IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1291

BRIAN P. PATCHEN and BARBARA PATCHEN,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Respondent.

On Certified Question from the Third District Court of Appeal

---

AMICUS CURIAE BRIEF OF BROOKS TROPICALS, INC.

MALCOLM A. MISURACA
Resolution Law Group, P.C.
3717 Mt. Diablo Blvd., Suite 200

Lafayette, CA 94549
Telephone: (925) 284-0840
Facsimile: (925) 284-0870

CRAIG P. KALIL
Aballi, Milne, Kalil & Escagedo, P.A.
2250 SunTrust International Center
One Southeast Third Avenue
Miami, Florida 33131
Florida Bar No.: 607282
Telephone: (305) 373-6600
Facsimile: (305) 373-7929

JOHN G. CRABTREE
John G. Crabtree, P.A.
340 Crandon Boulevard, Suite 279
Key Biscayne, Florida 33149
Florida Bar No.: 886270
Telephone: (305) 423-4350
Facsimile: (305) 437-8118

ROY D. WASSON
Suite 450, Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
Florida Bar No.: 332070
Telephone: (305) 666-5053
Facsimile: (305) 666-0010

Counsel for Amicus Curiae, Brooks Tropicals, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

THIS COURT SHOULD RESPOND THAT THE CERTIFIED QUESTION IS FLAWED; THE DISTRICT COURT ERRONEOUSLY ESTOPPED THE PATCHENS FROM DEFENDING THE MERITS OF THE DEPARTMENT'S RULES BECAUSE THEY WERE NOT PARTIES TO THE PRIOR LITIGATION 3

CONCLUSION 6

CERTIFICATE OF SERVICE 8

CERTIFICATE OF COMPLIANCE 8

TABLE OF AUTHORITIES

Department of Agriculture and Consumer Services v. Varela,
732 So. 2d 1146 (Fla. 3d DCA 1999) 4, 6, 7

Department of Agriculture and Consumer Services v. Polk,
568 So. 2d 35 (Fla. 1990) .... passim

E.C. v. Katz, 731 So. 2d 1268 (Fla. 1999) 3, 6

Florida Dept. of Agriculture & Consumer Svcs. v. Haire,
2002 Fla. LEXIS 1483, 27 Fla. L. Weekly S683 (Fla. July 11, 2002) 4

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)....................................5, 6

Haire, et al. v. Florida Dept. of Agriculture & Consumer Svcs.,
17th Judicial Circuit Court Case No. 00-18394(08) 1, 5

In re Forfeiture of 1969 Piper Navajo,
592 So. 2d 233, 235 (Fla. 1992)...4

Joint Ventures, Inc. v. Department of Transportation,
563 So. 2d 622, 626 (Fla. 1990) 4

Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001) 4

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987) ... 5

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4

The Florida Bar v. Cosnow, 797 So. 2d 1255, 1258 (Fla. 2001) 3

INTRODUCTION

This case concerns an attempt by homeowners Brian and Barbara Patchen (collectively, the Patchens) to receive compensation for the value of their six healthy citrus trees, which were summarily destroyed by the Florida Department of Agriculture and Consumer Services (the Department) as part of the Department's Citrus Canker Eradication Program (the Eradication Program).

A. Statement of the Facts:

Brooks Tropicals, Inc., adopts the Statement of the Facts contained in the Amicus Brief of Broward County and Miami-Dade County.

B. Procedural History:

Brooks Tropicals, Inc. adopts the procedural history contained in the Petitioners' initial brief.

C. Statement of Interest:

Brooks Tropicals, Inc., is an intervening plaintiff in the case of *Haire, et al. v. Florida Department of Agriculture & Consumer Services*, 17th Judicial Circuit Court Case No. 00-18394(08), in which the constitutionality of the Eradication Program has been challenged. Brooks has been a commercial citrus grower in Florida for over 70 years. Brooks has had trees destroyed under the Eradication Program, and also faces the threat of further destruction. Brooks has a vested interest in ensuring that

decisions that may affect Brooks and other commercial citrus growers are made in cases where commercial growers' interests are properly represented so that adequate resources can be devoted to developing a proper record.

SUMMARY OF ARGUMENT

The doctrine of collateral estoppel governs whether the Patchens are bound by the former decision in *Polk*[1], concerning the 125-foot rule, or by the Department's later 1900-foot rule. In *Polk* the Court addressed the applicability of the 125-foot policy to Polk's nursery on a fact specific basis. That decision has no applicability to persons not parties to the case. The Third District Court of Appeal has misapplied *Polk* beyond its facts. This Court should reverse that error.

---

[1] *See Department of Agriculture and Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990).

ARGUMENT

THIS COURT SHOULD RESPOND THAT THE CERTIFIED QUESTION IS FLAWED; THE DISTRICT COURT ERRONEOUSLY ESTOPPED THE PATCHENS FROM DEFENDING THE MERITS OF THE DEPARTMENT'S RULES BECAUSE THEY WERE NOT PARTIES TO THE PRIOR LITIGATION

The district court's decision affirmed a summary judgment order based on a pure question of law, and is reviewed de novo. *The Florida Bar v. Cosnow*, 797 So. 2d 1255, 1258 (Fla. 2001) (citation omitted). This brief adopts the briefs of the Patchens and Broward County, et al, except in one central respect: it is exclusively the *principles* of collateral estoppel that govern whether the Patchens are bound by the former decision in *Polk* concerning the 125-foot rule, or by the Department's later 1900-foot rule. Applying those principles, neither the ruling in *Polk* nor the 1900-foot policy may be applied to the Patchens without the government's meeting its burden of proof in the Patchen case because there is a failure of mutuality of parties.

In the *Polk* case, the Court held that whether the 125-foot policy applied to Polk's nursery was a question of fact on which there was sufficient evidence to sustain the trial court's finding that Polk should not be paid for certain trees. So, *Polk* did *not* adopt the 125-foot policy as a matter of law. When a regulation or policy approaches a taking of private property, the Court applies strict scrutiny's searching inquiry into

whether the regulation is justified.[2] That inquiry should and does include an inquiry into the factual basis for scientific principles offered by government agencies for their taking of property.

The Third District relied on *Department of Agriculture and Consumer Services v. Varela*, 732 So. 2d 1146 (Fla. 3d DCA 1999), but *Varela* erroneously bound litigants to the ruling in *Polk*—a case in which they were not involved. *Varela*, 732 So. 2d at 1147. *Varela's* error is vastly extended here because the Patchens have now been bound by *Varela*—not, however, to the former125 feet rule at issue in *Polk*, but by the 1900 feet of the new rule, the scientific support for which the Patchens were never permitted to litigate.

The Patchens were, in fact, not prepared to affirmatively challenge the 1900-foot rule, and it was not their burden to do so. It was the Department's burden in "weighing of public and private interests" to produce evidence of the "true nature" and

---

[2]*Keshbro, Inc. v. City of Miami*, 801 So.2d 864 (Fla. 2001), citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which held that a governmental claim to abate nuisance-like activity may proceed without compensation for property destroyed only to the extent that a private or public nuisance may be abated at common law. See, also, *Joint Ventures, Inc. v. Department of Transportation,* 563 So.2d 622, 626 (Fla. 1990)(test of police power must precede physical taking).

Keshbro holds that it is the government's burden to prove that its regulation intrudes to the least extent compatible with abatement of the claimed nuisance, leaving all other aspects of ownership undisturbed. *Lucas* held that the government could not indulge in "artful harm-preventing characterizations" to meet this burden. *Lucas*, at 1025 n. 12.

the "genuine, substantial, and limited" basis for its taking their trees.[3] The Patchens had only backyard trees, which hardly justified the expense to litigate Dr. Gottwald's science. There is no record to test the old rule or the new one.

Brooks Tropicals and Broward County litigated the science behind the 1900-foot rule in the *Haire* case[4], which this Court recently declined to hear on pass-through jurisdiction in *Florida Dept. of Agriculture & Consumer Svcs. v. Haire,* 2002 Fla. LEXIS 1483, 27 Fla. L. Weekly S683 (Fla. July 11, 2002). Judge Fleet decided under the *Frye*[5] rule that the science and statistics in the Gottwald report, which gave rise to the 1900-foot rule, are so substantially flawed that there is no competent evidence on which the rule may be applied.[6]

By affirming the summary judgment against the Patchens on the ground that *Varela* and *Polk* compelled the conclusion that the tree owners here had no cause of action for destruction of their healthy trees located within 1900 feet of infected trees, the Third District implicitly applied the factual finding made in *Polk,* that the scientific

---

[3] *Keystone Bituminous Coal Ass'n. v. DeBenedictis,* 480 U.S. 485, 487, 491 n. 20, 493 (1987); see *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 235 (Fla. 1992)(forfeiture of property must be based on narrowly tailored means that will least infringe on property rights).

[4] *Haire v. Florida Dept. of Agriculture and Consumer Svcs.*, 17th Judicial Circuit Court Case No.00-18394(08).

[5] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[6] Order on Motion for Temporary Restraining Order, 17-18.

evidence offered by the Department supported the conclusion that the destruction of trees within the 125-foot radius did not constitute a "taking" of property without just compensation. The Patchens were estopped from contesting that factual finding in their own case, and precluded from putting the Department to its proof that the science underlying its distance rule met the requirements of *Frye*. The Patchens should not have been estopped to contest the scientific foundation for the Department's rule, because they were not parties in *Polk*.

The leading recent decision from this Court on the collateral estoppel doctrine is *E.C. v. Katz*, 731 So. 2d 1268, 1269 (Fla. 1999), in which the Court clearly held that "Florida has traditionally required that there be a mutuality of parties in order for the doctrine to apply." There being no mutuality of parties in the action below and those in *Polk* (or in *Varela*, for that matter), the collateral estoppel doctrine cannot apply and those prior cases do not support a summary judgment for the Department.

CONCLUSION

The Court should refuse to answer the certified question with a simple affirmative or negative response, and should instead respond that the question itself—and the *Varela* decision upon which it is based—both rest upon a fundamentally faulty premise. The certified question and *Varela* incorrectly overlook

basic collateral estoppel principles in assuming that either the 125-foot or 1900-foot policy applies to the Patchens, when neither does. This Court should disapprove of the Third District's decisions below and in *Varela*, and dismiss this proceeding as prematurely presented upon an inadequate record and implicit reliance on the collateral estoppel error in *Varela*.

Respectfully submitted,

____
ROY D. WASSON

MALCOLM A. MISURACA
Resolution Law Group, P.C.
3717 Mt. Diablo Blvd., Suite 200
Lafayette, CA 94549
Telephone: (925) 284-0840
Facsimile: (925) 284-0870

CRAIG P. KALIL
Aballi, Milne, Kalil & Escagedo, P.A.
2250 SunTrust International Center
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 373-6600
Facsimile: (305) 373-7929

JOHN G. CRABTREE
John G. Crabtree, P.A.
340 Crandon Boulevard, Suite 279
Key Biscayne, Florida 33149
Florida Bar No.: 886270
Telephone: (305) 423-4350
Facsimile: (305) 437-8118

ROY D. WASSON
Suite 450, Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
Florida Bar No.: 332070
Telephone: (305) 666-5053

Attorneys for Brooks Tropicals, Inc.

CERTIFICATE OF SERVICE

I hereby certify that true copies of this brief were served by mail on August 2, 2002 upon Robert C. Gilbert, Esq. 220 Alhambra Circle, Suite 400, Coral Gables, Florida 33134; Joseph H. Serota, Weiss Serota, Helfman, et al, 2665 South Bayshore Drive, Suite 420, Miami, FL 33133; Wesley R. Parsons, Esq., Adorno & Yoss, P.A., 2601 S. Bayshore Drive, Suite 1600, Miami Florida 33133 and to Andrew J. Meyers, Esq., Broward County Attorney, 115 South Andrews Avenue, Suite 423, Fort Lauderdale, Florida 33301.

____
ROY D. WASSON

CERTIFICATE OF COMPLIANCE

This brief was prepared in Times New Roman 14-point font.

____
ROY D. WASSON