, or due to the evidentiary rules for evaluation of the subject trees, it was Appellant's duty to present these grounds to the trial court **and** object to the directed verdict as the court proposed it. Wood v. Wilson, 84 *So.* 2d 32 (Fla. 1955); Karl v. David Ritter Sportservice, Inc., 164 *So.* 2d 23 (Fla. 3d DCA 1964). Three times the trial judge asked Appellant's counsel if there was any objection to the partial directed verdict he described -- and three times Appellant's counsel acquiesced. No mention was made of any objections, which are offered for the first time on appeal. Appellant has thus waived all grounds to challenge the directed verdict, and it should therefore be summarily affirmed.

b. Even if Review Wasn't Waived, the Trial Court's Directed Verdict is Correct

While a clearer waiver of review is hard to conceive, even if Appellant's counsel's above representations to the trial court aren't deemed waiver, they certainly suffice to distinguish this case from this Court's holdings in Division of Administration v. Decker, 408 *So.* 2d 1056 (Fla. 2d DCA 1985) ("Decker") and County of Sarasota v. Burdette, 479 *So.* 2d 763 (Fla. 2d DCA 1985) ("Burdette"). In both of these cases, the trial courts erred in granting verdicts for the valuations assigned by the condemnee's expert witness, because the condemnor presented no admissible contrary evidence at trial. Decker, at 1058; Burdette, at 764. The articulated rationale underlying these cases is that the jury could

fairly decide that the fair market value of the property was less than the expert appraisal. Burdette, at 765.

Appellant here not only failed to present contradictory evidence, but stipulated on the record that the fair market values of the mature and immature budded trees, as well as the potted trees, were as set forth in Appellee's summary. **(D.T., Pllf. Exh. #6).** Neither Decker nor Burdette contain such an explicit consent to fair market value by the condemnor. Under these cases the Appellant may have been justified in resting without presenting any evidence -- but they are hardly protected from their own express concessions as to fair market value. For this reason, there was no error in the trial judge premising a directed verdict on these representations.

2. EVIDENCE OF MATURE VALUE OF THE PLANTS WAS PROPERLY ADMITTED AND CONSIDERED BY THE COURT AND JURY

Nursery trees which were either budded but immature or unbudded ("liners") were valued in Appellee's evidence by presenting their mature value less the legitimate costs of bringing them to maturity. **D.T., Pllf. Exh. #6.** After remaking the facts and the law, Appellant contends that this accepted approach taints the entire judgment. However, the rejection of Appellant's argument on this score by both the trial court and the jury below was well-founded.

a. Mature Value Minus Costs of Production Is The Recognized Approach to Valuation of Immature Crops where there is no Market for Them

As Appellant points out, the universally accepted method for valuation of immature crops, such as Appellee's immature budded trees and "liners", is to take the fair market value of the crop at maturity, and subtract the casts of production. Lee County v. T & H Assoc., Ltd., 395 So. 2d 557 (Fla. 2d DCA 1981) ("Lee County"); R. A. Jones & Sons, Inc. v. Holman, 470 So. 2d 60, 70-71

(Fla. 3d DCA 1985); U.S. v. 576.734 Acres of Land, etc., 143 F.2d 408 (3d Cir. 1944) ("576.734 Acres"); see also, 21 Am. Jur. 2d Crops, §76 (1981). The only prerequisite to the employment of this method of valuation is the lack of a market for the immature crop in question. U.S. v. 729.773 Acres of Land, etc., 531 F. Supp. 967, 974-975 (Dist. of Hawaii 1982) ("729.773 Acres"); Daily v. United States, 90 F. Supp. 699, 701 (Ct. Cl. 1950) ("Daily").

As to the immature budded trees[13], Appellee testified that in September, 1985 when the taking occurred, these trees would not be saleable for one year. D.T. 140. There was thus no market for this type of tree. Appellant presented no contradictory evidence that there was such a market use of the mature value minus cost approach by the Court was therefore proper.

As to Appellee's "liners", Appellant plays the following sleight-of-hand with the record to endeavor to show that there was a market for unbudded trees or "liners", as they are called in the trade. Although there was no market for the "liners" -- no one would purchase an unbudded citrus nursery plant at that stage of growth (D.T., 130) -- Appellant's trial counsel asked Appellant at what price he purchased the "liners" that were destroyed, and at what price he could purchase new "liners" in September, 1985. D.T., 158. Understanding that she meant the seedlings that would become "liners" after planting and cultivation, Appellant gave a price of $.15 each. D.T., 158. Appellant later corrected any confusion on this point by stating unequivocally that there is and was no market for "liners" -- only seedling plants from which "liners" are grown. D.T., 205-206.

[13]As has been argued above, Appellant has waived all appellate issues as to the mature and immature budded trees, but in thoroughness, these points are made.

Appellant made the same ridiculous argument -- that Appellee's response to the ill-framed question concerning the price of "liners" conceded a market value for them -- to the jury. **D.T., 341-343.** Appropriately instructed by the judge that this was their question to answer after deliberation **(D.T. 352)** they rejected the argument arid applied the recognized formula. Their determination that no market existed was their prerogative and should not be disturbed on appeal. Renedo v. Dade County, 147 ***So.*** 2d 313 (Fla. 1962); Behm v. Division of Admin., 336 ***So.*** 2d 579 (Fla. 1976).

b. Since Both the Immature Budded Plants and the "Liners" Would Have Been Saleable Within One Year, There Was No Error in Admitting the Immature Crop Valuation Evidence

Appellant cites Lee County, cited above, and United States v. 131.68 Acres of Land, 695 F.2d 872 (5th Cir. 1983) ("131.68 Acres") for the proposition that immature plants with a "growth cycle" of more than one year are not susceptible to evaluation by the mature value minus cost approach. This contention not only misrepresents the holdings of these cases, but perverts the rationale underlying their actual rulings. In Lee County this court referred specifically to the "growing period" of the plants -- not the "growth cycle" as contended by Appellant. 395 ***So.*** 2d at 560. The terminology of the Lee County opinion clearly refers to the growing period of the plants after the date of taking, which was in that case four months. Id. at 558. In an identical fashion, the court in 131.68 Acres allowed the mature value of that part of the sugar cane taken which would have matured within one year of the date of taking. 695 F.2d at 876. This was permitted despite the undisputed fact that the "growth cycle" of that portion of the cane was fourteen months. Id. at 874.

Clearly, no one-year "growth cycle" restriction was observed in any case cited by Appellant. Rather, it is the rationale of these cases that fair market

value over one year beyond the date of taking may become unduly speculative. Lee County, 395 So. 2d at 560; 131.68 Acres, 695 F. 2d at 872; 576.734 Acres, 143 F.2d at 409-410. The reasonable point of scrutiny, as the court pointed out in the opinion in 729.773 Acres, cited above, is not the "growth cycle" of the plant, but the degree of accuracy with which the mature value of the plant may be determined, thus avoiding speculation. 531 F. Supp. at 975.

Both the immature budded trees and "liners" fell well within these rules. The immature budded trees would have been ready to sell in the summer of 1986 -- less than a year from the date of taking. **D.T., 140.** The "liners" were being budded at 6 months of age **(D.T., 122-123)** in September, 1985 when they were destroyed **(D.T., 130)**, and would thus have been mature and saleable in one year[14] **(D.T., 153).** Therefore, the mature values for September, 1986 (the First available market) were used for both types of plants **(D.T., 342-343)** and the jury clearly accepted them in their verdict. Attempts to reargue these facts to this Court (Initial Brief, pg. 8) now are improper. Dade County v. Kenedo, cited supra.

Moreover, the mature values given the jury by Appellee and his fellow nurseryman Peter Hutchinson were completely unspeculative. They were based on their clear memory of the prices nursery trees brought in September, 1986. **D.T., 137-138, 265-266.** Appellant didn't even attempt to contradict their accuracy with *any* evidence. There is no reasonable basis for excluding the evidence as being speculative, and it was within the trial court's discretion to do *so*. Lee County, 395 So. 2d at 560, Fn. 3. With the complete consent of the Appellant,

---

[14]As has been noted above, the burning of Appellee's nursery continued until late October, 1985. Thus, a year from the date of taking completed would be in late October, 1986. **L.T. 504.** Maturity of the immature trees and liners was well within this period.

the Judge considered the values in reaching a proper directed verdict. Despite Appellant's arguments, the jury used the values in reaching a proper final verdict. No ground for reversal is presented.

3. EXCLUSION OF FEAR EVIDENCE, WHERE ITS ADMISSION WOULD ALLOW THE STATE TO UNILATERALLY DICTATE THE VALUE OF PROPERTY TAKEN, WAS **NOT** ERROR

Appellant claims the trial court erred because the "fear" testimony of two offered witnesses was excluded on the basis that their "fear" was "unreasonable". Florida Power & Light Co. v. Jennings, 518 **So.** 2d 895 (Fla. 1987). This misstates the ruling challenged. The trial court ruled that appellant had to show him actual threat posed by the destroyed trees, as a foundational matter, before the evidence would be introduced. **P.T.C., 26.** This ruling was based on Appellee's motion in limine and argument that pointed out that to do otherwise would allow Appellant to unilaterally reduce the value of Appellee's property by its regulatory declarations concerning the property. **R., 335;** P. **T.C., 19-21.** Reasonableness of the fear of so-called "citrus canker" had nothing to do with the ruling, and was never mentioned by the trial judge as a basis for his ruling. **P.T.C., 22-24.**

This ruling is completely consistent with the recognized rule that the condemning authority may not unilaterally depress the value of condemned property. State Road Dept. v. Chicone, 158 **So.** 2d **753** (1963) ("Chicone"). In Chicone, the Florida Supreme Court barred from jury consideration evidence of "condemnation blight", i.e., the depression in property value which sometimes results from an announcement of taking. 158 **So.** 2d **758.** The Court observed:

> "This holding is not a new concept. It is merely an application of the principle that value is, as the measure of compensation, should be based on the highest and best use [of the property]. . . . There can be no doubt that the threat of condemnation restricts economic use of the property . . . It would be neither fair nor equitable nor

> just to compensate him for the value of his property as established by such limited and restricted use."

Id. See also, State Plant Brd. v. Smith, 110 So. 2d 401, 406-407 (Fla. 1959) (Legislature cannot unilaterally determine value of destroyed citrus trees by statute).

The rule of Chicone has been extended beyond the circumstance of loss of value due to condemnation announcements, to any loss of value resulting from the application of either established ordinances or appraisal guidelines of the condemning authority. Dade County v. Still, 377 So. 2d 689 (Fla. 1977) ("Still"); Dade County v. Southeast (U.S.) Recycling Corp., 422 So, 2d 1036 (Fla. 3d DCA 1982) ("Recycling Corp."). Accordingly, in Still when the county sought to widen streets by condemnation, it was held to be prohibited from availing itself of the previous reduction in value springing from collateral county ordinances and regulations setting forth minimum street-width affecting the condemned property. 377 So. 2d at 690. Similarly, in Recycling Corp., the Third Circuit interpreted the Florida Supreme Court's prohibition in Still to extend to a condemnor's appraisals prepared under its rules and regulations which took account of "condemnation blight". 422 So. 2d at 1036.

The holdings of Chicone and Still, and their progeny are in accord with the clear majority of American courts which disallow a unilateral reduction in the value of condemned property by official action of the condemnor. See Nichols, Law of Eminent Domain (Third Ed. 1977) 812.3151, n. 3. These counts perceive the same equitable reasons for the restriction mentioned in Chicone, cited supra.

Any review of Appellant's proffers shows that admission of the offered testimony would have violated these principles. Both proffers state that the bases for the witnesses' unwillingness to purchase Polk Nursery's trees were the declarations by Appellant of the presence of a "citrus disease" in Florida in

general, and Polk Nursery in particular. **R., 453-454, 455-456; L.T. Pltf. Exh. #4 & Exh. #26.** Moreover, the witnesses specifically adopt the "exposure" approach of Appellant's rules in determining which of Appellee's trees would be deemed unsalable. **R. 454, 456.**

Resting a reduction in value on such complacent acceptance by a potential buyer of the administrative declarations of the destroying agency, without any actual threat being present, allows the agency to take without compensation indirectly that which it could not take directly. This is not a point addressed or determined by the Jennings holding, and the exclusion of the evidence should therefore be affirmed, as within the trial judge's sound discretion. Buchman v. Seaboard Coastline R.R., **381 So. 2d 229** (Fla. **1980).**

4. LOSS TO APPELLEE RESULTING FROM PROHIBITIONS ON PRODUCTION ATTENDANT TO THE BURNING OF HIS NURSERY ARE PART OF "FULL" AND "JUST" COMPENSATION

After the destruction of Appellee's healthy trees, Appellee was ordered by Appellant not to replant or produce new nursery stock for one year. The compensable losses directly resulting to Appellee by this order attending the burning of his nursery are the only issue presented on appeal.[15]

The background against which this question should be viewed is the guarantee found in Jacksonville Expressway Auth. v. Henry G. DuPree & Co., **108 So. 2d 289** (Fla. **1956)** that all facts and circumstances bearing a reasonable relationship to full compensation for a taking may be presented by the condemnee to the jury. When this guarantee is considered together with the

[15]All issues of the amount of compensation of this type were submitted to the jury, and argued by Appellant. The jury returned a verdict of approximately **60%** of Appellee's claimed damages, which was their province. Dade County v. Renedo, cited supra. Appellee should not be permitted to argue this issue on appeal.

observation of the Florida Supreme Court is State Plant Board v. Smith, cited supra, that where healthy plants are destroyed by the state, the owner should at least be compensated for loss of profits (110 *So.* 2d at 403), a clear principle emerges: where the nature of the state action is not only to destroy a healthy crop, but to prevent the owner from replanting to complete the program of destruction, all immediate loss of profits to the owner should be compensated,

This principle is borne out in Florida State Turnpike Auth. v. Anhoco Corp., 116 So. 2d 8, **10** (Fla. 1959), where the Florida Supreme Court held that similar temporary restrictions on access rights of the condemnee, which were a part of the condemnation of a fee simple interest in a roadway, were compensable. See accord, Anhoco Corp. v. Dade County, 144 *So.* 2d 793 (Fla. 1962). Likewise, in Division of Admin. v. Mobile Gas Co., 427 *So.* 2d 1024 (Fla. 1st DCA 1983) rev. denied, 437 *So.* 2d 677 (Fla. 1983), the court held that a condemnor's subsequent passive restrictions on use of property adjacent to that taken, which cause a loss of income to the condemnee, required full compensation as a separate "taking". Id., at 1026-1027. Clearly, compensation for state action which aggravates the effect of a taking and causes definite loss of profits is not a novel concept under our **law.**

1. The Production Losses Sought Were Not Caused by Quarantine

Appellant seeks to avoid compensation by suggesting that these losses were caused by a valid quarantine, citing cases such as Flake v. State, 383 *So.* 2d 285 (Fla. 5th DCA 1980) and Loftin v. United States, 6 Ct. Ct. 596 (1984), aff'd. 765 F. 2d 1117 (Fed. Cir. 1985). But these cases are obviously distinguishable, since it is not the quarantine on movement of trees that was independently imposed on Appellee by Appellant, but the order by Appellant that Appellee refrain from planting new trees, that caused compensable loss. This restriction on production,

not quarantine, was the factor the jury was instructed to consider. **D.T. 352-353.**

2. No Mere Temporar Impairment s Involved Here

The Appellant's assertion that the production loss is an incompensable temporary impairment is equally meritless. Appellee never claimed that the restriction on replanting trees after the burning was a separate taking. Rather, it is the effect of the restriction on Appellee's ability to re-stock his destroyed nursery which causes loss aggravating the losses resulting from destruction. Appellant cites to Morton v. Gardner, 513 So. **2d** 725 (Fla. 3d DCA 1987), Hillsborough County v. Gutierrez, 433 So. 2d 1337 (Fla. 2d DCA 1983), and similar cases are therefore inapposite.

3. The Compensated Production Loss is Not "Business Damage"

The many cases cited by Appellant stating that "business damages" resulting from a taking are not part of full or just compensation are simply irrelevant to this case. See, eg. Behm v. Division of Admin., 383 So. 2d 216 (Fla. 1980), United States v. General Motors Corp., 323 U. S. 373 (1945). While the "business damage" which the burning caused Appellee was denied to him at the damages trial **(D.T.,** 71-78), he was allowed to present evidence as to the effect of the restriction on replanting. "Business damages" are only those losses of future profits which flow **from** the "taking", not additional losses occasioned by separate but complementary agency actions accompanying the taking. Appellee was not allowed the many losses in future years which the burning caused, but under the principles detailed above, he should recover the limited production losses as full or just compensation.

V.

CONCLUSION

For the foregoing reasons, it is submitted that the liability and damage judgments below should be affirmed. A provision of the liability judgment excluding a portion of Appellee's trees from compensation is cross-appealed by Appellee herein. Appellee's prayer for affirmance is qualified *only* by the arguments he presents on cross-appeal.

Dated: October 31, 1988.

PETERSON, MYERS, CRAIG, CREWS, BRANDON & MANN, P.A.

By _____

J. Davis Connor
P. O. Box 1079
Lake Wales, FL 33859-1079
813/676-7611
Fla. Bar #0714313
Attorneys for Appellee

and, Douglas A. Lockwood, III
P. O. Drawer 7608
Winter Haven, FL 33883-7608
813/294-3360
Fla. Bar No. 0286834

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 31st day of October, 1988 to Beverly S. McLear, Assistant Attorney General, Department of Legal Affairs, Ste. LL04, The Capitol, Tallahassee, FL 32399-1050 and Mallory Horne, General Counsel, Department of Agriculture and Consumer Services, Mayo Building, Rm. 512, Tallahassee, FL 32399-0800.

_____
J. Davis Connor