IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC02-1291

_____

BRIAN P. PATCHEN and
BARBARA G. PATCHEN,

Petitioners,

vs.

STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Respondent.
_____/

_____

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

_____

ANSWER BRIEF

_____

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TABLE OF CONTENTS

Page

Adorno & Yoss, P.A.
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TABLE OF AUTHORITIES

Cases

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Statutes

Other Authorities

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STATEMENT OF THE CASE AND FACTS

The Case

Under established Florida law, a citrus tree that has been infected by or exposed to citrus canker poses an immediate public threat and a nuisance. It has no value in law. As with any public nuisance, the Department need not compensate owners for its removal.

Petitioners, Brian and Barbara Patchen (the "Patchens"), argue that the question certified by the Third District Court of Appeal should be answered in the negative and suggest that their case be remanded and addressed on its facts. However, the Patchens have no greater right to compensation than any other tree owner whose exposed and infected trees have been destroyed by the Department. The Patchens contend that their damages cannot be measured by marketable value because they did not intend to sell their trees commercially, but disregard the threat to Florida citrus, Florida residents, and other homeowners' trees that have not yet faced canker's onslaught. The Patchens' premise is faulty because their intended use for the trees is irrelevant to citrus canker, which passes indiscriminately from tree to tree. The Third District correctly applied *Polk v. Dep't of Agriculture*, 568 So. 2d 35 (Fla. 1990), when it determined that a homeowner may not recover inverse condemnation compensation when the Department removes a canker-exposed citrus tree.

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On November 8, 2000, the Patchens sued the Department for inverse condemnation based upon the Department's removal of their trees, which stood within 1900 feet of trees infected with Asian strain citrus canker (R1-2). The Department moved for summary final judgment based on with uncontroverted evidence reflecting that the Patchens' trees were exposed to citrus canker. The trial judge entered summary final judgment against the Patchens, which they appealed to the Third District (R4-657-62). The Third District affirmed, confirming that, pursuant to *Polk* and *Dep't of Agriculture v. Varela*, 732 So. 2d 1146 (3d DCA), *review denied*, 744 So. 2d 459 (Fla. 1999), the Department is not liable for inverse condemnation damages for removing trees exposed to citrus canker (R4-669). On motion filed by the Patchens, the Third District certified the following question as one of great public importance:

> Does the Florida Supreme Court's decision in *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990), which held that the Department's destruction of healthy commercial citrus nursery stock within 125 feet of trees infected with citrus canker did not compel state reimbursement, also apply to the Department's destruction of uninfected, healthy noncommercial, residential citrus trees within 1900 feet of trees infected with citrus canker?

Dep't of Agriculture v. Patchen, 817 So. 2d 854, 855-56 (Fla. 3d DCA 2002) (R4-669). As the Patchens note, the Fourth District Court of Appeal is currently evaluating Broward Circuit Judge Leonard L. Fleet's certification of a class of plaintiffs seeking

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inverse condemnation compensation for the Department's removal of exposed trees. *Dep't of Agriculture v. Pompano Beach*, Case No. 4D02-672 (Fla. 4th DCA filed Feb. 12, 2002). Resolution of the certified question in this Court will likely govern the certification appeal pending before the Fourth District.

The Department has removed about 380,000 exposed residential trees in Florida during the current citrus canker outbreak.

The Facts

The Patchens focus upon the Department's conduct in executing the Immediate Final Order ("IFO") and the manner in which the Department removed their canker-exposed trees (Initial Brief at 5-11, 21, 28-33). The Patchens contend that they never received an IFO and that the Department did not provide sufficient notice of its intent to remove the trees (Initial Brief at 11). Such so-called disputed facts are irrelevant to an inverse condemnation claim and to the certified question, were not at issue before the trial court or the Third District, and are not at issue here.

Conversely, the undisputed facts presented to the trial court support the Third District's decision. Citrus canker is a bacteria affecting citrus fruit. Although it is not harmful to humans or animals, it is very harmful to citrus plants (R4-657). It causes premature fruit drop, may blemish the fruit and make it unmarketable as fresh fruit, and may cause Florida citrus to be quarantined by the federal government, which would

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prevent export to other citrus-producing states and countries (R4-657). Unlike some other plant pests the Department has faced, citrus canker spreads rapidly, and is chiefly transmitted by wind-blown rain, but sometimes by other means, including man (R4-657).

In 1995, Asian strain citrus canker was discovered in South Florida (R4-658). Pursuant to Fla. Stat. § 581.031(6), the Florida Commissioner of Agriculture declared citrus canker to be a plant pest and nuisance, declared an agricultural emergency, enacted an emergency rule, Fla. Admin. Code R. 5B-58.001 (R4-658), and established the Citrus Canker Eradication Program. The emergency rue rule defined a quarantine area, specified procedures for eradication of citrus canker, and prohibited the planting or movement of citrus, fruit, or trees without the Department's permission (R4-658).

Based on scientific evidence then available, the Department originally implemented the Citrus Canker Eradication Program by identifying two types of trees: those infected with canker and those exposed to canker because they stood within 125 feet of infected trees (R4-658). *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 541-42 (Fla. 4th DCA 2001). "Infected" trees harbored the citrus canker bacteria and showed visible symptoms, while "exposed" trees likely harbored the bacteria due to their proximity to infected trees, but did not yet exhibit visible symptoms. Fla. Stat. § 581.184(1) (2001). Even before removing trees within the 125-foot radius, the

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Department had briefly attempted to eradicate canker by "buck-horning" (severely pruning) infected and exposed trees (R4-658-59).

Unfortunately, the 125-foot removal radius did not work, and canker continued to spread. Based on scientific studies conducted in the last few years, the Department recognized that the radius of exposure should be increased to 1900 feet in order to eradicate canker. *Pompano Beach*, 792 So. 2d at 542-43. Because citrus canker is generally spread by wind-blown rain, all citrus trees within the 1900-foot radius will eventually harbor the bacteria through the natural spread of the disease (R4-659).

The Citrus Canker Eradication Program has three times been delayed by injunctions entered by South Florida circuit court judges, two of which were reversed and one of which is still pending in the Fourth District. *Pompano Beach*, 792 So. 2d 539 (injunction pending from Nov. 7, 2000 until July 30, 2001); *Dep't of Agriculture v. Miami-Dade County*, 790 So. 2d 555 (Fla. 3d DCA 2001) (injunction pending from April 18, 2001 until July 20, 2001); *Dep't of Agriculture v. Pompano Beach*, Case No. 4D02-2584 (Fla. 4th DCA filed June 21, 2002) (injunction entered May 24, 2002). Due to these delays, citrus canker has continued to spread north. Only recently, canker was identified in Orange, Brevard, and Lee counties.

In the Citrus Canker Eradication Program, the Department identified infected citrus trees and those trees within a 1900-foot radius of the infected trees. To identify

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infected trees, Department-trained pathologists (also known as diagnosticians) examined citrus trees in the field for visible signs of infection (R1-62).[1] Once an infected tree was discovered, the Department used the Geographic Information System computer program to draw a 1900-foot radius around the infected tree. All trees within that radius were exposed to citrus canker (R1-62). Both infected and exposed trees were removed.

Pedro Jose Gonzalez, a biochemist who completed a specialized 40-hour course from the Department, inspected the citrus trees that exposed the Patchens' property (R1-62; R3-397-98). Undisputed evidence established that four properties he inspected within 1900 feet of the Patchens' property contained trees infected with canker (R1-62, 64-74). This evidence included authenticated reports created when Department personnel inspected neighborhood trees (R1-64-74). The Patchens did not dispute that their property stood within 1900 feet of the trees the Department identified as infected. Since it was undisputed that the Patchens' trees were exposed to canker, as a matter of law the trees were valueless.

SUMMARY OF ARGUMENT

[1] The record on appeal was corrected to reflect that the Department's motion for summary final judgment included the affidavit of Kenneth Bailey, which appears at R1-55-74.

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The certified question should be answered in the affirmative. The Third District correctly applied *Polk* which established as a matter of law that a tree exposed to canker has no lawful use, is a public menace, and may be removed without compensating the owner. The Patchens' and *amici's* attempts to distinguish *Polk* by narrowing it to its facts are unavailing because *Polk* relied upon precedent in Florida that stands for the same proposition: that exposed trees have no value as a matter of law.

The Patchens' remaining arguments, which are unrelated to the certified question, also fail to demonstrate error by the Third District in affirming the summary judgment. The undisputed facts show the Department identified several canker-infected trees within 1900 feet of the Patchens' property. Accordingly, an emergency existed justifying immediate action by the Department to abate this nuisance.

Finally, the Third District correctly rejected the Patchens' attempt to transform an inverse condemnation claim into a due process claim.

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ARGUMENT

I. THE CERTIFIED QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE BECAUSE CANKER-EXPOSED CITRUS TREES ARE A PUBLIC MENACE AND HENCE LACK VALUE, WHETHER THEY ARE COMMERCIAL OR RESIDENTIAL AND WHETHER THE EXPOSURE RADIUS IS 125 FEET OR 1900 FEET.

In *Polk*, this Court held that citrus tree owners could not recover inverse condemnation damages when the Department destroyed trees that had been exposed to citrus canker because exposed trees are a public nuisance and hence have no marketable value. *Polk*, 568 So. 2d at 40. The Patchens largely overlook in their briefing the fundamental rationale of *Polk*–that trees exposed to citrus canker are an imminent public menace–and instead focus on distinctions without differences between *Polk* and this case. The Patchens contend that *Polk* is or should be limited to commercial groves, and thus would not apply to the Patchens, who did not intend to sell their trees. The Patchens also contend *Polk* is distinguishable because this Court decided *Polk* after a trial where the Department used 125 feet, rather than 1900 feet, as the benchmark for defining exposed trees. Each of the foregoing arguments fails.

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A. Whether the Patchens intended to sell their trees is irrelevant because exposed trees constitute a public nuisance. Thus, *Polk* is equally applicable to commercial and residential citrus trees.

Citrus canker does not discriminate between commercial citrus in a multi-acre grove and a single dooryard citrus tree. To the bacteria that cause citrus canker, any citrus tree presents a suitable host for infestation and further spread. Florida law recognizes that an apparently healthy tree, once exposed to canker, presents a public nuisance that must be eradicated to prevent further infestation. *Sapp Farms v. Dep't of Agriculture,* 761 So. 2d 347, 348-349 (Fla. 3d DCA 2000) (holding that appellant's citrus plants presented an imminent danger of spread of disease because they had been exposed to canker).

It is well settled that a governmental entity cannot be liable for inverse condemnation damages for exercising police powers to abate a public nuisance, seize contraband, or prevent the spread of disease. As this Court held in *Dep't of Agriculture v. Mid-Florida Growers, Inc.,* 521 So.2d 101, 104:

> This Court noted that when the State, in the exercise of its police power destroys decayed fruit, unwholesome meat or disease cattle, the constitutional requirement of just compensation clearly does not compel the State to reimburse the owner for the property destroyed because such property is valueless, incapable of any lawful use, and a source of public danger.

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See State Plant Board v. Smith, 110 So. 2d 401, 405 (Fla. 1959) ("To destroy property because it is a public nuisance is not to appropriate it to public use, but to prevent any use of it by the owner, and to put an end to its existence. . . ."); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 909 (Ca. 1995) (noting an exception to inverse condemnation liability when an emergency situation exists that poses a danger to public safety); *MacLeod v. City of Takoma Park*, 263 A.2d 581, 584 (Ct. App. Md. 1970) (recognizing that the city may destroy an unsafe building without incurring inverse condemnation liability); *Bennis v. Michigan*, 516 U.S. 442 (1996) (holding that contraband may be seized by the government without compensation).

Indeed, classifying canker as a public nuisance necessarily precludes liability for its eradication. The term "public nuisance," in inverse condemnation law, is a term of art. While a private nuisance is a tort "threatening one person or a relative few, . . actionable by the individual person or persons whose rights have been disturbed. . . . A public nuisance, on the other hand, is a common-law crime consisting of any unreasonable interference with common community rights, such as health, safety, peace or convenience." Stuart Miller, *The Evolution and Meaning of the Supreme Court's Three Regulatory Taking Standards*, 71 Temple L. Rev. 243, 255 (1998). Consequently, the elimination of a public nuisance does not require compensation to the parties harboring the nuisance. This analysis has recently been upheld in the area

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of regulatory takings by this Court. In *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), the Court upheld the "nuisance exception": the principle that the government may completely extinguish the value of property by regulation in order to control a public nuisance, in light of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Patchens rely upon *Mid-Florida Growers, Smith*, and *Corneal v. State Plant Board*, 95 So. 2d 1 (Fla. 1957), to support their contention that compensation is due for destruction of "healthy trees" (Initial Brief at 17). *Mid-Florida Growers* does not support the Patchens' argument because the plants for which compensation was ordered in that case were healthy. They were considered "suspect" because they had been located within 125 feet of budwood originating at a nursery where canker had been detected, but the budwood was not itself infected with citrus canker.[2] 521 So. 2d at 102. The trees destroyed were thus neither infected nor located within 125 feet of infected plants. In other words, there were no "exposed" trees in the case.

The principle that the destruction of healthy trees requires compensation but destruction of exposed trees does not was clarified when this Court decided *Polk* only

[2] If the suspect plants in *Mid-Florida Growers* had been within 125 feet of trees visibly infected with canker, they would have been considered "exposed" and their destruction would not have required compensation. *Polk, infra.*

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two years after *Mid-Florida Growers* and, guided by that precedent, concluded that the Department could not be liable for removing trees exposed to canker.

Smith and *Corneal*, the other cases upon which the Patchens rely, support the Department's position. In both cases, the Department faced "spreading decline," a tree-root disease caused by nematodes, which burrowed from tree to tree. Unlike citrus canker, the burrowing nematode moved slowly, at a rate of about 36 feet per year. *Corneal*, 95 So. 2d at 2. In both decisions, the court ruled that the destruction of seemingly healthy trees constituted a taking because the burrowing nematode moved so slowly that no real emergency existed. *Corneal*, 95 So. 2d at 5-6 (noting that a healthy tree uninfected with a burrowing nematode offers no immediate menace to other trees); *Smith*, 110 So. 2d at 408 (holding that spreading decline did not present an imminent danger justifying destruction of uninfected trees without a pre-deprivation hearing because the disease "is not carried by the wind or by insects from grove to grove").

Of course, unlike the burrowing nematode, citrus canker spreads rapidly, and is carried from grove to grove by wind-blown rain and through human contact (R1-657, 8). In *Denney v. Conner*, 462 So. 2d 534 (Fla 5th DCA 1985), the court analyzed the Department's right to immediately destroy exposed citrus trees without a pre-deprivation hearing. Like the Patchens, the appellant in *Denney* relied upon

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Corneal and *Smith*. *Denney*, 462 So. 2d at 536. The *Denney* court distinguished both decisions, highlighting the difference between spreading decline and citrus canker:

> We find the facts of the instant case to be clearly distinguishable from *Corneal* and *Smith*, above. No real controversy exists on the critical fact that citrus canker may be transmitted by both natural (wind and rain) and artificial (man and machinery) means and that it may lay dormant in apparently healthy plants for some months (one botanist opined up to 18 months) after exposure to infected plants before manifesting signs of the disease. Those circumstances underlie the Department's conclusion that, even though the plants appear healthy and at this time evidence no sign of citrus canker, appellant's plants still present an imminent danger in the spread of the disease since it has been exposed to infested or infected plants.

Id. at 536. *See Nordmann v. Dep't of Agriculture*, 473 So. 2d 278, 280 (Fla. 5th DCA 1985) (upholding summary seizure and destruction of citrus trees because Department order reflected immediate danger to public health, safety, and welfare).

The Patchens and *amici* fail to appreciate the basis of this Court's decision in *Polk*. They gloss over the principal conclusion in *Polk*–that trees exposed to disease are not compensable because they are a public menace–and try to find comfort in misreadings of the concurrences. In his special concurrence, Justice McDonald noted that citrus canker may remain dormant on trees and show no outward signs of disease, stating that "just because a tree is found to be [visibly] healthy should not be determinative of the constitutionality of the taking." 568 So. 2d at 45. Justice

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McDonald also noted the critical distinction between *Polk* and *Corneal* and *Smith*: that citrus canker, unlike the burrowing nematode, is carried by the wind. *Polk*, 568 So. 2d at 44. In their *amici* brief, Broward and Miami-Dade Counties refer to the concurrences of Justice Barkett and Justice Grimes (*Amici* Brief at 8-9, 26-28), arguing that the only issue is whether the removal of canker-exposed trees benefits the citrus industry. While Justice Barkett did opine that compensation must be paid if a taking occurred, she also recognized that no compensation is due when the Department destroys a public nuisance. "If this means that the state need not pay for the diseased trees because the trees were diseased and therefore, had no value, I agree." *Polk*, 568 So. 2d at 49. Justice Grimes observed that the Department acted reasonably based upon then-existing scientific information, and that compensation need only be paid for destruction of "uncontaminated property." *Id.*

The Patchens argue that the "no marketable value" rule (Initial Brief at 20-22, 25-26) has no application to their trees, which were not used for commercial purposes. The Patchens thus assume the term "marketable value" must refer solely to commercial goods sold in a marketplace. This is incorrect. "Marketable" means "fit to be offered for sale in a market; such as may be justly and lawfully sold." *Webster's Revised Unabridged Dictionary* (1996). *See Gardner v. Johnson*, 451 So.2d 477 (Fla. 1977) (noting that words can be understood by commonly accepted dictionary definitions).

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The Patchens do not suggest that their trees (or the fruit) could have been lawfully sold or that their trees were fit for sale, but only that they did not intend to sell the trees (Initial Brief at 25-26). Their intention is immaterial because their trees had no marketable value—they were not fit for sale nor could they have been lawfully sold. Fla. Admin. Code R. 5B-58.001

The Patchens suggest that all citrus owners should be able to challenge on the facts whether their citrus was actually a threat under the 1900-foot exposure zone (Initial Brief at 22-25). It would be chaotic, inefficient, and inconsistent with principles of *stare decisis* if all homeowners that had their exposed trees removed by the Department were entitled to a separate jury trial regarding whether the 1900-foot rule was valid in his case. Recognizing this, the Department, the Florida Legislature, and the courts have uniformly determined the exposure radius through administrative rule, statute, and case law. *See* Fla. Admin. Code R. 5B-58.001, Fla. Stat. § 581.184(1)(b), *Denney*, *Nordmann*. *See Sanfiel v. Dep't of Health*, 749 So. 2d 525 (Fla. 5th DCA 1999) (holding that an agency's interpretation of a statute or rule it has authority to administer should receive deference and not be overturned unless it is clearly erroneous); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (court should defer to agency's interpretation of a statute the agency administers).

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The truth to which the Patchens have no reply is that exposed and infected trees are "valueless, incapable of any lawful use and a source of public danger," in the same manner as "decayed fruit, unwholesome meats, or diseased cattle," *Mid-Florida Growers,* 521 So. 2d at 104, and therefore cannot have value. The point is valid regardless whether the trees are residential or commercial.

B. Expansion of the zone of exposure is irrelevant to the determination that the Patchens' trees have no value.

The Patchens contend that *Polk* should not govern their situation because *Polk* involved an exposure radius of 125 feet rather the 1900 foot radius used in their case (Initial Brief at 20-22, 26-28). The Patchens have raised a distinction without a difference. When the current outbreak of Asian strain canker began, the Department briefly buck-horned trees to eradicate the disease. When the ineffectiveness of the strategy became apparent, the Department began removing infected trees and trees within a 125-foot radius, based on the then-current scientific evidence. This too was ineffective (R4-658). As new scientific evidence from peer-reviewed studies conducted in South Florida became available, the Department determined that by expanding the reach of its exposure zone to 1900 feet it would have the ability to capture 95% of citrus canker and to eradicate citrus canker (R4-659); *Pompano Beach*, 792 So. 2d at 541-43. The change in the radius of exposure, from zero to

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1900 feet, was a consequence of evolving scientific knowledge and not a change in the legal principle at work.

At the time the Patchens' trees were removed, statutes authorized the Department to remove plants exposed to citrus canker, Fla. Stat. § 581.031(15)(a) & (17), and the radius of exposure had been expanded to 1900 feet based upon developing scientific research. While the distance utilized by the Department to determine an exposed tree may change, the fact that the exposed tree is a nuisance is an unwavering principle. In this regard, the Department's interpretation of its rules was a valid exercise of its police power pursuant to a legislative enactment. *Bisz v. Dep't of Agriculture*, 802 So. 2d 385, 385 (Fla. 3d DCA 2001) (citing *Envtl. Trust v. Fla. Dep't of Envtl. Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998)).

The analysis is the same in federal takings law, where trees subject to a plant disease may be destroyed within a particular radius of exposure. In *Miller v. Schoene*, 276 U.S. 272 (1928), owners of cedar trees destroyed pursuant to Virginia's Cedar Rust Act sought compensation from the state. *Miller v. State Entomologist*, 146 Va. 175 (Va. 1926). The Act allowed the removal of trees "which are or may be" the source of cedar rust (a plant disease)–corresponding to citrus trees that are infected or are exposed to infection. *Id.* The radius of exposure was two miles. 276 U.S. at 278-79. The United States Supreme Court upheld an order requiring the trees be

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removed without compensation, on the grounds the trees were a nuisance and threat to the state's apple orchards. *Id.* at 279-280. The exposed trees removed by the Department were a threat to citrus groves in Florida in the same manner as the cedar trees were a threat to apple orchards in Virginia.

C. The factual analysis identified in *Polk* is irrelevant to its application by the Third District in *Varela* and in this case and does not undermine the conclusion that no compensation is due when the Department removes exposed trees.

The Patchens not only challenge the Third District's application of *Polk* to this case, but further assert that the Third District misapplied this Court's ruling in *Varela*, where the court held that plaintiffs had no cause of action for removal of exposed trees and reversed class condemnation. As the Third District held:

> The trial court erred in certifying a class of plaintiffs where the plaintiffs have no cause of action. . . . We are obligated to follow the precedent set forth in *Polk*. . . . According to *Polk*, those trees within 125 feet of diseased trees have no marketable value and therefore, no damages can be awarded.

Varela, 732 So. 2d at 1147 (citations omitted). The Patchens argue that the *Polk* should have been limited to its facts and that the court improperly decided *Varela* because *Polk* involved a trial on the merits and the presentation of evidence and that

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this is an "obvious distinction" (Initial Brief at 18, 24). This argument fails for three reasons.

First, the *Polk* trial and the facts elicited therein had nothing to do with the legal determination that exposed trees have no value. The *Polk* trial merely established the amount of compensation due after the trial judge decided that the Department had acted improperly by destroying unexposed trees. *Polk*, 568 So. 2d at. 38. The citrus owners argued to this Court that the trial court's conclusion that no compensation was due for removing trees within 125 feet of the infected improperly invaded the province of the jury. *Id*. at 49, n. 4. This Court disagreed, however, holding that the trial court had the authority to conclude, as a matter of law, that the removal of trees within 125 feet of infected trees did not constitute a taking. *Id*. This Court specifically relied upon *Smith* for the proposition that when the state destroys property that "is incapable of any lawful use," such property is as well incapable of having value and is a source of public danger. *Id*. A jury cannot determine the value of property that is incapable, as a matter of law, of possessing value. This is a legal conclusion that did not depend on specific facts elicited during the *Polk* trial.

The Patchens propose that the 125-foot exposure rule appeared for the first time out of nowhere as the *Polk* jury's determination of the radius beyond which compensation for removed trees would be required. But the rule that exposed trees

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must be removed around infected trees had a long history in Florida, *see* Fla. Admin. Code R. 5B-58.001, *Denney*, *Nordmann*, *Mid-Florida Growers*, 521 So. 2d at 102, and has evolved from the 125-foot radius to the 1900-foot rule on the basis of scientific advances. Florida law has never left to juries the determination of the radius of exposure for citrus canker.

This Court answered the Patchen's jury argument in *Polk*. There, the Court was mindful of the criticism that "the trial court encroached upon the exclusive province of the jury by determining the amount of compensation due [i.e., zero] for property taken." 568 So. 2d at 40, n.4. This Court's response was that "the trial court's statement that the trees within 125 feet of [infected trees] had no market value was actually a determination that the destruction of those trees did not constitute a taking." *Id*. In other words, this Court made a legal holding that destruction of exposed trees was not a taking, couched in terms of the exposed trees lacking value.

Second, assuming, as the Patchens and *amici* argue, that certain facts in this case distinguish application of the legal maxim that no compensation is due when the state removes a nuisance, the Patchens had the opportunity to present such facts and failed to do so. The Patchens deposed Department witnesses and filed affidavits in opposition to the Department's motion for summary judgment. They did not create any disputed issue of material fact. In her affidavit, Barbara Patchen did not provide

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any testimony to contradict the Department's evidence that infected trees stood within 1900 feet of her property. Indeed, she acknowledged that she personally observed trees marked by the Department as infected at a location close to her property (R1-129). Barbara Patchen further averred that she never received an IFO or any other notice regarding the Department's intention to remove her trees (R1-130). Although this was a disputed fact issue, it was not material to the summary judgment entered by the trial court and is not material to the certified question. Whether the Department served an IFO prior to removing the Patchens' trees has no bearing on their entitlement to inverse condemnation damages.

Barbara Patchen also testified through her affidavit that no house or citrus trees existed on one property where the Department indicated that infected trees had stood (R1-129). Again, even if this is a disputed fact issue, it is immaterial because, as established by uncontroverted evidence the Department presented to the trial court, at least three additional properties within 1900 feet of the Patchens' property contained infected trees (R1-62, 64-74). Although the Patchens challenged the qualifications of Department personnel who inspected the trees, they did not provide any evidence or testimony to create a disputed fact issue regarding the Department's conclusions. Casting aspersions upon the diagnostician and challenging his qualifications cannot

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create a disputed fact issue when no evidence is presented to rebut his conclusions or the Department's reports.

Third, even if the Patchens created a fact issue regarding the exposed status of their particular trees, this does not address the certified question. The Third District requested this Court to determine whether *Polk* precludes a homeowner from recovering inverse condemnation damages when a tree is exposed to canker. If the Patchens assert that their trees were not exposed, they have no standing to address the certified question and their appeal should be dismissed. The Department has never taken the position that a homeowner cannot recover damages if the Department destroys an unexposed tree, more than 1900 feet from an infected host.

II. APPLICATION OF THE *POLK* DECISION IS A NECESSARY ELEMENT OF *STARE DECISIS* AND PRECEDENT. ACCORDINGLY, PRINCIPLES OF COLLATERAL ESTOPPEL DO NOT APPLY.

The Patchens (and *amici*) argue that the application of *Polk* to this case would violate principles of collateral estoppel because the two cases do not involve identical issues and parties (Initial Brief at 22-25; Brooks Tropicals Brief at 3-6). The Patchens have confused principles of *stare decisis* and precedent with collateral estoppel. The *Polk* decision was binding in *Varela* and in this case as precedent establishing that, as a matter of law, an exposed tree presents an imminent threat to Florida residents and

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thus has no value. The principle of *stare decisis* is a rule followed by courts to maintain stability in the law and, while not obligatory, is considered appropriate in most instances to produce consistency in the application of legal principles. *See Forman v. Florida Land Holding Corp.,* 102 So. 2d 596, 598 (Fla. 1958). The principles announced and followed in *Polk, Sapp Farms, Denney, Nordmann,* and *Varela* provide uniformity and consistency to Florida law. If the Patchens' argument were correct, no precedent would ever be binding because it would not involve "identical parties." Such an argument has no merit and must be rejected.

III. THE PATCHENS MUST ACCEPT THE DEPARTMENT'S CONCLUSIONS AND ACTIONS AS LAWFUL FOR PURPOSES OF EVALUATING AN INVERSE CONDEMNATION CLAIM.

The Patchens devote much of their brief to attacking the manner in which the Department acted in this case and challenging the qualifications of Department personnel, suggesting that Department diagnosticians are not qualified to identify canker (Initial Brief at 21, 28-33). These arguments have no place in an inverse condemnation proceeding. An inverse condemnation plaintiff must "accept the agency action as completely correct to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation." *Key Haven v. Board of Trustees of the Internal Improvement Trust*

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Fund, 427 So. 2d 153, 156 (Fla. 1982). *See State v. Sun Garden Citrus LLP*, 780 So. 2d 922, 928 (Fla. 2d DCA 2001) (holding that a party seeking relief from a circuit court for injuries arising out of Department actions would "have to accept the Department's decision as correct"). Since the Patchens must accept the Department's actions as correct, the Court should ignore these arguments.

IV. THE THIRD DISTRICT CORRECTLY REJECTED THE PATCHENS' EFFORTS TO TRANSFORM THEIR INVERSE CONDEMNATION LAWSUIT INTO A DUE PROCESS CLAIM.

The Patchens contend that the Third District improperly disregarded a claim for violation of due process rights (Initial Brief at 28). As the Patchens readily concede, the disposition of this issue has nothing to do with the certified question before the Court. Regardless, the Third District correctly affirmed the trial court's summary judgment and correctly noted that the Patchens have not sued for a violation of their right to due process.

The general principle of inverse condemnation appears in the Florida Constitution, Art. X, § 6(a), which provides that property shall not be taken "for a public purpose" without payment of "full compensation." This is distinct from a due process claim under the Fourteenth Amendment to the United States Constitution alleging that property was taken without prior notice and an opportunity to be heard

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or that an administrative agency violated its rules. A claimant suing for inverse condemnation accepts the Department's actions as lawful but contends that compensation is due, while a due process claim contends that the Department did not afford appropriate procedural protections before taking property. These are distinct causes of action. Contrary to the Patchens' argument, the failure to provide notice is not the "essence" of an inverse condemnation claim and none of the cases cited by the Patchens stands for a contrary proposition. In *State Road Dep't of Florida v. Tharp*, 1 So. 2d 868 (Fla. 1941), the Florida Supreme Court merely set forth an individual's right to sue for inverse condemnation when the State took action which reduced usable levels of the plaintiff's property. Nothing in that case suggested that due process considerations were relevant. Similarly, in *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. 1st DCA 1964), the First District discussed the plaintiff's right to sue for inverse condemnation under the then-existing eminent domain clause of the Florida Constitution. Nothing in that case linked a due process claim to an inverse condemnation claim. Finally, in *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487 (Fla. 1st DCA 1975), the Court noted that the plaintiff had advanced an independent claim that the City demolished his buildings without proper notice. *Id.* at 490. The Court did not factor the notice issue into its discussion of inverse condemnation.

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The Third District accurately noted that although the Patchens asserted a lack of notice prior to the Department's removal of their trees, they did not attempt to state an independent cause of action for a due process violation. Indeed, the Patchens confined their complaint solely to an action for inverse condemnation (R1-2-4). The Patchens' argument that notice is the crux of an inverse condemnation claim is wrong. If this were true the Department could immunize itself from inverse condemnation suits for removal of any tree–infected, exposed, or healthy–simply by providing reasonable notice. As this Court explained in *Polk*, "it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." *Polk*, 568 So. 2d at 39. The converse is true. If the Department fails to provide notice to a homeowner prior to removing a diseased tree, this does not transform the action into a viable claim for inverse condemnation.

The Patchens failed to assert their due process claim below in the only manner available to them, through a claim under 42 U.S.C. § 1983. In this regard, there is no direct cause of action for violation of the due process clause of the Fourteenth Amendment to the United States Constitution. "[Plaintiff] cannot bring a claim directly under the Fourteenth Amendment because it does not create a cause of action." *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir. 1995). "[Plaintiff] cannot bring a claim directly under the Fourteenth Amendment because there is no separate and

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independent cause of action under the Fourteenth Amendment against state officials. . . . 42 U.S.C. § 1983, not the Fourteenth Amendment, is the exclusive avenue for which to pursue violations of his Fourteenth Amendment rights." *Mtingwa v. North Carolina Agric. & Tech. State Univ.*, 1996 U.S. Dist. LEXIS 8254 (M.D.N.C. 1996), *aff'd*, 1997 U.S. App. LEXIS 13389 (4th Cir. 1997). The Patchens simply did not assert a § 1983 claim in their complaint (R1-2-4).

Even if the Patchens had sued for a due process violation, their claim would have failed because a plaintiff must still demonstrate that he or she suffered damage—that property was taken without procedural protections that resulted in injury. Since it is well settled under Florida law that the Patchens cannot recover damages for the Department's removal of a nuisance, the Patchens would be unable to state a cause of action under any theory.

Furthermore, Florida courts have acknowledged the Department's right to remove diseased trees without a pre-deprivation hearing due to the emergency posed by citrus canker. *See Denney*, 462 So. 2d at 536 (holding that Department authorized to act before providing notice and opportunity to be heard because "the threat of spreading citrus canker is of sufficient imminence and scope to justify the emergency order"); *Nordmann*, 473 So. 2d at 280 (allowing summary seizure and destruction of trees).

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CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative, establishing that homeowners cannot maintain inverse condemnation actions for the Department's removal of trees exposed to citrus canker.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I certify that the foregoing Answer Brief was prepared using Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Fla. R. App. P.

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