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

DOYLE CONNER, et al.,

Cross-Appellees/Defendants,

vs.

RICHARD O. POLK, d/b/a
RICHARD POLK NURSERY,

Cross-Appellant/Plaintiff

Docket No. 88-2014

'89 JAN 25 A8:49

DISTRICT COURT OF APPEAL
SECOND DISTRICT

CROSS REPLY BRIEF OF CROSS-APPELLANT

On Appeal From

The Circuit Court of the Tenth Judicial Circuit

In and For Polk County, Florida

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BRANDON & MA", P. A.

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SUMMARY OF ARGUMENT

The State's risk assessment regulations, enacted after the burning at Polk Nursery, have no relevance in determining the compensability of non-diseased trees. Crass-appellant has not waived error in the trial court's use of the risk assessment provisions to limit compensation, because he was not obligated to seek post-trial relief to perfect his appeal of certain portions of the final liability Judgment. Moreover, by merely stipulating as to the number (28,000) of trees contemplated by the Court's Order, cross-appellant did not waive error.

I.

STATEMENT OF FACTS

In its reply brief to the initial brief of cross-appellant, the State makes several serious misstatements of the record, as follows:

A. Concerning the Minor Infection at Folk Nursery

1. The Extent of Infection - The State asserts (Reply Brief, pg. 3) that "all of the available scientific evidence indicated that other trees in the nursery were probably infected". This remarkable statement has no support whatsoever in the record. The State makes four citations to the transcript in an effort to support this statement: pgs. 148, 209, 557 and 721. Examination of these portions of the transcript reveals that no witness testified that the balance of the trees at Polk Nursery were ''probably infected". The farthest any testimony went in this direction is the statement of Dr. Robert Stahl of the University of Florida concerning the uninfected trees, that:

> "It's a possibility that they could have been contaminated or infested as a result of activities at that site." L.T. 209.

For the State to take this statement and attempt to inflate it into evidence that the balance of the trees at Polk Nursery were "probably infected" is a gross exaggeration and should be completely disregarded by this Court. As has been previously discussed by cross-appellant in painstaking detail, the overwhelming evidence at trial was that the balance of the trees

at Polk Nursery were healthy. See, **Appellee's** Answer **Brief, pg. 4-5, 16-17.**

2. The Suggested "Dormancy" of the Bacteria - The State suggests that it was "uncontroverted that trees could be infected and still not exhibit physical signs of disease for at least one year". The very citations to the record that are made in the reply brief show that. this statement is completely false. So, for example, on page 625, cited by the State, Dr. John Miller of the State's Division of Plant Industries, testifies that in his expert opinion, the symptoms on the six plants at Polk Nursery appeared after six months. **L.T. 625.** This directly contradicts the State's assertion of a dormancy period of "at least" one year.

Moreover, Dr. Miller immediately thereafter testified that this six-month dormancy of the Polk bacterium was during the period of peak contagion, a factor which strongly suggested that the disease was not aggressive or virulent. **L.T., 627-628.** Again, the State has attempted to exaggerate the actual testimony at trial so as to support an insupportable statement of facts.

B. Concerning the Hypothetical Application of "Risk Assessment" to Polk Nursery

The State says in its Statement of Facts that if its "risk assessment" program had been applied to Polk Nursery, the actual level of threat presented by the infection found there, and the terms of the risk assessment regulation, would have dictated that all trees within a 125-foot radius of the half dozen diseased

trees would have been destroyed. **Cross Appellees' Answer Brief, pg. 4, 8-10,** It is thus argued that the risk assessment regulation justifies the trial judge's conclusion that all trees within this zone were worthless. The State *goes* even further, and suggests that. this 125-foot zone is measured from the infected block, rather than the diseased trees themselves, thus justifying the taking without compensation of over half of the trees in Polk Nursery. Cross **Appellees' Answer Brief, pg. 10, n.2, Appendix "A".** These assertions contradict the record and the very "risk assessment" regulation cited by the State.

1. No Burning of Non-Infected Trees Was Justified by the Level of Actual Threat. - Cross Appellant. has previously shown that the record in this case overwhelmingly supports the conclusion that there was no actual necessity to burn any but the handful of diseased trees at Polk Nursery. **See, Appellee's Answer Brief, pg. 2-5.** These proofs will not be reiterated here. If the scientific evidence didn't. justify the burning of any but infected trees, it certainly did not justify the burning of approximately 28,000 more trees within the proposed 125-foot radius.

2. The Terms of the Risk Assessment Regulation Would Nat have Mandated any Burning in Polk Nursery - The State also proposes that the terms of the risk assessment regulations would have required the burning of all trees within the 125-foot radius regardless of the degree of actual threat presented. This argument is based. on what the State urges is the "correct applica-

tion" of the regulations. **Cross-Appellees' Answer Brief, pg. 9-10.** Even a cursory reading of the regulations establishing the risk assessment program shows that this is incorrect.

The main framework of the risk assessment procedure is found in the "Florida Citrus Canker Action Plan", a document which is adopted as part of the regulations of the Department of Agriculture by §5B-49.0045 of the Florida Administrative Code. Any destruction of infected or suspect nursery plants under risk assessment is specifically made subject to the provisions of the Action Plan by Fla. Admin. Code §5B-49.009.

The procedures to be followed where infection is found in a commercial nursery are governed by §I(D)(2) of the Action Plan[1], which provides that plant. destruction within a nursery is based on a risk assessment, taking into consideration the unique factors pertaining to the individual nursery, including the aggressiveness of the bacterium found, the amount of inoculum (bacteria) present, and the location and distribution of infected plants. **Action Plan, §I(D)(2)(e); Appendix "A", pg. A-1.** The Action Plan goes on to state that, based on this risk assessment, a 125-foot buffer around the affected plants may be required. **Action Plan, Appendix "A", pg. A-2.** The Action Plan specifically provides that any such requirement of burning of a 125-foot buffer may be avoided by recommendation within the risk

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[1]This portion of the Florida Citrus Canker Action Plan is attached hereto as **Appendix "A"**.

assessment. **Action Plan,** Appendix **"A", pg. A-2.** This provision is mirrored in §5B-49.0135(1)(b), which states that recommendations of a risk assessment group which depart from the above-stated 125-foot guidelines may be reviewed and approved by the Commissioner of Agriculture's technical advisory committee.

Thus, contrary to the suggestion of the State, it is clear that risk assessment, as embodied in the Action Plan, does not mandate the automatic burning of a buffer zone of 125 feet around infected plants or blocks of plants. Rather, the degree of burning to be employed in a given case is determined based on a determination by a group of experts of the level of actual necessity, not by reference to arbitrary "buffer zones". Since, as discussed above, the level of actual threat at Polk Nursery was so low as to justify no tree burning, one can only assume that this would have been the result under risk assessment.[2] The State's factual assertion that risk assessment would have meant, in the case of Polk Nursery, the burning of a 125-foot buffer zone is without support in the regulations or the record.

C. Concerning the Assertion that Cross-Appellant Agreed or Stipulated to Exclusion of Trees Within the 125-Foot Radius from Just Compensation

The State asserts that cross-appellant stipulated to the exclusion of 28,000 trees from just compensation at the pre-trial

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[2]Since risk assessment was not enacted until after the burning of Polk Nursery, any assertion as to how it would have been applied at Polk Nursery is, at best, speculation.

conference preceding trial of damages below. **Cross-Appellees'** Answer **Brief, pg. 14-16.** The conclusion certainly does not follow from the portions of the transcript of that conference cited by the State. Rather, it is clear that cross-appellant and the State entered into a stipulation which merely translated that provision of the trial court's Final Judgment providing for a 125-foot buffer zone into a specific number of trees - - 28,000. PTC, **pg. 14-16.** In **so** doing, cross-appellant was in no way acquiescing ox agreeing to the legal conclusion that just compensation shouldn't be paid for these trees. The purpose of the stipulation was simply to facilitate a determination of the precise number of trees the jury would be required to take into account in their: valuation. To say, as the State does, that cross-appellant somehow stipulated to a lack of just compensation misstates the terms of the stipulation.

II.

ARGUMENT

A. The State Cannot "Bootstrap" Actual Necessity by Use of its Regulations

Not one witness testified at trial below that there was any necessity for burning a 125-foot "buffer zone" around the half dozen or so infected plants at Polk Nursery. The uniform scientific evidence presented at trial dictated that there was no necessity for burning any but the infected trees themselves. Based on this evidence, the trial court specifically found that the minor infection at Polk Nursery posed no imminent danger to

citrus, and that there was, therefore, no actual necessity for the burning of the non-infected trees. R., pg. 323-324.

The State now wishes to contradict this overwhelming evidence, and the specific finding of the trial court,, by using its regulations to define "actual necessity" at Polk Nursery. This is attempted with a tautology, which states, in essence:

1. The risk assessment regulations would have dictated, in the case of Polk Nursery, the burning of a buffer zone of 125 feet in addition to the trees actually diseased;

2. Risk assessment was, according to its terms, based on actual necessity;

3. Therefore, actual necessity dictated the burning of a 125-foot buffer zone.

The fallacy in this tautology is obvious. It allows "actual necessity" to be determined by the regulation itself, rather than by the scientific evidence available. The State cannot "boot-strap" actual necessity by using its own regulations, when the result would contradict the scientific evidence. As the Florida Supreme Court has stated in response to this argument, the fact that a particular action may or may not be authorized pursuant to agency rule does not preclude a determination that the action constitutes a taking. Department of Aqriculture v. Mid-Florida Growers, 521 So. 2d 101, 103, n.1 (Fla. 1988).

In the final analysis, the terms of the State's subsequent-ly-enacted risk assessment program are of doubtful relevance to these issues. Department of Aqriculture v. Mid-Florida Growers,

cited supra, states with clarity that cross-appellant must be compensated for trees destroyed which are not actually diseased. 521 So. 2d at 104-105. This legal result remains unchanged whether, under risk assessment, a 125-foot buffer zone may or may not arguably have been burned.[3] Even if, speaking hypothetically, risk assessment had been applied to Polk Nursery and the result had been the destruction of a 125-foot buffer zone of non-infected trees, such trees would still have to be paid €or by the State. Risk assessment, therefore, does not affect the issue of compensability, and this argument should be disregarded.

B. Cross-Appellant Does Not Concede that the Destruction of Non-Infected Trees Was Justified by Actual Necessity

The State contends that cross-appellant has somehow conceded actual necessity for destruction of non-diseased trees, due to the mere observation that the risk assessment program was designed to conform destruction to actual threat within a given nursery. Cross-appellant certainly has not conceded this point. In fact, cross-appellant, as appellee, has devoted considerable time to explaining precisely why there was no actual necessity for the burning of non-infected trees. **See, Appellee's Answer Brief, pg. 2-5, 14-30.** Little more need be said on this topic,

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[3] As is explained in the above Statement of Facts, the State has misstated the terms of the risk assessment regulations which do not automatically require the burning of a 125-foot buffer zone of non-infected trees. Rather, the risk assessment regulations leave the extent of burning in an individual nursery in the sound discretion of the experts making the assessment. Fla.. Admin. Code §5B-49.0135(1)(a).

except to reiterate that the overwhelming scientific evidence in the record supports the conclusion that there was no actual necessity for burning any but the handful of infected trees at Polk Nursery. This fact is not altered in any way by the terms of the risk assessment regulations, and cross-appellant certainly does not concede to any contrary assertion.

C. Cross-Appellant has not Waived his Challenge to the Exclusion of Non-Diseased Trees from Just Compensation

Exclusion of approximately 28,000 non-diseased trees from just compensation was set forth in the Final Judgment below. R., **pg. 324.** In ruling to exclude a portion of the non-diseased trees from compensation, the trial court disregarded cross-appellant's specific trial argument that compensation should be ordered for all non-diseased trees, with the exception of the small number of infected plants alone. **L.T., pg. 748, 754-755.** It is, therefore, hard to see how cross-appellant has waived any objection to the exclusion of the non-diseased trees.

Nevertheless, the State claims waiver because: 1) cross-appellant voiced no objection to the terms of the Final Judgment of liability at the pre-trial conference preceding the damage-phase trial, and 2) cross-appellant stipulated that the exclusion provision of the Final Judgment of liability comprehended 28,000 trees, when reduced to numerical terms. Neither of these record events constitutes a waiver.

In order €or a party to an appeal to lose his right to attack error, he must have agreed or consented to the ruling or

procedure which he challenges. McClanahan v. Mayne, 138 So. 36 (Fla. 1931); Karl v. David Ritter Sports Service, Inc., 164 So. 2d 23 (Fla. 3d DCA 1964). In the case at bar, as stated above, cross-appellant offered its arguments for compensation for all of the non-diseased trees, with no exclusion, to the trial court in closing argument. L.T. pg. 748, 754-755. He, therefore, can hardly be said to have consented or agreed to the exclusion of any of the non-diseased trees. His failure to register any further objection after Final Judgment of liability is understandable -- the Court had ruled. The very style of the ruling is "Final Judgment", and, thus, it was subject to immediate appeal fur all errors of law without any further post-trial proceedings. Florida E.C.R. Co. v. Peters, 83 So. 559 (Fla. 1919); St. Andrews Bay Lumber Co. v. Bernard, 143 So. 159 (Fla. 1932); Smith v. McCullough Dredging Co., 152 So. 2d 194 (Fla. 3d DCA 1963), cert. denied, 165 So. 2d 178 (Fla. 1963).[4] Cross-appellant's lack of argument with the trial court after the Final Judgment of liability concerning the exclusion of the non-diseased trees should not, therefore, be deemed any sort of waiver.

Likewise, cross-appellant did not agree or acquiesce in the exclusion provision by merely stipulating that the spatial

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[4]In fact, the only instance where an appellant must make a post-trial motion for rehearing or new trial in order to perfect an appeal is where he or she challenges the sufficiency of the evidence supporting the verdict. Furr v. Gulf Exhibition Corp., 114 So. 2d 27 (Pla. 1 DCA 1959). This is certainly not the basis of cross-appellant's challenge here.

dimensions of 125 feet mentioned in the Judgment would amount of a total of 28,000 trees. It should be borne in mind that at the time of the pre-trial conference, cross-appellant was on the eve of a jury trial as to damages. These damages could not he computed unless certain numbers of trees to be evaluated could be derived from the terms of the Judgment of liability. Thus, the exclusion provision had to be quantified so that the case could be taken to the jury. Cross-appellant did not make any statement in the course of this stipulation at the pre-trial conference which indicated that he was acquiescing in the legal correctness of the exclusion provision of the Judgment. PTC, pg. 14-16. This stipulation as to the number of non-diseased trees to be excluded from the jury determination of value, was therefore certainly not a waiver.

III.

CONCLUSION

The arguments offered in cross-appellant's cross appeal are meritorious. Once having ruled that the destruction of non-diseased trees without compensation was unconstitutional, the Court was obligated by the evidence and the rule in Department of Agriculture v. Mid-Florida Growers, cited supra, to order compensation for all non-diseased trees. The exclusion of a portion of the trees based on the State's regulations was an unconstitutional error. Cross-appellant in no way waived this error since he argued for compensation €or all non-diseased trees. Cross-appellant's stipulation as to the number of trees contemplated by

the exclusion provision of the Final Judgment of liability does not constitute waiver of error on appeal. For these reasons, the Final Judgment should be reversed, only to the extent that it excludes non-diseased trees from the ambit of compensation. All other provisions of the Final Judgment of liability and Final Judgment of damages herein should be affirmed.

Dated: January 3, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and attached Appendix has been furnished by U.S. mail. this 3rd day of January, 1989 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