IN THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

v. Case No. 74373

ROBERT H. BONANNO,
AS CIRCUIT COURT JUDGE
OF THE 13TH JUDICIAL CIRCUIT,

Respondent.
_____________________________/

RESPONSE OF GRADY SWEAT, ERNST JANVRIN,
AND BALM CITRUS NURSERY, INC., TO
PETITION FOR WRIT OF PROHIBITION

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I.

INTRODUCTORY STATEMENT

As Plaintiffs in the trial court, Grady Sweat, Ernst Janvrin, and Balm Citrus Nursery, Inc., are interested parties in this proceeding, who submit the following response on behalf of Circuit Judge Robert H. Bonanno. Pursuant to Florida Rule of Appellate Procedure 9.020 (f)(4), Plaintiffs have referred to themselves as "Respondents" in this response.

II.

JURISDICTION

Respondents do not dispute this Court's jurisdiction to consider and resolve the State's Petition for Writ of Prohibition.

III.

FACTS UPON WHICH THE PETITION RELIES

Respondents accept the State's factual presentation subject to the following corrections and additions.

Respondents Grady Sweat and Ernst Janvrin are citrus grove owners, who suffered the destruction of fully set, originally planted groves of citrus trees as a result of the Citrus Canker Eradication Program of 1984 ("the Program"). Respondents had planted and maintained the trees comprising their groves for approximately 18 months prior to destruction. (State's Appendix B). Respondent Balm Citrus Nursery, Inc., is a greenhouse nursery, which suffered the destruction of all nursery stock as a result of the Program.

Respondents dispute the State's factual assertion that Chapter 89-91, Laws of Florida (1989), provides "full compensation to claimants whose trees were destroyed pursuant to the Program." (State's petition, p. 3). Conversely, Staff testimony presented before the Joint Select Committee on Citrus Canker readily acknowledged that the compensation schedules contained in Chapter 89-91 provided only 40 percent of full compensation as judicially determined in the case of Department of Agriculture v. Himrod. (Tape 2 of recorded hearing before Joint Select Committee on Citrus Canker, May 9, 1989). Recorded statements made in committee proceedings properly may be considered by the judiciary as extrinsic aids in statutory construction. Ellsworth v. Insurance Co. of North America, 508 So.2d 395 (Fla. 1st DCA 1987); Rhodes and

Seereiter, <u>The Search for Intent: Aids to Statutory Construction in Florida--An Update</u>, 13 Fla. St. U. L. Rev. 485 (1985). The Court may consult such materials in the course of its independent research, through advocacy, or through introduction into the record at the trial level by judicial notice. <u>Ellsworth</u>, 508 So.2d at 398.

The State admitted liability except for the issue of the releases signed by Respondents. In deposition, the State's designated agent acknowledged that the releases did not apply to Respondents' constitutional rights to just compensation. (Respondents' Appendix 2). On June 29, 1989, Judge Bonanno rendered partial summary judgment against the state as to liability, determining that the releases executed by Respondents did not operate to release their claims as a matter of law. (Respondents' Appendix 1).

Finally, the deposition of Dr. Timothy Gottwold established that citrus bacterial spot did not affect trees in groves, but rather affected trees only in citrus nurseries. After being contaminated with the bacteria in scientific experiments, mature trees in groves dropped their leaves and then fully recovered from the bacteria without outside intervention. (Respondents' Appendix 3, pp. 50-51).

IV.

NATURE OF RELIEF SOUGHT

Respondents request the Court to deny the State's Petition for Writ of Prohibition and thus affirm the trial court's finding that grove owners Sweat and Janvrin do not

constitute claimants within the statutory definition provided in Chapter 89-91, Laws of Florida (1989), and that the Act otherwise cannot be applied retrospectively to the pending trial court proceeding. In the alternative, Respondents request the Court to affirm the trial court's decision on the basis of the Act's violation of federal and state constitutional guaranties involving due process, just compensation, separation of powers, access to courts, establishment of courts, administration of courts, and trial by jury.

V.

ARGUMENT

A. THE TRIAL COURT CORRECTLY CONSTRUED CHAPTER 89-91, LAWS OF FLORIDA, AS APPLYING ONLY TO A LIMITED CLASS OF CLAIMANTS WHICH DOES NOT INCLUDE GROVE OWNERS GRADY SWEAT AND ERNST JANVRIN.

The State challenges the trial court's determination that Chapter 89-91, Laws of Florida (1989), applies only to owners of "citrus nursery plants" destroyed during the Canker Eradication Program of 1984, and thus has no application to grove owners Grady Sweat and Ernst Janvrin, who suffered the loss of fully set groves which had been planted and maintained for approximately eighteen months prior to destruction. According to the State, the trial court's construction of the Act contravenes the Legislature's clear intent to encompass "all citrus plants destroyed in the Program" within the administrative compensation scheme set out in the statute. (State's petition, p. 8). The State

apparently reaches this conclusion by disregarding the Act's repeated and explicit reference to "citrus nursery plants," focusing instead upon presumptive value tables and survival factors which are confusing and ill-defined.

Under accepted rules of statutory construction, legislative intent is to be determined from the plain language of the statute, which must be construed and applied in the form actually enacted. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). Statutory language cannot be disregarded as mere surplusage, inserted without purpose or meaning. Stein v. Biscayne Kennel Club, 145 Fla. 307, 199 So. 364 (1941). Conversely, it must be assumed that the Legislature knew the meaning of the words utilized and purposely selected particular language to express its intent "and not merely to cause confusion." Id. at 365. Accord Thayer, 335 So.2d at 817. Moreover, the express mention of one thing implies the exclusion of another under the doctrine of expressio unius est exclusio alterius. "Hence, where a statute enumerates the things on which it is to operate . . . it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. . . . Any other interpretation would extend the meaning of the language of the subject Act to include a class of persons not referred to by the Legislature." Thayer, 335 So.2d at 817.

In the instant case, Chapter 89-91 purports to provide "the sole and exclusive remedy and procedure to compensate those claimants whose citrus nursery plants were destroyed

under the Citrus Canker Eradication Program." Sec. 2(2)(b), Chap. 89-91, Laws of Fla. (1989)(emphasis added). Section 1(2) of the Act defines a "claimant" as "a person who owned citrus nursery plants which were destroyed [by government agents] pursuant to an immediate final order." Notwithstanding the statute's repeated, specific reference to "citrus nursery **plants,"** that term has not been defined either in this enactment or existing provisions of Chapter 581. Under such circumstances, a court must assume the common or ordinary meaning of a word which otherwise has not been defined in the statute. State v. Buckner, 472 So.2d 1228, 1229 (Fla. 2d DCA 1985). A court also should assume that the Legislature drafted the provision with full knowledge of the scientific attributes of the disease addressed in the statute and thus knew that citrus bacterial spot did not affect trees in groves, but rather affected plants in citrus nurseries.

Utilizing this approach, one would conclude that a **"citrus** nursery plant" refers to a special category of plants which is located at a citrus nursery pending sale. Such a definition comports with section 581.011(14), Florida Statutes (Supp. 1988), which defines "nursery" as "any grounds or premises on or in which nursery stock is grown, propagated, or held for sale or distribution." (emphasis added). Similarly, section 581.011(16) defines "nursery stock" as "all plants, trees, shrubs, vines, bulbs, cuttings, grafts, scions, or buds grown or kept for or

capable of propagation or distribution, unless specifically excluded by the rules of the **department."** (emphasis added). Neither definition suggests inclusion of plants already distributed to a grower and incorporated into a fully set grove for at least eighteen months following sale. Contrary to the State's suggestion, one cannot simply overlook the adjective **"nursery"** as being meaningless surplusage. Thayer; Biscayne Kennel Club.

Conversely, the legislative findings, expressions of intent, and design of the enactment limit its application to plants found in citrus nurseries where the perceived "emergency of crisis proportions" existed. After referring specifically to "citrus nursery plants" in the preamble, definitional section, and expressions of legislative findings and intent, the Act observes tellingly that Florida law authorized the State to destroy all "plants infected with or exposed to disease" at all times material to this matter. Sec. 2(h), Chap. **89-91,** Laws of Fla. **(1989).** The Act thus suggests a distinction between "citrus nursery plants" and "all plants infected with or exposed to disease." This language also illustrates the Legislature's ability to describe at will the class now urged by the State, which it clearly has not done elsewhere in the statute. The Legislature's use of different terms in different portions of the same act provides "strong evidence that different meanings were intended." Department of Professional Regulation v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA

1984). Accord Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751, 753 (Fla. 3d DCA 1982).

This definitional distinction finds further support in section three of the Act, which identifies categories and presumptive values for "citrus nursery plants" destroyed. Significantly, none of the categories describe and realistically value fully set groves of young trees which have been planted and maintained for eighteen months prior to destruction, such as those owned by Sweat and Janvrin. The Act's presumptive values make no provision for costs incurred or value added after sale. Furthermore, the tree survival factors set out in section 3(2) of the Act "represent the average percentage of original planted trees reaching sale after allowances for culling or death." Sec. 3, Chap. 89-91, Laws of Fla. (1989)(emphasis added). This definition lends further support to the trial court's conclusion that the Act does not apply to trees already sold by a nursery and incorporated into groves.

Finally, because the Act fails to define the term "reset," as used in its presumptive value tables, one cannot determine that an original grove of young trees falls within this statutory concept. That the Department of Agriculture classified Sweat and Janvrin's property as **"resets"** in the releases obtained from them fails to resolve this issue conclusively for purposes of statutory construction. Surely, each individual's perception of this term may differ, based upon numerous factors such as the length of time a grove has

been planted and the status of the tree as an original or replacement setting.

The State encourages this Court to overlook the definitional shortcomings and inconsistencies of Chapter 89-91 in favor of the construction which it advocates, labeling the Act as **"remedial"** and thus subject to liberal interpretation to effectuate its presumed purpose. (State's petition, p. 8). As the Fifth District Court of Appeal observed in L. Ross, Inc. v. R.W. Roberts Construction Co., 466 So.2d 1096, 1097 (5th DCA 1985), appr'd, 481 So.2d 484 (Fla. 1986), a party's classification of a statute as remedial or penal depends largely upon "whose ox is being gored," and thus is not dispositive of the ultimate issue. The statute presented in the instant case attempts to limit a citizen's legal recourse following governmental appropriation of his property, by restricting him to an administrative determination of his constitutionally mandated "just compensation," subject to appellate judicial review of the agency's decision. As such, the Act impacts upon the area of eminent domain, which this court has described as "one of the most harsh proceedings known to the law." Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451, 455 (Fla. 1975). A strict construction must be given to statutes attempting to delegate this power to political units or agencies, resolving any doubt against the agency asserting the power. **Id.** ~~See also~~ Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954)(statute relating to suppression of

viscular exanthema which allows no compensation for confiscation or destruction of hogs fed uncooked garbage is penal in nature and thus should be construed liberally in favor of the individual and against the government). Consequently, Respondents urge this court to approve the trial court's construction of Chapter 89-91, which limits its application only to those claimants clearly identified in the Act.

B. THE TRIAL COURT CORRECTLY DECLINED TO APPLY CHAPTER 89-91 RETROSPECTIVELY TO RESPONDENTS, WHERE APPLICATION OF THE ACT WOULD HAVE DIMINISHED VESTED RIGHTS OR IMPOSED ADDITIONAL BURDENS, IN CONTRAVENTION OF THE FEDERAL AND STATE CONSTITUTIONS.

As the State acknowledges, Chapter 89-91 imposes significant changes upon pre-existing mechanisms for determining just compensation following a governmental appropriation of private property. For example, the Act eliminates a litigant's right to obtain a de novo judicial determination of his entitlement to compensation by filing an action for inverse condemnation in circuit court. Similarly, it eliminates his right to jury determination of his damages in such litigation, replacing both judge and jury with an administrative hearing officer who initially resolves issues concerning the State's liability on the basis of presumptive values compiled by the State, itself. Finally, the Act imposes a presumptive cap on attorney's fees recoverable by the claimant, while limiting his reimbursable costs to those which the hearing officer deems necessary and proper.

The State characterizes these changes as merely

"procedural" or "remedial," and thus properly applicable to the pending litigation pursuant to the Legislature's mandate. (State's brief, pp. 5-7). Notwithstanding the State's assertion, constitutional due process precludes retrospective application of legislation which adversely affects or takes away vested rights, creates or imposes new obligations or duties, or establishes additional disabilities as to transactions or events which already have occurred. McCord v. Smith, 43 So.2d 704 (Fla. 1949). Respondents' position under the Act must be compared with that existing under previous law to determine whether Chapter 89-91 affects vested rights or imposes new obligations or duties. Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). Ultimately, this due process examination may be resolved by weighing the nature of the rights affected, the extent of abrogation, and the public interest served by the statute. **Id.** at 1158.

Prior to the enactment of Chapter 89-91, Respondents possessed a cause of action for inverse condemnation, which accrued immediately upon the uncompensated destruction of their property. Roberts Construction Co., 466 So.2d at 1098. Contrary to the State's assertion, Respondents' entitlement to obtain just compensation following a governmental taking emanates from the federal and state constitutions, themselves, and is not dependent upon enabling statutory authorization. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96

L.Ed.2d 250 (1987); Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla.), cert. denied, ___ U.S. 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). Conversely, a property owner who has suffered a governmental taking is "entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .'" First English Evangelical Lutheran Church, 482 U.S. at _____, 107 S.Ct. at 2386, 96 L.Ed.2d at 264. He holds a "basic constitutional right" to file an action for inverse condemnation and thus "pursue a judicial determination of a [governmental] taking and [his] entitlement to compensation." Joint Ventures v. Department of Transportation, 519 So.2d 1069, 1071 (Fla. 1st DCA 1988).

Prior to the enactment of Chapter 89-91, Respondents possessed the right to jury trial on the issue of just compensation in an inverse condemnation proceeding pursuant to statutory law. Sec. 73.071, Fla. Stat. (1987). They validly invoked this right pursuant to Florida Rule of Civil Procedure 1.430 and were scheduled to proceed to trial by jury on July 10, 1989, fewer than three weeks after enactment of Chapter 89-91.

The State apparently contends that the right to jury trial is "merely a statutory, procedural right" which the Legislature has the power to revoke at will. (State's petition, p. 6). Contrary to the State's assertion, rules governing "practice and procedure in all courts" in the

state, including Rule 1.430, fall within the province of the Florida Supreme Court pursuant to Article V, Section 2 (a), of the Florida Constitution.

Rule 1.430(a) provides: "The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate." (emphasis added). By preserving the right to jury trial as granted by statute, this rule goes beyond the constitutional guarantee afforded by Article I, Section 22, of the Constitution. The rule thus possesses significance independent of the organic right afforded by that section. Once properly invoked under Rule 1.430, the right of jury trial in a pending action becomes inviolable, and cannot be abrogated by subsequent legislation. Cf. Division of Administration v. Grossman, 536 So.2d 1181, 1182 (Fla. 3d DCA 1989); Manhattan Properties Ltd. v. Division of Administration, 541 So.2d 655, 656 (Fla. 2d DCA 1989) (properly invoked demand for jury trial in eminent domain proceeding vests and cannot be withdrawn without consent of all parties). Although the legislature has the right to repeal any rule of the Supreme Court by a two-thirds vote, "it has no constitutional authority to enact any law relating to practice and procedure." In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 204 (Fla. 1973), modified in part, 297 So.2d 301 (Fla. 1974). Legislation relating to practice and procedure in Florida courts is void, violating both the separation of powers doctrine embodied in Article 11, Section 3, of the

state constitution, and Article V, Section 2 (a), establishing the rule making province of the judiciary. Graham v. Murrell, 462 So.2d 34 (Fla. 1st DCA 1984).

The historical development of inverse condemnation actions also suggests that Respondents' right to a jury trial is protected under Article I, Section 22, of the state constitution. This section preserves inviolate the right to jury trial in those actions in which the right existed in 1845 when the state's first constitution became effective. In re Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986). As the Second District Court of Appeal noted in Sarasota-Manatee Airport Authority v. Alderman, 238 So.2d 678, 679 (Fla. 2d DCA 1970), "What we term 'inverse condemnation proceedings' is often nothing more that an action for abatement of nuisance brought against a defendant having the power of eminent domain." At common law, such abatement actions required a jury determination of damages. Id. Cf. City of Orlando v. Pragg, 31 Fla. 111, 12 So. 368 (1893)(a city abates a nuisance at its peril, and is liable in damages, as determined by a jury, for resulting mistakes).

Finally, Respondents possessed certain rights and obligations under Chapter 73, as judicially construed and applied to actions for inverse condemnation. For example, they were required to prove merely that they had suffered an uncompensated taking by government action to establish their claim for inverse condemnation. Division of Administration v. Ideal Holding Co., 480 So.2d 243 (Fla. 4th DCA 1985).

Upon successful proof of this element, the condemning authority then bore the burden of proving, by substantial, competent evidence, the value of the property taken. City of Ft. Lauderdale v. Casino Realty, Inc., 313 So.2d 649, 652 (Fla. 1975)(concurring opinion, J. Overton). If the property owner subsequently offered proof of a divergent value, then a presumption of such value arose, which the condemning authority was required to rebut. Wilkerson v. Division of Administration, 319 So.2d 585 (Fla. 2d DCA 1975). Moreover, Respondents were entitled to recover "all costs and attorney's fees reasonably and necessarily expended in connection with the investigation, research, preparation and presentation of [their] case, both at the trial level and at the appellate level." County of Volusia v. Pickens, 435 So.2d 247, 248 (5th DCA), review denied, 443 So.2d 980 (Fla. 1983); Sec. 73.091, Fla. Stat. (1987).

Chapter 89-91 retrospectively alters Respondents' rights and obligations to establish their claims for just compensation. The Act's delineation of presumptive values imposes significant, constitutionally impermissible burdens upon Respondents, who now must rebut a statutory presumption which relieves the State of its initial burden of proof. While the State undoubtedly will attempt to characterize this change as a mere procedural adjustment, that argument

> fails to recognize that substantive rights do not exist in an absolute binary world but are relative and are often a matter of degree and that any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be

> reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages.

Roberts Construction Co., 466 So.2d at 1097-98, quoted with approval, L. Ross, Inc., v. R.W. Roberts Construction Co., 481 So.2d 484, 485 (Fla. 1986).

To the extent that a claimant fails to overcome the prescribed presumptive values, then his substantive right to just compensation has been determined and potentially limited by legislative intervention which occurred after his cause of action accrued. As the Second District Court of Appeal recently observed in City of Winter Haven v. Allen, 541 So.2d 128, 132 (Fla. 2d DCA 1989), "There seems to us to be something basically unfair about allowing the state to reduce its exposure for damages after the incident causing the damage has occurred and action has been filed to recover those damages." Consequently, the Second District declined to apply an amendment limiting the state's liability for tortious acts to its specified waiver of sovereign immunity, notwithstanding excess insurance coverage.

In addition to Chapter 89-91's alteration of Respondents' burden of proof and ultimate potential recovery, the statute also limits their entitlement to attorney's fees. As this Court has recognized on several occasions, the right to attorney's fees is a substantive right which cannot be adversely affected through retrospective legislation. Roberts Construction Co., 481 So.2d 484 (Fla. 1986); Young v.

Altenhaus, 472 So.2d 1152 (Fla. 1985). Legislation which places or increases a pecuniary limitation on a substantive right "serves to decrease that substantive right," and thus cannot be applied retrospectively. Roberts Construction Co., 466 So.2d at 1099; Cone Brothers Contracting v. Gordon, 453 So.2d 420 (Fla. 1st DCA 1984). That Chapter 89-91 imposes a "presumptive limitation" which a litigant may or may not be able to overcome does not alter this conclusion.

Even if some of the changes mandated by Chapter 89-91 could be construed as "mere procedural adjustments," the totality of those changes materially and impermissibly alter previously held rights. The Fourth District Court of Appeal addressed this issue in Anderson v. Anderson, 468 So.2d 528, 530 (4th DCA), petition for review denied, 476 So.2d 672 (Fla. 1985), declining to apply a statutory amendment which substituted "an entirely new system in place of the old procedure, with widely expanded consequences." The Anderson court apparently found the statute's material alteration of procedure simply to exceed the bounds of fairness when applied to facts which had arisen under pre-existing law.

For the reasons outlined above, the trial court correctly declined to apply Chapter 89-91 to Respondents.

C. CHAPTER 89-91 VIOLATES RESPONDENTS' RIGHT TO JUDICIAL DETERMINATION OF JUST COMPENSATION BY TRANSFERRING THIS JUDICIAL FUNCTION TO AN ADMINISTRATIVE TRIBUNAL, IN CONTRAVENTION OF THE FEDERAL AND STATE CONSTITUTIONS.

The determination of what constitutes just compensation for private property appropriated for public use "is a

judicial function that cannot be performed by the Legislature either directly or by any method of indirection." Daniels v. State Road Department, 170 So.2d 846, (Fla. 1964); Spafford v. Brevard County, 92 Fla. 617, 110 So. 451, 454-55 (1926). Indeed, the entity which appropriated the citizen's property cannot constitutionally determine the compensation owed as a result of the taking. The United States Supreme Court specifically addressed this principle in Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), invalidating an act of Congress which purported to exclude an element of value in calculating the compensation owed for the plaintiff's property. The Court stated,

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question .... It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

13 S.Ct. at 626 (emphasis added). Legislative usurpation of this constitutionally mandated judicial function violates the just compensation clause of the Fifth Amendment to the United States Constitution, and Article X, Section 6, of the Florida Constitution.

Similarly, the Legislature cannot transfer this judicial function to an administrative tribunal. While the Legislature admittedly has the power to create administrative agencies with quasi-judicial power, it cannot authorize those

agencies to exercise powers that are fundamentally judicial in nature. Laborer's Local 478 v. Burroughs, 541 So.2d 1160 (Fla. 1989); Broward County v. La Rosa, 505 So.2d 422 (Fla. 1987). Conversely, an attempted delegation of judicial authority to an administrative entity violates the separation of powers clause, codified in Article 11, Section 3, of the Florida Constitution, as well as Article V, Section 1, which precludes the creation of any courts other than those constitutionally authorized. La Rosa, 505 So.2d at 424. The Legislature's mere characterization of an agency's power as quasi-judicial does not rectify an unconstitutional delegation of functions which clearly are judicial, such as determination of just compensation following governmental taking of private property. **Id.**; Behm v. Division of Administration, 383 So.2d 216, 218 (Fla. 1980).

Chapter 89-91 violates each of these principles by attempting to shift adjudication and determination of just compensation from a judicial tribunal to the Office of Citrus Canker Claims, or its administrative hearing officer, where blatant legislative direction establishes presumptive levels of compensation. Judicial participation in this fundamentally judicial function will be limited to appellate review of the final administrative decision, an evaluation which necessarily is circumscribed by the record on appeal and standards of review provided by the Administrative Procedures Act. **See** Sec. 120.68(10), Fla. Stat. (1987).

Faced with numerous pending lawsuits arising out of its

Citrus Canker Eradication Program, the State obviously has taken action to nullify or ameliorate adverse decisions rendered in Department of Agriculture v. Mid-Florida Growers, 521 So.2d 101 (Fla. 1988), cert. denied, ___U.S.___, 109 S.Ct. 180, 102 **L.Ed.2d,** and Department of Agriculture v. Mid-Florida Growers, 541 So.2d 1243 (Fla. 2d DCA 1989). These rulings confirmed the State's obligation to pay just compensation for claims arising out of its Canker Eradication Program and rejected its theories of damage calculation. Indeed, the preamble to Chapter 89-91 candidly acknowledges the impact of this court's ruling in Mid-Florida. It is "axiomatic," however, that a state statute "cannot constitutionally alter a prior court decision interpreting the state constitution." Sarmiento v. State, 371 So.2d 1047, 1051 (Fla. 3d DCA 1979). Nor can the Legislature interfere with pending judicial controversies to deprive parties of their existing legal rights. Reedus v. Friedman, 287 So.2d 355 (Fla. 3d DCA 1973). Such legislative action would be "improper and uncountenanced in **law."**[1] **Id.** at 358.

The Legislature's enactment of Chapter 89-91 constitutes direct interference with pending judicial controversies in a

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[1]**As** the recorded legislative debates before the Joint Select Committee on Citrus Canker demonstrate, the Legislature was acutely aware of the judicial decisions being rendered in pending canker claims cases. Some hearings actually involved comparisons of damages awarded by the judiciary and the amount which the Committee loosely referred to as "our offer" of compensation. Notwithstanding the dictates of Reedus v. Friedman, committee materials addressing the Act evidence the Legislature's decided effort to interfere with and directly attempt to control pending litigation.

calculated effort to mitigate the State's liability for damages arising out of its Canker Eradication Program. As acknowledged in legislative debate, the "presumptive value" tables set forth in Chapter 89-91 provide remuneration equal to about 40 percent of the amounts judicially determined to be just compensation in the Himrod case. Because these legislatively mandated values are presumed to equal just compensation, the citrus nursery owner now bears the burden of proving a higher value. Thus, values previously rejected in the judicial process, have been given extra evidentiary weight and necessarily will require appellate affirmance of any finding of the administrative hearing officer not lower than the 40 percent value set forth in the table. Sec. 120.68(10), Fla. Stat. (1987).

Although the State contends that this legislative scheme does not violate the separation of powers clause because the adequacy of compensation is finally determined by the judiciary through its appellate review, this argument ignores the limited scope of appellate proceedings. The appellate court must determine whether the administrative finding is supported by substantial, competent evidence; it may not determine the amount of adequate compensation de novo. Therefore, an administrative hearing officer's finding that the legislatively mandated values constitute just Compensation will have to be upheld upon appellate review, given the presumption surrounding the tables themselves. Through carefully crafted legislation, the Legislature

thereby will have succeeded in allowing the executive branch to take private property, to determine compensation for it pursuant to an artifically low schedule of values, and to insure appellate affirmance of its valuation based upon the presumed correctness of the legislatively determined values. Thus, through an artful method of indirection, the Legislature will have determined just compensation notwithstanding Spafford.

The State attempts to defend the challenged legislation against constitutional attack by suggesting that this Court approved a similar statute enacted in response to the "pull and treat" program for containment and eradication of "spreading decline." (State's petition, pp. 9-10). Specifically, the State construes this court's opinion in State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), as approving administrative determination of just compensation pursuant to legislative guidelines, subject to final judicial "determination" through appellate review. A close examination of the historical, factual, and procedural context of the Smith decision suggests that the State has misperceived its holding.

The Florida Supreme Court first identified the determination of just compensation as a judicial function in Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926). In Spafford, the court invalidated a statutory provision which authorized the state road department to take possession of private property upon filing an appropriate petition and

securing full compensation to the owner "by depositing with the clerk of the circuit court . . . double the amount of the value of said property as fixed by the judge of said court <u>based upon affidavits of not less than three disinterested freeholders</u> owning property in the vicinity of that sought to be taken." Sec.2, c.10118, Acts of 1925 (emphasis added). On rehearing, the Court articulated its objection to the deposit procedure prescribed by the statute, stating:

> In this state the determination of what is just compensation for private property that is taken for public use is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection.
>
> Even if [the Legislature may authorize the appropriation of private property to the public use upon petition and payment of appropriate security], the amount so paid into court or secured should be duly determined by the court in the orderly course of judicial procedure. The means and processes of such determination cannot lawfully be so circumscribed or arbitrarily controlled by legislative action as to make the amount to be paid into court or secured a legislative and not a judicial ascertainment and determination. . . . [The challenged provision] purports to authorize an appropriation of private property upon making a deposit, and arbitrarily requires the judge to determine the amount of the deposit upon ex parte affidavits of not less than three disinterested freeholders, without affording the owner any notice of opportunity to be heard, and without using any other appropriate means or processes for determining the proper amount to be deposited from which to pay the compensation when the amount thereof has been duly adjudicated. Such provision is clearly an attempted statutory limitation upon the judicial powers that are by the Constitution vested in the court of the state. And such legislative limitation of judicial powers necessarily invades the organic rights of the owners to due process of law and just compensation when private property is taken for public use.

110 So. at 454-55.

A trilogy of cases resulting from the State's "pull and treat" program to eradicate spreading decline admittedly has created some confusion concerning the constitutional mandate for judicial determination of just compensation. As factually explained in Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), the State implemented a compulsory program of destroying all trees actually infested with the burrowing nematode responsible for spreading decline, as well as all healthy trees located within a defined zone of potential exposure to the disease. Pursuant to this program, the State Plant Board intended to destroy 197 citrus trees located in Mr. Corneal's 703-tree grove, even though only 16 actually had been affected by the burrowing nematode. Mr. Corneal filed suit to enjoin the destruction of his property, challenging the State's finding that an emergency existed, objecting to the radical program proposed, and protesting the destruction of his healthy but "exposed" trees as an unconstitutional taking of property without compensation. The trial court declined to issue an injunction, upholding the validity of the underlying statute.

On appeal, the Supreme Court reversed, specifically finding that no real emergency existed given the slow progress of the nematode, the small percentage of total citrus acreage actually affected, and the apparent presence of the disease in the state for almost thirty years. 95 So.2d at 5. Moreover, the Court found no imminent danger posed by the healthy, but potentially exposed, trees.

Recognizing the right to own property as an "indispensable attribute" of "free government" which is guaranteed by state and federal organic law, the Court held that owners of healthy trees which had been destroyed under the program were entitled to compensation. In support of this holding, the Court observed that "all other rights become worthless if the government possesses an untrammeled power over the property of its citizens." Id. at 6.

Responding to the Corneal decision and a perceived onslaught of claims, the Legislature enacted Chapter 57-365 during its next legislative session. See Cunningham v. State Plant Board, 112 So.2d 905 (2d DCA), cert. denied, 115 So.2d 701 (Fla 1959). This Act provided for administrative determination of compensation by the State Plant Board pursuant to statutorily specified guidelines "and other reasonable factors having a bearing on just and fair compensation." The Act mandated that no compensation be paid for infected trees destroyed under the program, and that compensation for uninfected trees not exceed $1,000.00 per acre. It provided for a hearing before the Board concerning the adequacy of proposed compensation, and ultimate judicial review of the agency's determination. Finally, the Act suggested that the compulsory program of pull and treat could be carried out summarily, without judicial or administrative review concerning the necessity of the proposed destruction.

In State Plant Board v. Smith, the Plaintiffs sued for injunctive relief, attacking the statute as a taking of

property without due process or just compensation, and as a taking in contravention of the constitutional limitations pertaining to eminent domain. The state moved to dismiss the injunctive action, defending the statute as tracking all mandates addressed in Corneal. The trial court denied the State's motion and invalidated the statute on specified constitutional grounds, thus prompting the resulting appeal.

Clarifying that the "pull and treat" program constituted an exercise of the state's police power, the Supreme Court rejected the trial court's finding that the statute involved or violated constitutional safeguards associated solely with eminent domain. The court agreed with the trial judge, however, that the act violated the just compensation and due process clauses of the Florida Declaration of Rights in the following respects:

1. No authority existed for the Legislature's specification of the maximum compensation to be paid for uninfected trees. Citing the separation of powers clause and Spafford, the court reiterated that the determination of just compensation constitutes a judicial function. Consequently, the court found the holding of Spafford "equally applicable to the legislative encroachment upon the powers of the judiciary attempted here in the taking of property under the police power." Id. at 407.

2. No justification existed for the statutory prohibition against awarding compensation for an infested, but still productive, tree. In this regard, the court

stated:

> As noted above, the question of what is "just compensation" must be finally determined by the judiciary, unless the grove owner is satisfied by the amount offered by the Board's agent. And, as previously stated, an infested tree may be healthy, in the sense that it has not yet begun to decline, and still commercially profitable. A court might wish to consider the profits expected from such productive, although infected, tree in determining "just compensation." And it is apparent that an X-mark on a map, showing an infested tree destroyed under the Board's pull and treat program, and the testimony of the parties as to the condition of the tree, would not be the best evidence of the condition of the tree. Thus, in addition to the fact that the statutory provision quoted immediately above is an invasion of the province of the judiciary, it might also deny to the grower a hearing that is "full and fair, not merely colorable or illusive." [citation omitted].

Id. at 408 (emphasis added).

3. No emergency existed justifying the statute's failure to provide an owner with the opportunity to be heard prior to destruction of his property.

The court then concluded,

> It follows, therefore, that the Board's compulsory program of pull and treat cannot be summarily carried out in any grove, either as to infected or uninfected trees, without giving the grove owner an opportunity to be heard on the questions of the propriety of the action of the Board's agents and the adequacy of the compensation proposed by such agents to be paid to him.

Id. at 409 (emphasis changed).

The State places great significance upon the Smith court's closing remark that the remainder of the challenged statute was valid and effective. According to the State, this single statement validates administrative determination of just compensation, subject to judicial appellate review.

The State's conclusion on this point makes the Smith holding virtually irreconcilable with Spafford, which Smith cites and quotes with approval. Moreover, this conclusion makes Smith's discussion of factors which "a court might wish to consider" in valuing infected but still healthy trees completely meaningless. When confined to the capacity of appellate review, a court has no ability or opportunity to consider any valuation factors not expressly reflected in the record on appeal. Determination of just compensation necessarily is a fact-finding procedure, which a court simply cannot discharge while sitting in its appellate capacity. The State's reasoning ignores that portion of the Smith decision which expressly contemplates a hearing before the Court involving the issue of "adequacy of the compensation," i.e., a factual determination of "just compensation."

The third case in the "pull and treat" trilogy bears comment. The Second District Court of Appeal addressed the retroactive application of Chapter 57-365 in Cunningham v. State Plant Board, 112 So.2d 905 (2d DCA), cert. denied, 115 So.2d 701 (Fla. 1959). Unlike Corneal and Smith, which both arose as actions for injunctive relief against the application of Chapter 57-365, Cunningham involved an action seeking damages in tort, brought by grove owners whose trees already had been destroyed prior to the Corneal decision or enactment of the statute. Chapter 57-365 became law after the Plaintiffs' action for damages had vested, but before their lawsuit had been filed. Presumably because the suit

did not arise in the context of an action for inverse condemnation, or as a constitutional claim for just compensation following governmental appropriation of property, the Cunningham court was not compelled to address the statute's potential encroachment upon the judicial function of determining just compensation. The administrative process was allowed to continue consistent with the Court's holding in Smith.

This Court's holding in Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964), demonstrates the State's misreading of Smith. In Daniels, the Court addressed the Legislature's authority to enact a statute which purported to determine the amount of Compensation owed to a landowner upon appropriation of his property for a road right-of-way. Citing Spafford and Smith, the Daniels Court stated:

> It is well-settled that the determination of what is just compensation for the taking of private property for public use is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection. [citations omitted].

Id. at 851. While the Legislature may declare its policy with respect to compensation, it cannot conclusively resolve this "purely judicial question." Id.

Because the Legislature cannot usurp the judicial function of determining just compensation for a taking, "either directly or through any method of indirection," Spafford, 110 So. at 455, "[i]nverse condemnation actions cannot be adjudicated by administrative boards or agencies."

Bowen v. Department of Environmental Regulation, 448 So.2d 566, 568 (Fla. 2d DCA 1984).

D. CHAPTER 89-91 DENIES RESPONDENTS THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

Article I, section 21, of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." As construed by this Court in Kluger v. White, 281 So.2d 1 (Fla. 1973), the constitutional guarantee of access to courts precludes the Legislature from abolishing statutory or common law causes of action which predate adoption of the Florida Constitution, unless a **"reasonable** alternative" is provided to protect the rights of the people to "redress for injuries," or "overwhelming public necessity" mandates the abolishment of such right, and "no alternative method of meeting such public necessity can be shown." Kluger, 281 So.2d at 4. Kluger does not address legislative abolition of causes of action which emanate from the constitution itself, such as the constitutional right to bring an action in inverse condemnation to secure just compensation for property taken by the government. See First English Evangelical Lutheran Church v. County of Los Angeles; Department of Agriculture **v.** Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988).

Subjecting Chapter 89-91 to scrutiny under the Kluger analysis--notwithstanding this critical distinction--reveals

further infirmities. The final analysis prepared by the staff of the House Committee on Agriculture contains the following explanation as to why the Act provides a reasonable alternative to litigation of such claims in the judicial system, with its attendant jury determination of damages:

> For persons who have begun a lawsuit in circuit court and all others whose judicial remedies are not barred by the statute of limitations, this act will provide a major benefit in that the state's liability will not have to be proved, nor will the issue of any release signed by the claimant have to be litigated. Claimants who agree to accept compensation without a hearing and whose claim is decided by a hearing officer or by the appellate court will be assured of payment without having to resort to post-judgment enforcement proceedings. These benefits outweigh the loss of **a** jury determination of damages.

Staff of House Comm. on Agriculture, 1989 Regular Session, Staff Analysis and Economic Impact Statement, Sec. IV, CS/HB 1088 (1989)(emphasis added). (See Respondents' Appendix 4.)

The "benefits" perceived by the staff analysis are totally illusory to Respondents. In the instant cases, the State already has admitted liability. The releases obtained from Respondents and others have been acknowledged as inapplicable by the State's designated agent during deposition (see Respondents' Appendix 2); previously ruled inapplicable in Department of Agriculture v. May Brothers (see Respondent's Appendix 5); and judicially invalidated in this action by summary judgment rendered contemporaneously with the order challenged in the State's petition (see Appendix 1 . Thus, the Kluger criteria for abolition of a right have not been met. See Smith v. Department of

Insurance, 507 So.2d 1080 (Fla. 1987)($450,000 statutory cap on noneconomic damages recoverable by tort victim ran "only in one direction," with victim receiving no commensurate benefit or reasonable trade-off for loss of his constitutional right to full redress of injuries). See also Knowles, 402 So.2d at 1158, n.8 (statute granting immunity to governmental employees abolished victim's right to full tort recovery without offering victim any right which he did not already possess). Respondents have received no quid pro quo through the Legislature's thinly disguised attempt to limit the State's liability. As in Knowles, Chapter 89-91 "effects an abrogation of [Respondents' right to just compensation], not merely a procedural adjustment of . . . remedies." 402 So.2d at 1158 (footnotes omitted).

Chapter 89-91 also fails to provide a reasonable alternative for Respondents' abolished cause of action for inverse condemnation because the administrative forum provided cannot constitutionally determine issues of just compensation or resolve complex issues involving unliquidated damages. As previously discussed, the determination of just compensation constitutes a judicial function, Spafford; Daniels, which a quasi-judicial administrative tribunal cannot constitutionally perform. La Rosa. While an administrative agency may be authorized to award "quantifiable damages," Laborers' Local 478, 541 So.2d at 1163, the calculation and award of non-liquidated damages resulting from a governmental taking of property exceeds the

realm of permissible quasi-judicial activity. Finally, as legislative history candidly reveals, the Act's presumptive values reflect approximately 40 percent of the amounts judicially determined to constitute just compensation in previous cases. Thus, the alternative claims procedure provided under Chapter **89-91** is neither fair, reasonable, nor constitutional.

Under Kluger, the Legislature cannot abolish an existing cause of action without providing a reasonable alternative "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." 402 So.2d at 4. As suggested by the preamble to Chapter **89-91** and its legislative findings and statement of intent, the Legislature has abolished Respondents' cause of action to protect the state treasury from lawful claims for compensation, which "may chill the legitimate exercise of the police power" by making its use "cost prohibitive." [2] If the constitutional guarantee of full compensation means anything, then the state cannot shield itself from paying full compensation for property destroyed during the Eradication

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[2] The State asserts that the Act abolishes Respondents' cause of action for inverse condemnation by 'divesting the circuit court of subject matter jurisdiction over claims arising under the Canker Eradication Program.' (State's petition, pp. 4-5) Article V, Section 5, of the Florida Constitution provides that "circuit courts shall have original jurisdiction not vested in the county courts . . . ." The Legislature has no authority to remove jurisdiction from the circuit court in favor of an administrative body.

Program simply by citing public necessity and a perceived need to lessen the taking's financial impact on the state. A constitutional right may not be restricted or abridged simply because the legislature deems it rational or expedient to do so. Smith v. Department of Insurance, 507 So.2d at 1089.

CONCLUSION

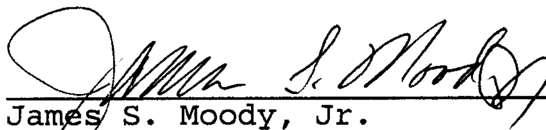
The trial court correctly declined to apply Chapter 89-91 to the lawsuits filed by grove owners Sweat and Janvrin, who do not fall within the class of claimants specifically described in the statute. The court also correctly determined that the Act could not be applied retrospectively to any of the Respondents to abrogate their vested rights to jury trial, increase their burdens of proof, or otherwise adversely affect their causes of actions which had accrued prior to the statute's enactment.

Chapter 89-91 reflects the Legislature's bold attempt to remove claims for just compensation from de novo judicial determination, transferring them to an administrative tribunal for resolution pursuant to a table of legislatively prescribed presumptive values. By its own admission, these presumptive values will result in awards which are approximately 40 percent of those determined in previous judicial proceedings. The challenged statute violates constitutional protections relating to separation of powers, access to courts, due process, just compensation, and establishment and administration of courts, and thus should be invalidated.

Accordingly, Respondents request the Court to deny the State's petition for writ of prohibition and to allow them to proceed with their pending lawsuits to obtain just

compensation in a court of law.

Respectfully submitted,



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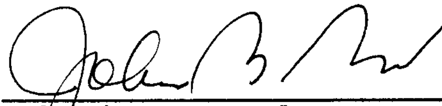

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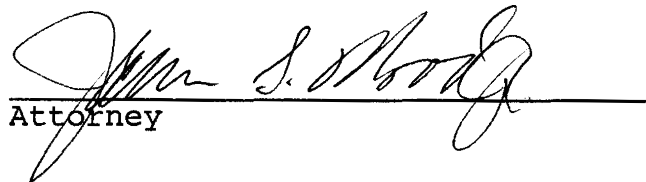
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing response of respondents has been furnished to the Honorable Robert H. Bonanno, Judge of the Thirteenth Judicial Circuit, 302 North Michigan Avenue, Plant City, Florida 33566, by hand delivery, and to David G. Guest, Esquire, and Ronald G. Stowers, Esquire, Assistant Attorneys General, 111-36 South Magnolia Drive, Tallahassee, Florida 32301, by regular U.S. mail, this 21 day of July, 1989.



Attorney