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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

FILED

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DOYLE CONNER, et al., |
 |
 Appellants/Defendants, |
v. |
 |
RICHARD O. POLK, d/b/a |
RICHARD POLK NURSERY, |
 |
 Appellee/Plaintiff. |

DOCKET NO. 88-2014

FL BAR NO.: 398292

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REPLY BRIEF OF APPELLANTS

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

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	1
I. LIABILITY	1
A. THE STATE DID NOT ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO A TAKING	1
B. MID-FLORIDA IS NOT BINDING ON THIS CASE	2
C. FAIRLY DEBATABLE QUESTIONS OF NECESSITY REQUIRE AFFIRMANCE OF LEGISLATIVE ACTION	3
D. THE COURT ERRONEOUSLY RELIED ON RETROSPECTIVE SCIENTIFIC EVIDENCE AND OPINION	4
E. THE STATE DIDN'T ARGUE EXHAUSTION OF ADMINISTRATIVE REMEDIES	6
F. POLITICAL MOTIVATIONS ARE NOT PROPER MATTERS OF JUDICIAL INQUIRY	8
II. DAMAGES	8
A. THE DIRECTED VERDICT WAS IMPROPER	8
B. THE USE OF FUTURE MARKET VALUES WAS IMPROPER	10
1. The market value of liners was established by the record.	10
2. The future market methodology is only available for those plants which would have matured in the same year they were taken.	12
C. EXCLUSION OF FEAR EVIDENCE WAS IMPROPER	14
D. LOSS OF PRODUCTION IS NOT COMPENSABLE	14
CONCLUSION	15

TABLE OF CITATIONS

	PAGE
<u>Albrecht v. State</u> , 444 So.2d 8 (Fla. 1984)	7
<u>Bowen v. Department of Environmental Regulation</u> , 448 So.2d 566 (Fla. 2d DCA 1984)	7
<u>Brest v. Jacksonville Expressway Authority</u> , 194 So.2d 658 (Fla. 1st DCA 1967)	3
<u>Campoamor v. State Livestock Sanitary Board</u> , 182 So. 277 (Fla. 1938)	5
<u>Conner v. Cone</u> , 235 So.2d 492 (Fla. 1970)	5, 6
<u>Corneal v. State Plant Board</u> , 95 So.2d 1 (Fla. 1957)	8
<u>Dade County v. Nat'l Bulk Carriers, Inc.</u> , 450 So.2d 213 (Fla. 1984)	7
<u>Daily v. United States</u> , 90 F.Supp. 699 (Ct. Cl. 1950)	12
<u>Dept. of Agriculture v. Mid-Florida Growers</u> , 521 So.2d 101 (Fla. 1988)	1, 2, 3
<u>Division of Administration, State of Florida v. Frenchman</u> , 476 So.2d 224 (Fla. 4th DCA 1985)	1
<u>Golden v. McCarty</u> , 337 So.2d 388 (Fla. 1976)	3
<u>Graham v. Estuary Properties</u> , 399 So.2d 1374 (Fla. 1981)	2
<u>Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund</u> , 427 So.2d 153 (Fla. 1982)	6
<u>L. Maxcy v. Mayo</u> , 139 So. 121 (Fla. 1932)	4, 5
<u>Lee County v. T & H Associates</u> , 395 So.2d 557 (Fla. 2d DCA 1981)	12, 13
<u>Loftin v. U.S.</u> , 6 Cl.Ct. 596 (1984)	7

<u>Mills v. U.S.</u> , 410 F.2d 1255 (Ct.Cl. 1969)	7
<u>Rabin v. Lake Worth Drainage District</u> , 82 So.2d 353 (Fla. 1955)	1
<u>School Board of Escambia County v. State</u> , 353 So.2d 834 (Fla. 1977)	8
<u>Setzer v. Mayo</u> , 9 So.2d 280 (Fla. 1942)	3 - 6
<u>State, Department of Transportation v. Donahoo</u> , 412 So.2d 400 (Fla. 1st DCA 1982)	1
<u>U.S. v. 729.773 Acres of Land, Etc.</u> , 531 F. Supp. 967 (D.C. Haw. 1982)	12
<u>United States v. 131.68 Acres of Land</u> , 695 F.2d 872 (5th Cir. 1983)	13
<u>United States v. Carolene Products Co.</u> , 304 U.S. 144, 58 S.Ct. 718, 82 L.Ed. 1234 (1937)	3 - 6
<u>Wilkerson v. Division of Administration, State, Department of Transportation</u> , 319 So.2d 585 (Fla. 2d DCA 1975)	8

SUMMARY OF ARGUMENT

Polk has failed to refute Appellants' showing that the court erroneously relied on retrospective scientific evidence, that the directed verdict was improper, and that the court erred in excluding fear evidence. Additionally, the scientific knowledge available at the time the nursery was destroyed requires affirmance of the legislative determination that the nursery strain was a threat to the public health, safety and welfare. Polk's arguments based on sovereign immunity, the binding effect of Department of Agriculture v. Mid-Florida Growers, 521 So.2d 101 (Fla. 1988) ("Mid-Florida"), exhaustion of administrative remedies, political motivations, and production loss are not supported in the record or in the law.

I, LIABILITY

A, THE STATE DID NOT ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO A TAKING,

Contrary to Polk's assertion, the State has not claimed that sovereign immunity is a defense to a taking claim. The State did assert [R. 46] that Polk's claim that the rule was improperly applied sounds in tort, not in inverse condemnation, and the principles of sovereign immunity apply. State, Dep't of Transp. v. Donahoo, 412 So.2d 400, 403 (Fla. 1st DCA 1982); Div. of Admin., State of Fla. v. Frenchman, 476 So.2d 224, 229 (Fla. 4th DCA 1985); Rabin v. Lake Worth Drainage District, 82 So.2d 353 (Fla. 1955). See also, Initial Brief, pp. 16-21. Polk is not precluded from a remedy as he can apply to the legislature for

compensation above the waiver cap in the same manner as any other tort victim. Frenchman, supra.

B. MID-FLORIDA IS NOT BINDING ON THIS CASE

"Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case." Graham v. Estuary Properties, 399 So.2d 1374, 1380 (Fla. 1981) ("Graham"). Thus, a determination in one case that the facts show a taking is not dispositive of another case.

In the instant case, the trial court explicitly distinguished the factual record from that presented in Mid-Florida. [R. 323-24]. In Mid-Florida virtually no scientific evidence of necessity was presented and none of the trees within the nurseries were infected. Id. The destruction was predicated solely on the fact that, five months earlier, the nurseries had purchased budwood from Ward's infected nursery. Id. at 102, 105. With no scientific evidence supporting the need for the destruction, the trial court was compelled to find it was unnecessary and constituted a taking.

The evidence in the instant case is far different [Initial Brief, pp. 4-13] and reveal that Polk's field nursery was infected with the nursery strain of citrus canker. [R. 49] This strain was both similar and dissimilar to the A strain of citrus canker. [LT: 179, 314, 609]. A field nursery is highly conducive to the spread of disease by wind, rain, temperatures, and the movement of tools, workers, and equipment among the

plants. [LT: 304, 6271. In only six months the disease had revealed its presence in Polk's nursery. [LT: 309, 3221. The only scientifically accepted procedure at the time was destruction by burning. [LT: 213, 236, 6211. See also, Initial Brief, pp. 4-7.

The factual record in the instant case is clearly distinguishable from that in Mid-Florida. As the trial court recognized, the decision there is not controlling in this case.

C. FAIRLY DEBATABLE QUESTIONS OF NECESSITY REQUIRE AFFIRMANCE OF LEGISLATIVE ACTION

A legislative determination of what is harmful or injurious to the public is to be accorded great deference. Golden v. McCarty, 337 So.2d 388, 390 (Fla. 1976)("Golden"); Brest v. Jacksonville Expressway Authority, 194 So.2d 658, 660 (Fla. 1st DCA 1967). An inquiry into the propriety of a legislative judgment is "restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 718, 82 L.Ed. 1234, 1243 (1937)("Carolene"). Thus, if the legislative determination is debatable, it must be upheld. Id.; Setzer v. Mayo, 9 So.2d 280 (Fla. 1942)("Setzer") (upholding legislative prohibition on filled milk).

This rationale has been specifically applied to exercises of the police power to protect the public health, safety, and welfare from perceived evils. Carolene, supra. In Setzer, the Florida Supreme Court held "if there is room for a difference of

opinion as to whether the product outlawed is deleterious to health or morals, the judgment of the legislature will stand." Setzer, 9 So.2d at 281. Though noting that there was "a well founded division of opinion" on the qualities of filled milk, the court upheld the legislative decision that it was harmful. Id.¹

In the instant case, both parties provide numerous record citations to support their totally conflicting viewpoints on the scientific necessity for the State's chosen course of action. The scientists plainly did not all agree, and still do not agree, on the best method to combat the disease. The state's decision was nonetheless supported by competent scientific evidence available at the time and should have been upheld. Carolene, supra; Setzer, supra; L. Maxcy, supra.

D. THE COURT ERRONEOUSLY RELIED ON RETROSPECTIVE SCIENTIFIC EVIDENCE AND OPINION

In explaining the liability judgment, the trial court stated

I had witnesses, I'm satisfied, who testified that in light of today's knowledge that the burning or eradication would be 125 feet around the trees not around the blocks . . . I intended it to be from the trees in 125 foot circle based upon my recollection and testimony as to what would occur in light of present knowledge.

[PTC: 14-16] (emphasis supplied). It is indisputable that the court expressly based its determination on retrospective

¹ Accord, State, Dep't of Agri. and Cons. Serv., Etc., v. Denmark, 366 So.2d 469 (Fla. 4th DCA 1979 ("Denmark")) (upheld Dept. determination despite conflicting scientific evidence); L. Maxcy v. Mayo, 139 So. 121 (Fla. 1932) ("L. Maxcy") (upheld prohibition on all use of arsenic on citrus though some use was harmless).

scientific evidence and conclusions. [PTC: 14-16]; [DT: 293].

The parties' conflicting citations show vividly that the scientists did not, and still do not, agree on the proper way to combat the nursery strain. But the courts have long recognized that new scientific developments and ever-expanding knowledge may change the ways in which diseases or even human activities are viewed. Carolene, supra; Campoamor v. State Livestock Sanitary Board, 182 So. 277, 280 (Fla. 1938). For example, in the 1930's the prevailing scientific thought was that filled milk causes undernourishment and malnutrition. Carolene, 304 U.S. at 149-150; Setzer, 9 So.2d at 282. Indeed, both Carolene and Setzer discussed the prevailing scientific knowledge of the time that whole milk is essential to good growth and preventing disease. Id. The filled milk statutes were upheld because they were based on scientific knowledge at the time. Id.

In Florida, the validity of the prohibition on filled milk was addressed again thirty-eight years later in Conner v. Cone, 235 So.2d 492 (Fla. 1970) ("Cone"). In 1967, the Legislature had revised the statutes to permit synthetic milk products while still prohibiting filled milk. The court recited the changes in scientific knowledge and attitudes with respect to filled milk from the 1930's through to 1970. Id. at 494. The court explicitly recognized that given the "state of the art at the time", the prohibition on filled milk was valid in 1941 but because knowledge and circumstances had changed, it was no longer valid. Id. ² But the fact that it was no longer valid did not

make the previous prohibition a taking.

In the instant case, Polk contends that because scientific developments and knowledge in late 1987 indicate that the means chosen to combat the nursery strain in 1984-85 may no longer be deemed necessary, the state's action was a taking. Applying Polk's theory to the filled milk cases, the prohibition on filled milk was a taking and the milk producers are entitled to compensation for all the filled milk they could not produce or sell for thirty-eight years. In application, this theory is preposterous.

Applying the rationale of Setzer, Carolene, and Cone, the Department's eradication decision was a valid legislative choice given the state of facts and knowledge at the time. That the scientific community may have receded from that choice given the current state of knowledge does not render the previously appropriate actions a taking. Cone, 235 So.2d at 497-98.

E. THE STATE DIDN'T ARGUE EXHAUSTION OF ADMINISTRATIVE REMEDIES

Polk completely misconstrues Appellant's citation to Key Haven Associated Enterprises v. The Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982) ("Key

2 See also, L. Maxcy, where the court stated: "Just what amount of such use might be safely permitted . . . was unknown to informed authority at the time the Legislature passed the statute here considered. And, indeed, to judge from the testimony now before the court coming from experts supposed to be familiar with this subject, the question now of how much arsenical spraying can be permitted as a safe and harmless practice is far from settled." 139 So.2d at 129.

Haven"). That case, and others, were not cited for any exhaustion of administrative remedies claim, but rather because they set forth when a claim of inverse condemnation may be brought. Key Haven, Albrecht v. State, 444 So.2d 8 (Fla. 1984), Bowen v. DER, 448 So.2d 566 (Fla. 2d DCA 1984) and Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984) ("Bulk Carriers") stand for the proposition that "proceedings [may be] properly commenced in circuit court [for inverse condemnation] if the aggrieved party accepts the agency action as proper. [Albrecht, 444 So.2d at 12-13]. A "claim of uncompensated taking constitutes a separate and distinct cause of action from an action challenging the propriety of an agency's action . . ." Bulk Carriers, 450 So.2d at 215. In the instant case, Polk is attempting to have it both ways.3

Appellants' argument is simply that **Polk** improperly challenged the propriety of the Department's action in an inverse

3 **Polk's** assertion that he received "no prior notice or hearing as to the propriety of the burning" [Answer Brief, p. 24] and that he could "never challenge the propriety of such action" [Answer Brief, p. 25] is a ruse. The First Amended Complaint states that **Polk** had the opportunity to challenge the propriety of the Department's proposed action and waived it. [R. 41]. Richard **Polk** testified that he waived his right to a hearing because somebody told him it "wouldn't do any good" and because if he didn't waive it he "was going to have to put up with them an extra 10 days." [LT: 518]. As stated in Loftin v. U.S., 6 Cl.Ct. 596 (1984) "faced with the total destruction of his dairy with its certain detrimental economic impact, [he] should have sought counsel . . . and should not now be able to complain based on undesired results of which counsel could have made him aware." Id. at 610. Accord, Mills v. U.S., 410 F.2d 1255 (Ct.Cl. 1969) (one cannot rely on ignorance of regulations or alleged misrepresentations of officials as to the law).

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condemnation proceeding. [Initial Brief, pp. 16-19].

**F. POLITICAL MOTIVATIONS ARE NOT PROPER MATTERS
OF JUDICIAL INQUIRY.**

As the Florida Supreme Court has succinctly stated

"[t]he political motivations of the legislature . . . are not a proper matter of inquiry for this Court. We are limited to measuring the Act against the dictates of the Constitution."

School Board of Escambia County v. State, 353 So.2d 834, 839 (Fla. 1977). Polk's political considerations argument is totally without merit. Moreover, Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), cited as authority for Polk's argument [Answer Brief, p. 30], makes no reference whatsoever to consideration of political factors.

**II.
DAMAGES**

A. THE DIRECTED VERDICT WAS IMPROPER

1
The transcript of argument on Polk's motion for directed verdict [attached hereto as Appendix A] shows that the state consistently argued that there was a range of prices in evidence which the jury must be allowed to consider and never waived its objection to the motion for directed verdict. [App. A: 293-3031.

Polk moved for directed verdict asserting that his figure of \$4.50 was rebuttably presumed to be the value of the plants and relied on Wilkerson v. Division of Administration. State Department of Transportation, 319 So.2d 585 (Fla. 2d DCA 1975).

[DT: 293-94]. Polk argued that because the state had not put on

witnesses of its own, it had failed to rebut this presumption. [App. A: 294-95]. Appellant responded that the range of values in evidence was sufficient to withstand the motion, that no specific price needed to be presented to rebut **Polk's** evidence, and that as to liners a specific price had been introduced. [App. A: 295-96]. Halfway through the argument, **Polk** conceded that a specific value was in evidence as to the liners [App. A: 296-7] and stated that his motion was for "Immature, budded trees and seven-gallon containerized trees." [App A: 297]. Appellant again argued the range of values in evidence and that it was unnecessary for Appellant to rely on any particular price [App. A: 297-298]. Both **Polk** and the court contended that the state had not specifically rebutted the \$4.50 figure; they had not put on witnesses or cross-examination of some other specific figure. [App. A: 297, 300]. Both **Polk** and the court discussed the range of values available and that the jury could award any value within that range. [App. A: 298-300]. **Polk** considered withdrawing his motion because he thought the jury may award him \$5.00 per tree [App. A: 303] and later argued to the jury that they could award as much as \$6.00 for the liners. [App. A: 323-241].

The trial court had made it clear that it disagreed with Appellant's argument that the range of values was sufficient to withstand the motion and Appellant merely quit arguing the point. **Polk's** contention that Appellant waived its objection or "invited error" because, having argued at length against the

motion, it failed to keep arguing ad nauseum, is absurd.

Polk briefly asserts [Answer Brief, p. 34-35] that Appellant stipulated to the fair market values awarded in the directed verdict. As support for this proposition Polk cites his own exhibit from the damages trial. It is unclear to Appellant how Polk's exhibit constitutes a stipulation by Appellant as to anything. As just discussed, Appellant has never conceded the fair market value of Polk's plants. For the reasons stated in the Initial Brief (pp. 39-41), the directed verdict should be reversed.

B. THE USE OF FUTURE MARKET VALUES WAS IMPROPER.

1. The market value of liners was established by the record.

Polk's assertion that Appellants used "sleight of hand" to show a market for liners is a disingenuous attempt to condemn Appellants' counsel for Polk's own testimony and exhibits. The testimony, referenced below, is attached as Appendix B.

During the liability trial, Polk testified that when he began his nursery, he grew his own liners. [App. B: 501]. He went on to define a liner as a "rootstock that is planted from seed and then is lined out (planted) in the field" or "replanted from a greenhouse." [App. B: 501]. Polk testified that he preferred buying greenhouse liners to those grown in the field. [App. B: 501-5021.

At the damages trial, Polk's counsel specifically asked Polk how many liners he had on order and when those liners would have

been delivered. [App. B: 117]. Polk defined a seedling as a citrus plant grown in a flat or container in plug form, much the same way that tomatoes are grown. [App. B: 118]. A liner, he testified, is a seedling that is lined out in a row or in a citri pot [App. B: 120-21]. The plant which he had brought to court that day was a Cleopatra Mandarin liner in a four inch citri pot "like they're grown in a greenhouse." [App. B: 121].

Following argument at the bench wherein he recognized that the State would prove a value for the liners [App. B: 1251, and having previously specifically asked Polk if he had 500,000 liners on order [App. B: 117], Polk's counsel then called the 500,000 liners seedlings. [App. B: 130]

On cross-examination, Appellant asked Polk about the 500,000 liners he testified that he had ordered. Polk testified that he had 500,000 liners on order, that the liners were ordered from Chester Rasnake for 15 cents each, and that the 115,434 liners which the state had destroyed had also been purchased from Mr. Rasnake for 15 cents each. [App. B: 1581.

Appellant's counsel then moved on to another subject, whereupon Polk voluntarily clarified his testimony about the amount he paid for the liners purchased from Rasnake. He testified that Swingle liners cost more, about 17-18 cents each. [App. B: 158-59]. Later, Polk corrected counsel on the number of liners he had purchased from Rasnake stating "I bought more liners than that from him. . ." [App. B: 158-59].

On redirect, Polk again discussed the number of liners he

had ordered. [App. B: 187]. He then asserted that he uses the term seedling and liner to mean the same thing [App. B: 2061 although he had given them distinctly different definitions before. [App. B: 118, 120-21]. Additionally, Plaintiff's Exhibits 6, 7, and 8 from the damages trial, purportedly enumerating Polk's losses from the burn, give liners a value of 55 cents. [DT, Pl Exhs. 6, 7, 8].

It is no "sleight of hand" by Appellants that establishes a market value of 15 cents for liners. Polk's own testimony and exhibits accomplished that. With record evidence of the market value of liners, it was error to apply any future market value methodology. U. S. v. 729.773 Acres of Land, Etc., 531 F.Supp. 967, 974-75 (D.C. Haw. 1982); Daily v. United States, 90 F.Supp. 699, 701 (Ct.Cl. 1950).

2. The future market methodology is only available for those plants which would have matured the year they were taken.

Polk argues that the future market methodology is available in this case because his plants would have been saleable within one year of the date of the taking. [Answer Brief, p. 37-39]. In Lee County v. T & H Assoc., 395 So.2d 557 (Fla.. 2d DCA 1981) ("Lee County"), the court held that the future value less costs methodology was appropriate because the watermelons had a "growing period of no more than one year." 395 So.2d at 560 (emphasis supplied). From the time the seeds are planted, it takes from four to five months to grow a mature watermelon. Id.

at 558. The court explained in a footnote that "[I]n the case of plants with a growing life in excess of a year, such as trees grown for commercial cutting, the rule may be entirely different." Id., n.2 (emphasis supplied). In the instant case, Polk established that his citrus plants have a "growing life" or "growing period" of eighteen (18) months. [DT: 1531. Thus, the valuation method used in Lee County is not applicable.

Similarly, in United States v. 131.68 Acres of Land, 695 F.2d 872 (5th Cir. 1983) ("131.68 Acres"), the court refused to use the future market value approach for any "crop that matures after the year of the taking." 695 F.2d at 876. The holding in 131.68 Acres, was not based on maturity "within one year of the date of the taking" as alleged by Polk [Answer Brief, p. 371.⁴ The primary basis for refusing to consider future market values has been that any determination of how many plants would actually have survived or been sold is too speculative. For detailed discussion, see Initial Brief, pp. 33-36.

C. EXCLUSION OF FEAR EVIDENCE WAS IMPROPER

Polk mistakenly asserts that exclusion of fear evidence was proper because the state cannot "unilaterally reduce" the value of the plants. In the "unilateral reduction" cases cited by Polk, the reduction in value was directly attributable to the

⁴ The distinction can be best understood by a simple example. The statement "Johnny will be 6 years old this year" is not the same as the statement "Johnny will be 6 years old within one year."

fact that the state was going to take the land and had thus "caused" the reduction in value. In the instant case, the fear evidence had nothing to do with any action to be taken by the state. Rather, it was strictly limited to the indisputable fact that the nursery was infected. Polk cannot ignore the fact that the state did not in any way "cause" the nursery to be infected. Thus, the cases cited by Polk for the proposition that the state cannot "cause" a reduction in property value and then benefit thereby are totally inapplicable.

The value of the plants in Polk's nursery was affected by the fact that the nursery was infected. Evidence of fear aroused because of the infection bears on the fair market value of plants in the nursery and should have been admitted. [Initial Brief, pp. 36-38].

D. LOSS OF PRODUCTION IS NOT COMPENSABLE

Polk expressly based his claim of production losses on the existence of the quarantine. [DT: 68, 79, 327-301. Argument by counsel on both sides centered on whether or not losses due to the quarantine are compensable. [DT: 283-2931. Contrary to **his** contention in the trial court, Polk now argues that the quarantine prohibiting new production for a short period of time is somehow not a quarantine. As shown in the Initial Brief, a quarantine which temporarily restricts citrus production is not a taking. [Initial Brief, pp. 42-45].

The assertions by Polk that he never claimed that the

quarantine constituted a taking [Answer Brief, p. 43] or that production losses are business damages [Answer Brief, p. 43] are patently false. Polk specifically requested the court to award production losses during the quarantine as business damages and compensation for a taking. [PTC: 28-30]; [DT: 79].

In support of his claim, at the pre-trial conference and the damages trial, Polk defined the production losses as "business damages" [PTC: 28-30] and "future loss of profits" [PTC: 28-30] which "flows from the burning plus the quarantine." [DT: 285-87]. Now, Polk claims that the production losses are not business damages because business damages are "losses of future profits which flow from the taking." [Answer Brief, p. 43] (emphasis supplied). Polk is using the same argument to show that production losses are not business damages as he used to convince the trial court that they are.

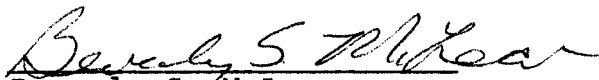
Polk has totally failed to refute Appellants' showing [Initial Brief, pp. 42-48] that Polk is not entitled to compensation for the temporary restriction of production.

CONCLUSION

For the reasons set forth above and in the Initial Brief, the liability and damages judgments should be reversed and remanded for new trial.

Respectfully submitted this 9th day of December, 1988.

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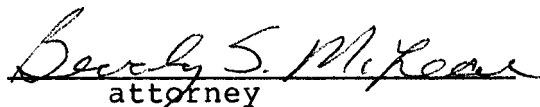


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. Mail to Harry Lewis Michaels, Esq., Department of Agriculture and Consumer Services, Room 513, Mayo Building, Tallahassee, FL 32399-0800; Douglas A. Lockwood, 111, Esq., Peterson, Myers, Craig, Crews, Brandon, and Mann, P.A., Post Office Drawer 7608, Winter Haven, FL 33883; and J. Davis Connor, Esq., Post Office Box 1079, Lake Wales, FL 33859-1079, this 9th day of December, 1988.


attorney

INDEX TO APPENDICES

APPENDIX A	Transcript of argument on motion for directed verdict.
APPENDIX B	Transcript of testimony about purchases of liners