IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1291
Lower Tribunal Case No. 3D01-1440

BRIAN P. PATCHEN and BARBARA PATCHEN,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Respondent.

On Appeal from the
Third District Court of Appeal

AMICUS BRIEF OF BROWARD COUNTY AND MIAMI-DADE COUNTY

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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.

Since 1984 on Florida's Gulf Coast, and since 1995 in southeast Florida, the Department has operated its Eradication Program. R:658.[1] In an attempt to eradicate the bacteria that causes citrus canker, the Department destroys canker-infected trees and all trees within a specified radius around each canker-infected tree. R:658-659. Uninfected trees within such radius are destroyed because the Department deems them to have been "exposed" to the citrus canker bacteria. R:659.

Prior to January 1, 2000, the Department deemed that all trees within a 125-foot radius around each infected tree were "exposed" and must be destroyed. R:659. Each 125-foot radius contained an area of approximately 1.13 acres. Effective January

[1] References to the record on appeal are indicated by "R:" followed by the page number(s) assigned by the clerk of the trial court. References to "PA:" are to the Petitioners' Appendix.

1, 2000, the Department expanded its "exposure" radius from 125 feet to 1,900 feet. R:659-660. This change increased the area of the Department's zone of destruction 230-fold. Now, instead of destroying 1.13 acres worth of citrus trees every time it finds an infected tree, the Department destroys more than 260 acres of citrus trees.[2]

The Patchens' home is located within 1,900 feet of a canker-infected tree. R:660. On October 31, 2000, the Department destroyed the Patchens six large, healthy, mature, fruit-bearing citrus trees. R:128-130, 660.

B. Procedural History.

Broward County and Miami-Dade County adopt the procedural history contained in the Petitioners' initial brief.

C. Statement of Interest.

Florida's two most populous counties, Broward County and Miami-Dade County, along with numerous municipal governments and residents of Broward, Miami-Dade and Palm Beach counties (collectively, the "Circuit Court Plaintiffs"), have filed suit against the Department, challenging the constitutionality of recent statutory amendments, affecting the Eradication Program, set forth in Chapter 2002-11,

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[2] The area of the radius was calculated by squaring the radius distance and multiplying the resulting product by Π. The acreage was calculated by dividing total square footage by 43,560.

Laws of Florida. *Haire, et al. v. Florida Dept. of Agriculture & Consumer Services*, 17th Judicial Circuit Case No. 00-18394(08). South Florida has borne the brunt of the Eradication Program, where hundreds of thousands of healthy citrus trees have already been destroyed and hundreds of thousands more are targeted for destruction.

The counties and municipal governments filed suit against the Department in an effort to enforce local tree canopy preservation ordinances, which would require the Department to mitigate tree canopy loss through replanting. The local government tree canopy preservation ordinances contain findings that preservation of tree canopy is essential to the physical health of county residents, and essential to prevent significant environmental degradation.

The non-governmental plaintiffs in *Haire*, private homeowners and a citrus grower, have, as relevant to *Patchen*, challenged the 2002 statutory amendments to the Eradication Program's enabling statute on due process grounds. One portion of the statutory amendments codified the 1,900-foot destruction radius used by the Department to destroy the Patchens' healthy citrus trees. Unlike the Patchens, the Circuit Court Plaintiffs' healthy citrus trees have not been destroyed. In an attempt to prevent such destruction, the Circuit Court Plaintiffs have challenged the substance of the 1,900-foot destruction radius on substantive due process grounds and have also asserted that the summary destruction of healthy trees violates due process by

amounting to an improper circumvention of constitutional eminent domain protections.[3]

After an evidentiary hearing which spanned three weeks and ended May 24, 2002, the trial court issued a preliminary injunction finding, among other things, that the Eradication Program and 1,900-foot destruction radius were not based on credible science or statistics. The trial court also found, based on the evidence presented, that the healthy citrus trees targeted for destruction had value. The trial court preliminarily enjoined the Department from further destroying healthy citrus trees, pending a final hearing on the merits. PA:27-57. The Department has appealed the preliminary injunction order, 4th DCA Case No. 4D02-2584.

The compensation issue is extremely important to the hundreds of thousands of southeast Florida residents who have lost healthy citrus trees as part of the Eradication Program. The compensation issue is also of critical importance to Broward and Miami-Dade counties' continued quest to protect the physical health of county residents, and county air and water quality, by preventing further unnecessary loss of tree canopy.

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[3] An injunction is appropriate when a statute circumvents Art. X, §6 because, as noted by this Court in *Joint Ventures, Inc. v. Dept. of Transportation*, an inverse condemnation remedy is not an adequate substitute for the owner's remedy under eminent domain. 563 So.2d 622, 627 (Fla. 1990).

SUMMARY OF ARGUMENT

The Third District Court of Appeal misinterpreted this Court's decision in *Polk*. *Polk* did not announce, as a matter of law, that all citrus trees deemed "exposed" by the Department are valueless. In *Polk*, this Court recognized that whether a taking results from the destruction of private property must be determined by the trial judge based on the specific facts presented. The trial judge in *Polk* found that no taking resulted from the destruction of trees within 125 feet of infected trees. Since this Court determined that the trial judge's finding was based on competent, substantial evidence, this Court affirmed.

The Patchens presented facts pursuant to which a trial judge could find that the destruction of their six healthy trees resulted in a compensable "taking." Unlike the nursery stock at issue in *Polk*, which was being grown for the express purpose of distribution to commercial groves, the Patchens' trees could not be found to present any imminent threat to citrus groves. Additionally, the Patchens' trees were destroyed pursuant to the Department's current "exposure" zone which is 230 times larger than as the "exposure" zone at the time of *Polk*. The trial court deemed these facts irrelevant due to its misinterpretation of *Polk*.

The Third District Court of Appeal, also based on a misreading of *Polk*, affirmed. The certified question should be answered in the negative and the decision of the Third District Court of Appeal should be reversed.

ARGUMENT

Standard of Review

The underlying decision, which affirmed a summary judgment, presents a question of law which is reviewed de novo. *The Florida Bar v. Cosnow*, 797 So.2d 1255, 1258 (Fla. 2001) (citation omitted).

POINT I

THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE SINCE NEITHER *POLK* NOR ANY OTHER DECISION OF THIS COURT PREVENTS A TRIAL JUDGE FROM DETERMINING THAT THE DESTRUCTION OF HEALTHY CITRUS TREES RESULTS IN A TAKING.

A. The Third District Court Of Appeal Erred When It Failed To Recognize That, Under *Polk*, Whether An Action Results In A Taking Must Be Determined By The Trial Court From The Evidence Presented.

The *Polk* Court did not hold that a taking cannot result when the Department destroys healthy trees it deems to have been "exposed" to the citrus canker bacteria. *Dept. of Agriculture & Consumer Services v. Polk*, 568 So.2d 35, 40, 43 (Fla. 1990). Rather, the *Polk* Court confirmed that the trial judge, based on the specific evidence presented, must decide whether a taking has occurred, and further confirmed that the trial judge's finding will not be disturbed on appeal if supported by competent, substantial evidence. *Id*. at 40.

The trial judge in *Polk* found that most of the nursery stock destroyed resulted in a taking. The trial judge further found, based on the evidence presented, that infected nursery stock, and nursery stock within a 125-foot "exposure" radius, had no marketable value and therefore no compensation was required for its destruction. *Id*. at 38. This Court in *Polk* merely affirmed the trial judge's finding after concluding it was based on sufficient evidence:

> We conclude, based upon a review of the record, that there was substantial competent evidence . . . to support the trial court's finding that Polk was entitled to compensation for all nursery stock destroyed except for trees exhibiting symptoms of canker and those located within 125 feet.

Id. at 40 (underline added).

The *Polk* Court stated that this Court has recognized on many occasions that a regulation or statute, even if a legitimate exercise of the police power, may result in a taking. *Id*. at 39 (citations omitted). The Court noted that the trial court correctly considered whether the trees in the nursery constituted a nuisance or imminent public danger. *Id*. Had the trial court found, based upon the evidence, that the entire nursery was a nuisance or imminent public danger, it would have been justified in determining that no taking occurred and, therefore, that no compensation was required. *Id*. at 39 n.2. The trial court made such finding only with regard to infected trees and trees

within a 125-feet radius of infected trees. *Id*. at 38. As for all other trees, the trial court found that a taking occurred, and that compensation must be paid. *Id*. at 40 n.4.

Four Justices on the *Polk* Court wrote separate concurring opinions.[4] Justice McDonald noted that, after the Department destroyed the trees at issue, Department scientists determined that canker may present less of a threat than first thought and may be successfully controlled by applying sprays. *Id*. at 46. However, Justice McDonald believed that, given information available to the Department at the time, given the speed with which canker can purportedly spread, and since the Department's action was not contested by the tree owner, no compensation should be required. *Id*. at 45.

Justice Barkett questioned the importance of distinguishing between a taking resulting from an exercise of police power and an exercise of eminent domain power, since neither the 5th Amendment to the U.S. Constitution nor Article X, §6(a) of the Florida Constitution qualify, in any way, the requirement to pay compensation for a taking of private property. *Id*. at 47-48. Thus, according to Justice Barkett, "the only relevant question is whether a 'taking' has occurred." *Id*. at 48. If there has been a

[4] Justice Kogan concurred in part and dissented in part.

taking, compensation must be paid regardless of whether it results from what is described as an exercise of police power or power of eminent domain. *Id*.

Justice Barkett also stated that the distinction between "eminent domain takings" and "police power takings" was of limited practical use. *Id*. This distinction depended on whether the action was considered to prevent a public harm or to confer a public benefit. *Id*. Justice Barkett stated that harm prevention and benefit conferment are simply two different ways of describing the identical act. *Id*.

Justice Grimes noted his belief, from review of the trial record, that the Department had not acted arbitrarily. *Id*. at 49. Justice Grimes, however, did not believe the lack of arbitrariness defeated the compensation requirement. Justice Grimes determined that the state should not be able to destroy one person's uncontaminated property in order to protect the economic interests of a larger group without the payment of just compensation.

The *Polk* Court did not determine, as a matter of law, that no compensation is required for the destruction of healthy trees within the Department's designated "exposure" zone. The Court only determined that the trial judge's fact-based delineation of the taking was supported by substantial, competent evidence. In that regard, the *Polk* decision is consistent with every other decision of this Court addressing the compensation required when the state destroys healthy citrus trees.

B. This Court Has Never Determined That No Compensation Is Required When The State Destroys Healthy Citrus Trees.

This Court first considered a case involving the destruction of healthy citrus trees in 1957. *Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957). The Court noted that the state's police power is broad when it acts to protect the public without destroying property. *Id*. at 4. But the Court stated that different rules apply when property is destroyed:

> [T]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation.

Id.

As in the instant case, the program at issue in *Corneal* required the destruction of healthy trees for the purpose of protecting other healthy trees. The *Corneal* Court noted that, even if it could be assumed that all healthy trees destroyed would, at some point in the future, have become infected and less productive, the fact remained that some of these healthy trees would be fully productive for a matter of years. *Id*. at 6. The Court also noted that these uninfected trees were not an immediate danger to neighboring trees. *Id*. The Court held, therefore, that compensation was required. *Id*. at 6 - 7.

The *Corneal* decision dealt with a citrus disease called "spreading decline," a disease which traveled very slowly. *Id*. at 2. Twenty-one years later, this Court made it clear that the *Corneal* rationale was equally applicable to citrus canker. *Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla. 1988). In *Mid-Florida Growers*, the Second District certified a question asking whether "the state, pursuant to its police power, has the constitutional authority to destroy healthy, but suspect citrus plants without compensation." *Id*. at 102. Because the trial court had determined, based on the evidence presented, that such destruction resulted in a taking, the Court answered the certified question in the negative. *Id*. at 102-105.

The trial court in *Mid-Florida Growers* found that the destruction of healthy trees allegedly "exposed" to citrus canker resulted in a taking. *Id*. at 102. The Second District affirmed, noting that whether a valid exercise of police power results in a taking must be decided on the facts of each case. *Id*. The district court determined that the trial court's finding of a taking was clearly supported by substantial, competent evidence. *Id*.

This Court affirmed the Second District decision, stating that destruction of private property, even if a valid exercise of the state's police power, may result in a taking. *Id*., *citing Albrecht v. State*, 444 So.2d 8 (Fla. 1984). The Court also cited

the U.S. Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), which stated that:

> the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

Id. at 103 (emphasis in original).

The *Mid-Florida Growers* Court stated its agreement with the lower court that the destruction of healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. *Id*. The Court expressly rejected the Department's claim that, because the trees destroyed were deemed by the Department to be "exposed" to infected trees, they were not healthy. *Id*. at 104. The Court stated that whether a taking occurred must be determined by the trial judge based on the facts of each case, and that the trial judge's finding will not be disturbed if supported by competent, substantial evidence. *Id*. The Court concluded by holding that full compensation is required when the state, pursuant to its police power, destroys healthy trees. *Id*. at 105.

The *Mid-Florida Growers* Court expressly approved the decision of the Second District. *Id*. at 102. *Dept. of Agriculture & Consumer Services v. Mid-*

Florida Growers, Inc., 505 So.2d 592 (Fla. 2nd DCA 1987). The district court had determined that:

> It is difficult to determine when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. No settled formula exists. Whether a valid exercise of the police power results in a taking must be decided on the facts of each case.

Id. at 594. The district court also cited to the U.S. Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104 (1978). In *Penn Central*, the U.S. Supreme Court stated that the compensation requirement "is designed to bar the government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Id*. at 123, *quoting Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). The *Penn Central* Court also acknowledged that there is no "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionally concentrated on a few persons." *Id*. at 124 (citations omitted).

The Second District in *Mid-Florida Growers* expressly recognized the difficulties of confronting citrus canker and in determining when canker is present in apparently healthy trees. 505 So.2d at 595. However, the court affirmed the trial court, noting that because the destruction of healthy trees benefitted all Floridians, the

cost is properly spread among the many rather than the few who purchased "exposed" plant materials. *Id*. at 595-96.

C. The Third District Misinterpreted *Polk* And *Mid-Florida Growers* In Reaching Its Decisions In *Varela* And *Patchen*.

Polk and *Mid-Florida Growers* dealt with the issue of marketable value of commercial citrus nursery stock grown for sale to citrus groves, an issue factually distinct from whether the destruction of healthy, mature residential citrus trees results in a taking. Through a series of case decisions, the Third District improperly homogenized the issues presented by the Patchens with the vastly different issues presented in *Mid-Florida Growers* and *Polk*.

The first citrus canker case before the Third District Court of Appeal, and the first case anywhere in the state seeking inverse condemnation damages for the destruction of healthy residential citrus trees, was *Dept. of Agriculture & Consumer Services v. Varela*, 732 So.2d 1146 (Fla. 3rd DCA 1999). In *Varela*, the trial court certified a class of plaintiffs seeking compensation for the destruction of their healthy trees which were destroyed solely because they were located within 125 feet of an infected tree and therefore deemed by the Department to be "exposed" to citrus canker. *Id*. at 1147. The Third District reversed the trial court's class certification

order, holding that the plaintiffs had no cause of action since, under its interpretation of *Polk*, trees within 125 feet of infected trees have no marketable value. *Id*.

The Third District plainly misinterpreted this Court's holdings in *Polk* and *Mid-Florida Growers*. In both cases, the trial courts determined whether there was a taking based on a review of the evidence. In *Mid-Florida Growers*, the trial court found that the destruction of all trees except for infected trees resulted in a taking. In *Polk*, the trial court found that neither the destruction of infected trees nor the destruction of trees within a 125-foot radius resulted in a taking. In each case, this Court affirmed because the trial court's finding was based on substantial, competent evidence.

The *Varela* Court sent a message to the Department that it could, as a matter of law, destroy some measure of healthy citrus trees without being required to pay compensation. Emboldened by this message, the Department, within months of the *Varela* decision, expanded its "exposure" zone from a 125-foot radius to a 1,900-foot radius, a 230-fold increase in the area within the zone of destruction. *See Sapp Farms, Inc. v. Florida Dept. of Agriculture & Consumer Services*, 761 So.2d 347, 348 (Fla. 3rd DCA 2000).[5]

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[5] *Sapp Farms* addressed alleged technical deficiencies in the immediate final order used by the Department to notify Sapp that the Department would be destroying all trees within a 1,900-foot radius of an infected tree. *Sapp Farms* did not address the issue of compensation or any of the due process issues raised in the

Shortly after it decided *Varela* and *Sapp Farms*, the Third District considered a challenge brought by homeowners seeking review of an immediate final order, issued by the Department, notifying the homeowners that their healthy citrus trees, which were within 1,900 feet of an infected tree, would be destroyed. *Markus v. Florida Dept. of Agriculture & Consumer Services*, 785 So.2d 595 (Fla. 3rd DCA 2001). The healthy trees were destroyed prior to the time the appeal was decided, thereby mooting the issue before the district court. *Id*. at 596. The Third District expressed its frustration over being unable to provide a full remedy,[6] stating:

> Property owners as well as judicial tribunals are struggling with the issue of how and why the Department of Agriculture embarked on its dogged obliteration of the healthy back (or front) yard citrus tree. The frustrations of challenging this policy, either in a Chapter 120 proceeding or before this court, are staggering. Both infected and condemned trees are removed and ground into dust before any meaningful action can be taken by the property owner. The 'final agency order' is nothing but a "Dear Resident"

Broward County circuit court matter referenced above.

[6] The court could not provide a full remedy for two reasons. First, as stated above, the healthy trees were destroyed while the appeal was pending, thus mooting the challenge which sought to quash the immediate final order. Second, under existing case law, review of immediate final orders, which are commonly used as administrative cease and desist orders, is limited to whether the orders, on their face, recite with particularity the facts underlying the agency's finding that there exists an immediate danger to the public healthy, safety or welfare. *E.g. Denney v. Conner*, 462 So.2d 534, 535-36 (Fla. 1st DCA 1985). The reviewing court does not go beyond the face of the order.

> form from the Department of Agriculture. A 'record on appeal' is an oxymoron. There is no record. Hence there is no meaningful appeal. We find that situation unacceptable as a matter of law, policy, and principle, yet must affirm.

Id.

Although stopping the destruction of the healthy trees exceeded the scope of immediate final order review, the Third District noted that homeowners whose healthy citrus trees were destroyed had at least one remedy: "Although small consolation to the owners, this decision is without prejudice to bring an action for inverse condemnation . . .." *Id*. Consistent with this announcement, the Patchens brought an inverse condemnation action when their healthy trees were destroyed.

In *Patchen*, the trial court and Third District acknowledged that the Patchens' six destroyed trees were healthy, mature and fruit-laden. *Patchen v. Florida Dept. of Agriculture & Consumer Services*, 2002 WL 341593 at *1 (Fla. 3d DCA 2002). However, the Third District stated that its "suggestion in *Markus* [that homeowners could pursue compensation in an inverse condemnation action] was well-intentioned but perhaps ill-advised." *Id*. The Third District held that, "[u]nder the current state of the law, the [Department] need not compensate the owners for the destruction of those trees." *Id*. Citing to its *Varela* decision, the Third District stated its understanding that this Court's decision in *Polk* held that healthy trees within 125 feet

of an infected three, which were then deemed "exposed" by the Department, had no "marketable value," and that no compensation was therefore due as a result of their destruction. *Id*.

The Third District next addressed the Department's 230-fold increase in the "exposure" zone which followed the *Varela* decision. The Third District analogized the destruction of healthy trees within any radius of an infected tree specified by the Department to the destruction of diseased cattle. *Id*. Since, as recognized in *Polk*, diseased cattle are incapable of any lawful use, are of no value and are a source of public danger, no compensation is required for their destruction. Since the destruction of healthy residential citrus trees was, according to the Third District, comparable to the destruction of diseased cattle, the Third District found that the Patchens were not entitled to any compensation, but certified the issue to this Court. *Id*. at *1-2.

In *Varela*, the Third District misinterpreted *Polk*. In *Patchen*, the Third District compounded that error by assuming that mature, healthy, fruit-laden citrus trees, whether within the Department's present 260-acre zone of destruction or within whatever larger zone of destruction the Department may divine in the future, are "incapable of any lawful use" and are a "source of public danger." The *Patchen* court never explained how healthy, benign backyard trees endanger the public. Nor did it explain why the consumption of fruit grown in one's backyard, or the enjoyment of

the aesthetic pleasures of a mature, fruit-laden, healthy citrus tree in one's backyard, are not lawful uses. Common sense dictates that healthy backyard citrus trees are capable of many lawful uses and in no way endanger the public. The fallacy in the Third District's analogy to diseased cattle is self-evident.

In focusing on an inappropriate analogy, the *Patchen* court failed to consider the true reason the Department seeks to destroy healthy trees within a given radius of infected trees. Simply stated, the Department believes that canker spreads from infected trees to nearby trees. Canker bacteria can, according to the Department, be spread by causes including weather events and human movement. *Florida Dept. of Agriculture & Consumer Services v. Pompano Beach*, 792 So.2d 539, 542 (Fla. 4th DCA 2001). Canker bacteria can spread to any citrus tree anywhere, and all citrus trees, whether in backyards, groves or nurseries, are potential hosts of the disease. Despite the unlimited potential for spread, the Department concluded, based on a "scientific" study which the Circuit Court Plaintiffs preliminarily demonstrated lacked credibility, that most spread occurs within 1,900 feet of an infected tree. *Id*.

As recognized by the Second District in *Mid-Florida Growers*, 505 So.2d at 595, it may be difficult to timely detect new infections. A newly-infected tree, before it is detected, may spread canker to another tree. Since the Department claims it cannot timely cull the infected from the healthy, the Department believes it must

destroy all trees, healthy or otherwise, within each 1,900-foot radius to stop canker spread. The Department is not, therefore, destroying all trees within each 1,900-foot radius because they are or will become infected. It is destroying them because some of those trees may become infected, but the Department claims it will not be able to detect the infection in time to stop further spread.

The propriety of the Department's 1,900-foot destruction radius is not at issue here, as it was properly not raised by the Patchens who merely seek compensation. However, the Third District's analogy of all trees within each 1,900-foot radius to diseased cattle is clearly off base.

The Third District's misreading of *Polk* is also aptly demonstrated by the wording of the certified question. Contrary to the wording of the certified question, the *Polk* Court did not hold that the Department's destruction of healthy commercial citrus trees within 125 feet of canker infected trees did not require compensation. The *Polk* Court determined only that the *Polk* trial court's finding that destroying trees within 125-feet did not result in a taking was supported by substantial, competent evidence. The *Polk* Court unequivocally stated that a trial judge must determine whether a taking has occurred based on the actual evidence presented, and that the trial court's finding will not be disturbed if based on sufficient evidence. The *Polk* Court

did not establish any safe harbor permitting destruction without compensation.[7] By failing to consider all relevant evidence, and failing to make a factual determination as to whether there was a taking, the *Patchen* trial court denied the Patchens due process. *Southern Wood Industries, Inc. v. Florida Carolina Lumber Co.*, 84 So.2d 589, 590 (Fla. 1956); *Zerillo v. Snapper Power Eqpt.*, 562 So.2d 819, 820 (Fla. 4th DCA 1990). The Third District erred in affirming that due process denial.

[7] Moreover, as *Polk* and *Patchen* involve neither the same parties nor the same issues, neither the doctrine of res judicata nor the doctrine of collateral estoppel apply. *Seaboard Coast Line Railroad Co. v. Industrial Contracting Co.*, 260 So.2d 860 (Fla. 1972).

POINT II

THE FACTS PRESENTED BY *PATCHEN*, WHICH VARY CONSIDERABLY FROM THE FACTS PRESENTED IN *POLK*, WOULD SUPPORT A TRIAL COURT FINDING THAT A TAKING RESULTS FROM DESTRUCTION OF HEALTHY, RESIDENTIAL CITRUS TREES.

Polk did not address the destruction of healthy, mature, residential citrus trees permanently anchored to the ground. *Polk* dealt with commercial nursery stock which would be "sold to growers" across the state. *Polk*, 568 So.2d at 37. The trial court did not find that Polk's nursery stock within a 125-foot radius had no value; it found that such stock had no marketable value and, therefore, no taking occurred.[8] *Id*. at 38.

The trial court may have concluded that, because canker infection can be difficult to detect, and because of the close proximity of this nursery stock to canker bacteria, there would be no market for this nursery stock. Growers may not purchase "suspect" nursery stock which, if infected, could cause the destruction of the grower's other mature, producing trees. Because this "suspect" nursery stock would be distributed to many groves across the state, and because this nursery stock could

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[8] Marketable value is merely one measure of value, but not, by any means, the exclusive measure. A trial court is required to make "a practical attempt to make the owner whole" by using the measure of value appropriate to each particular case to ensure compliance with the constitutional compensation requirement. *Jacksonville Expressway Auth. v. Henry G. DuPree Co.*, 108 So.2d 289, 292 (Fla. 1959).

contain latent canker infections, the trial court could properly determine that the nursery stock constituted an imminent public danger. *Id*. at 39.

The issue of marketable value is irrelevant when considering the value of residential trees and trees in public parks. These trees are part of the realty, permanently rooted to the ground. These trees are not marketed. The potential to imminently spread canker statewide simply does not exist. Nor, therefore, does any imminent public danger.

The Patchens' trees were located counties away from the prime commercial citrus growing regions of central Florida. Even if the Patchens' trees contained some latent canker infection, there would be no imminent risk of that infection spreading to any growing region. In contrast, any latently infected nursery stock in *Polk* would be physically transported into groves as a matter of certainty, since that nursery stock was being grown for exactly that purpose.

Obviously, there is also a big difference between a 125-foot radius and a 1,900-foot radius. A 1,900-foot radius contains 230 times more area than does a 125-foot radius. The Third District and *Patchen* trial court failed to consider this huge factual distinction.

One of the factors courts consider in determining whether there has been a taking is whether the destruction of private property confers a public benefit or

prevents a public harm. *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla. 1981). The *Patchen* trial court and the Third District failed to consider that canker infection presents, at most, an economic threat, not any threat to public health or safety, a factor highly relevant to the taking issue. *Conner v. Reed Bros., Inc.*, 567 So.2d 515, 519 (Fla. 2nd DCA 1990) (when dealing with canker, there is an "absence of any risk to public health or safety").

Another factor courts should consider in determining whether a taking has occurred, but was not considered in *Patchen* is whether, because of the nature of the interests at stake, the damage suffered by the private property owner should equitably be borne solely by that owner or should be shared by all taxpayers. As this Court stated in *Mid-Florida Growers*:

> Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery.

505 So.2d at 595-96.[9] In *Mid-Florida Growers*, this Court recognized that it would be inequitable to require even commercial nurseries to bear an expense to protect a

[9] Broward County, Miami-Dade County and the other Circuit Court Plaintiffs have challenged the materiality of the threat presented by citrus canker.

segment of the economy upon which the nurseries themselves depend for their future livelihood. *Id*. at 595. Certainly, private residents such as the Patchens, who are less directly benefitted by the continued vitality of the citrus industry, who have no crop insurance and did not purchase infected trees, are no less equitably positioned than are citrus nurseries.

It must also be recognized that the term "exposed" is not synonymous with the term "infected." In a medical or biological sense, "exposed" means "to make liable to or accessible to something ([such] as a disease or environmental conditions) that may have a detrimental effect." *Merriam Webster Online Medical Dictionary* (2002). Thus, exposure creates only a risk of infection. This distinction may be of no practical difference when the exposed item is fungible nursery stock not marketable to risk-averse groves statewide. But the distinction is of critical importance when dealing with mature, vibrant residential trees which not only produce fruit but are often integral parts of backyards and often of great sentimental importance.

"Exposed" nursery stock is arguably of such little value, and the risk of statewide canker spread from such stock sufficiently great, that a finding of no taking would be justified. But "exposed" grove trees retain all of their value. As this Court recognized in *Corneal*, even mature, productive grove trees which become infected at some point in the future will be fully productive for years. *Corneal*, 95 So.2d at 6.

Nor are trees, prior to the time they become infected, an "immediate menace to trees in [a] neighboring grove." *Id*.

Alleged exposure of residential trees, which are not used commercially, has no impact on value. At most, actual infection of residential trees merely impacts, and does not destroy, value. The trees would still produce fruit, although some of it may be blemished, and would still possess other valuable attributes. Thus, facts presented in *Patchen* are far different than the facts presented to the trial court in *Polk*.

POINT III

THIS COURT SHOULD ADOPT THE SIMPLIFIED APPROACH ARTICULATED BY JUSTICE BARKETT AND JUSTICE GRIMES IN THEIR CONCURRING OPINIONS IN *POLK*.

As Justice Barkett recognized in her concurring opinion in *Polk*, neither the 5th Amendment to the U.S. Constitution nor Article X, section 6 of the Florida Constitution, condition the compensation requirement on the type of taking at issue. *Polk*, 568 So.2d at 48. The unqualified nature of the compensation mandate was recently considered by this Court:

> The Florida Constitution guarantees that '[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . . [U]nder the constitution, every person holding an interest in private property is entitled to reasonable compensation in the event the property is taken.

Palm Beach County v. Cove Club Investors Ltd., 734 So.2d 379, 382 (Fla. 1999) (citations omitted).

This Court has also consistently held that a valid exercise of the police power may result in a taking, *Mid-Florida Growers,* 521 So.2d at 103 (citation omitted), and that the prohibition against the taking of private property without compensation is not limited to takings under express exercises of eminent domain power. *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959) (citations omitted.) Justice Barkett also recognized that a specific action could be viewed either as preventing a public harm or as providing a public benefit and, therefore, such distinction is of limited practical use. *Polk*, 568 So.2d at 48.

The Department is attempting to eradicate citrus canker solely for economic reasons. As Justice Grimes stated in his concurring opinion in *Polk*, the state is destroying uncontaminated private property to protect the economic interests of a larger group. *Id*. at 49. The Florida Constitution grants all natural persons the fundamental right to possess and protect property. Art. I, §2, Fla. Const. At a minimum, Floridians should not be dispossessed of their benign, valuable property unless it would serve a public purpose by creating a demonstrable, material net public benefit. To ensure that state confiscation of private property produces a material net

public benefit, the decision-maker must consider all costs that would result from the decision to destroy.

One of those costs is the value of destroyed healthy trees. While the value of canker-infected backyard trees can be debated, it cannot be debated that healthy trees have value. Any holding by this Court that, as a matter of law, all "exposed" trees, as determined by the Department, are without value, would result in two highly detrimental impacts. First, it would lead to an inefficient and unnecessary level of destruction. Second, and ultimately more damaging, it would undermine fundamental pillars of our constitutional democracy.

A. Inefficient and Unnecessary Level of Destruction.

It cannot be overlooked that the Department dramatically increased its defined "exposure" zone shortly after it learned in *Varela* that it would not have to pay compensation for its destruction of residential trees it deemed to be "exposed." The concept of exposure is amorphous. Exposure can be random and unpredictable. According to the Department, exposure can result from movement of the bacteria by either weather or man. *Pompano Beach*, 792 So.2d at 542. Because human travel is not limited by the same principles of physics as is weather-borne spread, humans carrying contaminated lawn equipment, contaminated plant materials or bacteria on their clothes could "expose" trees an unlimited distance away from the infected tree

which was the source of the bacteria. Because of unlimited spread potential, "exposure" can be defined very broadly. If the concept of exposure is the primary factor separating the compensable from the valueless, a unilateral declaration from the Department could potentially render valueless every citrus tree in the state. PA:105.

While unduly large exposure zones may ultimately be found arbitrary, or based on specious science or statistics,[10] the Department's use of virtually unchallengeable summary final orders to destroy trees, as fully described by the Third District in *Markus*, *infra* at 16-17, will permit mass destruction prior to resolution of the substantive due process issues. That destruction can never be undone. Unlike fungible nursery stock, there is no replacement market for 25-year old, 20-foot tall, healthy, fruit-laden, rooted citrus trees. Aside from the violation of the fundamental constitutional right to possess property, the Department will have imposed potentially staggering liability on the state's taxpayers.

As stated above, new canker infections can be difficult to detect. The more frequently and thoroughly the Department inspects trees, the more quickly it will detect canker spread and the more quickly it can remove infected trees, thereby minimizing

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[10] In their preliminary injunction hearing, the Circuit Court Plaintiffs demonstrated a substantial likelihood that they will be able to establish, during the permanent injunction hearing, that the "science" and "statistics" underlying the Department's present 1,900-foot destruction radius are invalid.

further spread.[11] But frequent inspections are expensive. Inspection costs can be minimized by clear-cutting all citrus, thereby negating the need for future inspections. Unless the Department must account for the damage to homeowners resulting from destruction of healthy trees, the Department will under-inspect and over-destroy, an unnecessary result violative of homeowners' constitutional right to possess property. Art. I, §2, Fla. Const. This single-minded reliance on mass destruction may also prevent the Department from attempting to find alternative solutions that may prove necessary if canker is eventually recognized as having become endemic to Florida's commercial groves.

The requirement that legal decision-makers consider all costs resulting from their decisions is not new. More than forty years ago, Dr. Ronald H. Coase, 1991 Nobel Laureate in Economics, helped to usher in the era of law and economics in his seminal article. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960). The Coase Theorem recognizes that, to ensure a proper decision, the decision-maker must

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[11] The only caveats are that the Department's inspection workers must properly decontaminate so they themselves are not a source of canker spread, and the destruction of infected trees must be done in a manner the does not contribute to the spread. Unfortunately, the Department's workers and method of destruction presently contribute to canker spread. PA:55.

"internalize all externalities" or, in other words, must consider all actual costs of the decision.[12]

If the decision-maker is forced to consider all costs, including the clear damage resulting from the destruction of healthy, mature residential citrus trees, a more efficient decision will result. Presently, as recognized by the Fourth District, the Department creates a 1,900-foot buffer zone around each infected tree it finds. *Pompano Beach*, 792 So.2d at 542. If the creation of buffer zones is an appropriate way to prevent canker spread, and canker eradication is being attempted to benefit commercial groves, forcing the Department to consider all costs may result in a determination that it would be more efficient to create buffer zones immediately outside the prime commercial growing regions instead of around each tree that may be counties away. This determination may offer maximum protection to our citrus industry with minimum destruction of healthy residential citrus trees. This decision will never be reached if the Department is granted free reign to define "exposure" as broadly as it wishes, and is also relieved of any obligation to compensate the owners of healthy but allegedly exposed citrus trees.

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[12] While the Coase Theorem does not allocate the costs among the parties, that allocation would be accomplished through the constitutional prohibition of uncompensated takings, as defined by this Court.

A proper buffer zone concept is aptly demonstrated by *Miller v. Schoene*, a 1928 U.S. Supreme Court case that the Department has relied upon to support its argument that no compensation is required. 276 U.S. 272 (1928). In *Miller*, a Virginia statute required the destruction of cedar trees infected with "cedar rust," a condition not threatening to the cedar trees but devastating to nearby apple orchards. *Id*. at 280. The destruction of infected cedar trees was limited to a radius surrounding each apple orchard, to create a buffer zone around the orchards. *Id*. The U.S. Supreme Court held that no compensation was due to the owners of the infected cedar trees which were in close proximity to orchards. *Id*. at 278.[13]

Healthy residential trees far away from the prime commercial growing regions, which present no imminent threat to Florida's groves and economy, will be clear-cut by a Department encouraged by the *Varela* and *Patchen* holdings. If forced to "internalize the externalities," to consider all costs of its destruction, the Department will destroy no more trees than is absolutely necessary, which may be accomplished instead by creating buffer zones around the commercial growing regions. Efficient decisions can be made only if the decision-maker considers all costs of each option. All true costs will be considered only if this Court reverses *Patchen*.

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[13] The Court noted, however, that the tree owner was permitted to keep the cedar wood, which the Court noted was a valuable commodity. *Id*. at 279.

B. Undermining Fundamental Pillars of our Constitutional Democracy.

Forty-five years ago, this Court spoke to the dangers of permitting destruction of benign property without requiring compensation:

> We have found no case -- and none has been cited -- holding that a healthy plant or animal, not *imminently* dangerous, may be destroyed without compensation to the owner in order to protect a neighbor's plant or animal of the same specie. And, indeed, we would not be inclined to follow such a decision, had one been made. . . . [W]e hope we never become insensitive to the clear and indefeasible property rights of the people guaranteed by our state and federal organic law, nor forgetful of the principle of universal law that the right to own property is an indispensable attribute of any so-called 'free government' and that all other rights become worthless if the government possesses an untrammeled power over the property of its citizens.

Corneal, 95 So.2d 1 at 6 (emphasis in original). As the *Corneal* Court so eloquently stated, the right to own property, and the right to receive compensation when state destruction of that property is necessary, are pillars of our constitutional democracy.

The state and federal constitutions afford two safeguards to protect property rights. First, due process prevents destruction of property as a result of unreasonable exercises of the police power. Second, even if destruction would not deny substantive due process, the state "acting within its lawful power to regulate property is [still]

limited by the depth of its purse." *Dept. of Community Affairs v. Moorman*, 664 So.2d 930, 933 (Fla. 1995).

The Department argued, and the Third District in essence agreed, that the alleged citrus canker emergency overrides the constitutional right to compensation. This Court recently cited with approval the words of an eminent domain scholar demonstrating that the compensation requirement cannot be vitiated based on claims of expediency:

> [T]he constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. . . . If one must make a choice between the government's convenience and a citizen's constitutional rights, the conclusion should not be much in doubt.

Cove Club Investors, 734 So.2d at 389 (citation omitted).

Broward County and Miami-Dade County believe the Department's mass destruction of healthy, residential citrus trees denies substantive due process. That issue may be before this Court in the near future. For now, it is imperative that this Court protect crucial pillars of our "free government," to prevent all of our other rights from becoming "worthless." This can be done only by ensuring that the Department acts within the "depth of its purse" and not pursuant to the free reign it was granted by the Third District's misinterpretation of *Polk*.

CONCLUSION

The Third District's decision in *Patchen* misinterpreted this Court's decision in *Polk*. This Court should answer the certified question in the negative, reverse the Third District's decision and direct the Third District to instruct the trial court that it must determine whether a taking has occurred based upon the specific facts presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by overnight mail on July 12, 2002 to Robert C. Gilbert, Esquire, 220 Alhambra Circle, Suite 400, Coral Gables, Florida 33134 and to Wesley R. Parsons, Esquire, Adorno & Yoss, P.A., 2601 S. Bayshore Drive, Suite 1600, Miami, Florida 33133.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief is typed in Times New Roman 14-point font.

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ANDREW J. MEYERS