IN THE SUPREME COURT OF FLORIDA

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

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BRIAN P. PATCHEN and BARBARA G. PATCHEN,

Petitioners,

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Respondent.

____

On Appeal from the Third District Court of Appeal

PETITIONERS' INITIAL BRIEF ON THE MERITS

Joseph H. Serota
WEISS SEROTA HELFMAN PASTORIZA & GUEDES, P.A.
2665 South Bayshore Drive
Suite 420
Miami, FL 33133
Tel: (305) 854-0800
Fax: (305) 854-2323

Robert C. Gilbert
ROBERT C. GILBERT, P.A.
Commercebank Center
220 Alhambra Circle
Suite 400
Coral Gables, FL 33134
Tel: (305) 529-9100
Fax: (305) 529-1612

Attorneys for Petitioners

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STATEMENT OF THE CASE AND FACTS[1]

Introduction. Petitioners Brian P. Patchen and Barbara G. Patchen (the "Patchens") seek review of a decision of the Third District Court of Appeal affirming summary final judgment in favor of the State of Florida Department of Agriculture and Consumer Services (the "Department"). (PA. 7-10). On motions for rehearing, rehearing *en banc* and certification, the Third District certified the following question to be 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?

(PA. 11-12).

The answer to this important question will impact thousands of residential property owners throughout the State of Florida whose uninfected, healthy, noncommercial, residential citrus trees have been destroyed since January 1, 2000

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[1] References to "R. ____" refer to the original record on appeal transmitted to the district court of appeal. References to "PA. ___" refer to additional materials included in petitioners' appendix being filed together with this brief. For ease of reference, a copy of the index to the record on appeal is included in petitioners' appendix. (PA. 1-6).

solely because they were located within 1900 feet of trees determined by the Department to be infected with citrus canker. The trial court and the Third District both held, as a matter of law, that the Patchens were precluded from seeking recovery for the destruction of their six large, healthy, uninfected, mature, fruit-bearing citrus trees because they had "no marketable value." (R. 657-662; PA. 7-10).

This Court's answer to the certified question will thus determine whether the Patchens and other Florida residential property owners are precluded from seeking to recover full and just compensation for the Department's taking of their property for a public purpose. Based on the arguments set forth herein, the Patchens urge this Court to answer the certified question in the negative, to quash the Third District's decision, and direct the trial court to determine whether a taking has occurred based on the specific facts and circumstances present in this case.

Background. Citrus canker is a bacteria affecting citrus fruit. (R. 657; PA. 69). It is not known to be harmful to humans or animals. (Id.). Canker may cause premature fruit drop and may blemish the fruit and make it unmarketable as fresh fruit (but not affect its use for making fruit juice). (R. 657-658; PA. 69). The bacteria is chiefly transmitted by wind-blown rain, but sometimes by other means. (R. 658; PA. 69).

The Department's Eradication Efforts in the 1980s. In the mid-1980s, a form of citrus canker was discovered in Central Florida. (R. 658; PA. 70). Fearing the disease would devastate the state's surrounding commercial citrus industry, the Department embarked upon the Citrus Canker Eradication Program ("CCEP"). (Id.). Under the CCEP, all citrus trees determined by the Department to be infected with citrus canker were destroyed. (Id.). In addition, many more uninfected trees were destroyed in an effort to prevent the spread of canker to adjacent citrus groves. (Id.).

A number of inverse condemnation actions were successfully brought by commercial citrus nurseries (businesses which raise citrus trees for purposes of resale) as a result of the Department's eradication efforts in the mid-1980s. *See*, *e.g.*, *Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988) (full and just compensation required when state, pursuant to its police power, destroyed healthy orange trees to prevent the spread of citrus canker); *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990) (inverse condemnation award to commercial citrus nursery affirmed in part).

The CCEP Comes to South Florida. In 1995, citrus canker was detected in South Florida, far removed from the state's commercial citrus heartland. (R. 658; PA. 72). The Department declared an agricultural emergency. (Id.). The Department instituted a policy of destroying all citrus trees it determined to be infected, as well as

all uninfected citrus trees located within a 125 foot radius, effectively covering an area of approximately 1.13 surrounding acres. (R. 658-659).

The Department's 125 foot destruction policy resulted in a new round of litigation. This time, a class action claim for inverse condemnation was brought on behalf of Miami-Dade County homeowners whose uninfected trees were destroyed by the Department because they were located within 125 feet of trees determined to be infected by the Department. Plaintiffs sought to recover as damages the replacement cost of their trees. The circuit court certified the case as a class action and the Department appealed. The Third District reversed, holding:

> The trial court erred in certifying a class of plaintiffs in a case where the plaintiffs have no cause of action." *See Department of Agriculture v. Polk*, 568 So. 2d 35 (Fla. 1990).
>
> . . .
>
> According to *Polk*, "those trees within one hundred and twenty-five feet (125 ft.) of [diseased trees], ha[ve] no marketable value" and therefore, no damages can be awarded. *Polk*, 568 So. 2d at 40 n. 4 & 43.

Department of Agriculture & Consumer Services v. Varela, 732 So. 2d 1146 (Fla. 3d DCA 1999). Thus, the first attempt by residential property owners to recover an inverse condemnation award for the destruction of their uninfected, noncommercial citrus trees for a public purpose came to a grinding halt.

The Department Expands the Kill Zone to 1900 Feet. Effective January 1, 2000, the Department embarked upon a new and unprecedented phase of the CCEP. (R. 659; PA. 28-29, 77). Under its new policy, the Department expanded the kill zone by summarily destroying all trees it determines to be infected, as well as all healthy, uninfected citrus trees located within a 1900 foot radius – a swath of tree destruction encompassing approximately <u>262 acres</u> for each infected tree found. (PA. 77). The Department claims that all trees located within 1900 feet are "exposed" and will eventually harbor the citrus canker bacteria through the natural spread of the disease. (PA. 77).

Since January 1, 2000, the Department has destroyed over 330,000 citrus trees in Broward and Miami-Dade Counties which were <u>not</u> determined to be infected with citrus canker. (PA. 14). These <u>uninfected</u> trees have been destroyed based solely on their proximity within 1900 feet of trees determined by the Department to be infected.

The Department has destroyed these <u>uninfected</u> citrus trees for the stated public purpose of protecting the state's commercial citrus industry. At the same time, the Department maintains that such trees have "no marketable value," and refuses to pay full and just compensation to their owners as required by the Florida Constitution. The Department's "no marketable value" position is premised on this Court's decision in *Polk*, a narrow, fact-intensive decision following a trial on the merits in which this

Court affirmed a liability finding in an inverse condemnation suit brought by a commercial nurseryman who raised citrus trees for purposes of resale.

The Department's widespread destruction under the new 1900 foot policy has spawned a new wave of litigation on many fronts.

In October 2000, Broward County, joined by several municipalities and residents, sought to enjoin the Department's policy of destroying all uninfected trees located within 1900 feet of trees determined to be infected. In November 2000, the trial court issued an injunction prohibiting the Department from cutting down healthy citrus trees which have no visible symptoms of canker but which are located within 1900 feet of trees determined to be infected with canker. The Department appealed to the Fourth District, which reversed the injunction based on the plaintiffs' failure to exhaust administrative remedies. *See*, *Department of Agriculture and Consumer Services v. City of Pompano Beach*, 792 So. 2d 539 (Fla. 4th DCA 2001).

Broward County and other plaintiffs then pursued a petition before the Division of Administrative Hearings challenging the validity of various aspects of the Department's rules. On July 31, 2001, the administrative law judge issued a final order finding that the Department invalidly exercised its authority in adopting certain rules relating to the destruction of "exposed" plants and defining the term "exposed." (PA. 61-133). The Department appealed. On May 20, 2002, the First District

affirmed. *See*, *Florida Department of Agriculture and Consumer Services v. Broward County*, 816 So. 2d 609 (Fla. 1st DCA 2002).

Meanwhile, several Broward and Miami-Dade Counties residential property owners pursued an inverse condemnation suit pursuant to Art. X, § 6(a), Fla. Const. (PA. 13-14). These residential property owners sought to certify the suit as a class action on behalf of all owners of noncommercial citrus trees within Broward and Miami-Dade Counties not determined by the Department to be infected with citrus canker and destroyed under the CCEP from January 1, 2000 forward. (*Id*.). On January 24, 2002, the trial court entered an order granting class certification following a multi-day evidentiary hearing. (PA. 13-26). The Department appealed that non-final order to the Fourth District (Case No. 4D02-672). The appeal has been fully briefed and is awaiting oral argument and decision.

Finally, Broward and Miami-Dade Counties, joined by several municipalities and private property owners, recently challenged the constitutionality of statutory amendments codifying the 1900 foot destruction radius used by the Department to destroy the uninfected, healthy citrus trees owned by the Patchens and thousands of other South Florida property owners. On May 24, 2002, following a lengthy evidentiary hearing, the trial court issued a temporary injunction finding, *inter alia*, that the CCEP and the 1900 kill zone are not based on credible evidence. (PA. 27-57).

The trial court found, based on the evidence presented, that healthy, uninfected, noncommercial, residential citrus trees have value. (Id.). The trial court enjoined the Department from further destroying any healthy, uninfected citrus trees pending a trial on the merits. (Id.). The Department appealed to the Fourth District. On July 9, 2002, the Fourth District certified that the appeal requires immediate resolution by the Supreme Court because the issues are of great public importance or will have a great effect on the proper administration of justice throughout the state. *See*, *Florida Department of Agriculture and Consumer Services v. Haire*, 2002 WL 1465712 (Fla. 4th DCA, July 9, 2002). (PA. 58-60). On July 11, 2002, this Court declined to accept bypass jurisdiction over the appeal.

Within this historical context it is clear that the question certified by the Third District in the instant case is of great public importance to thousands of Florida property owners whose uninfected, healthy, noncommercial, residential trees have been destroyed merely because they were located within 1900 feet of citrus trees determined by the Department to be infected with citrus canker.

The Department's Taking of the Patchens' Property. The Patchens own a home located on Miami Beach, Florida. (R. 128). Prior to October 31, 2000, their residential property boasted six large, healthy, mature, fruit-laden citrus trees. (Id.).

On October 31, 2000, the Department's agents arrived without notice at the Patchens' home, demanding entry in order to destroy all six trees. (R. 129). The Department's agents arrived without first having issued or served any document, warrant, "Immediate Final Order," or other written notice advising the Patchens that their trees were slated for destruction or otherwise authorizing the Department's entry onto their property. (R. 131). Mrs. Patchen initially denied them entry to the property. (R. 129). The Department's agents returned, armed with chainsaws and accompanied by several police officers, and threatened Mrs. Patchen with arrest if she again denied them entry. (R. 129-130). The Department's agents then entered the Patchens' property and destroyed all six of their citrus trees. (R. 130).

The Patchens' citrus trees were destroyed because the Department claimed they were located within 1900 feet of four infected trees and, therefore, presumed to be "exposed." (R. 62, 6, 23). The Patchens' trees were <u>not</u> determined to be infected with citrus canker. (R. 5, 23).

The Patchens' Inverse Condemnation Suit. The Patchens brought suit against the Department for inverse condemnation to recover full and just compensation for the destruction of their property. (R. 2-4). The Department admitted the destruction of the Patchens' property, but denied lack of notice and due process. (R. 5-6, 23, 46-48). The Department asserted that its conduct was justified "for the public

purpose of eradicating citrus canker and to prevent the public nuisance of citrus canker." (R. 46-48).

During pretrial discovery the Department admitted that the Patchens' trees were healthy and not infected with citrus canker. (R. 5-6, 23). The Department's senior-most employee charged with responsibility for managing the CCEP in Southeastern Florida admitted that the Department is required to serve an Immediate Final Order ("IFO") on every owner or his property before any tree can be destroyed (R. 179); that the requirement of serving an IFO is to afford an owner the right to appeal the slated destruction of his property (R. 179-180); that the Department is obligated to maintain copies of all IFOs issued (R. 191-193); and, although these procedures are required to be followed in every case and the Department's database enables it to produce copies of IFOs for all properties, the Department could not locate and produce a copy of the IFO served on the Patchens or their property. (R. 200-202).

Discovery also revealed the location of the four so-called infected trees "justifying" the destruction of the Patchens' property. The Department claimed that properties located across a large expanse of water, but within 1900 feet of the Patchens' home, contained four citrus trees infected with citrus canker. (R. 62). The Department's determination that those trees were infected was not made through a scientific laboratory analysis, but through "field diagnosis" by "trained pathologists."

(Id.). The training of these "pathologists" consisted of no more than a five day session conducted by the Department. (R. 153-155). The "pathologists" turned out to be "diagnosticians." (R. 154-155). One diagnostician claimed to have found one of the infected trees at a property which contained a house and citrus trees on the date of destruction. The public records disclosed that the house at that address had been demolished and the property cleared several months earlier. (R. 129, 131).

The Department moved for summary judgment, arguing that *Polk* and *Varela* preclude the Patchens from recovering damages for the destruction of their "exposed" trees because their trees have "no marketable value." (R. 55-60).

The Patchens defended, arguing that the testimony of several Department employees and the affidavit of Mrs. Patchen created disputed issues of material fact. (R. 525-617). In part, Mrs. Patchen's affidavit stated that:

> At no time did anyone in any manner serve me, anyone at our home, or our property itself with any warrant, "Immediate Final Order," or any other document that identified our trees as being 'infected' with citrus canker or 'exposed' to an infected tree. At no time were we given any notice whatsoever that the Department of Agriculture intended to cut down our trees. That message was delivered only by chain saw and force of arms.

(R. 131).

The trial court granted the Department's motion for summary judgment, summarily rejecting the Patchens' defenses that there existed disputed issues of material fact concerning notice, due process and the reliability of the non-scientific determination that four trees located within 1900 feet of the Patchens' property were infected. (R. 657-662). Instead, and <u>ignoring the undisputed fact that the Patchens' trees were healthy and uninfected</u>, the trial court held <u>as a matter of law</u> that:

> This Court is bound by the decision of the Third District Court of Appeal in *Varela* and the Florida Supreme Court in *Polk*. Plaintiffs' trees "have no marketable value" under *Varela* because they are within the 1900 foot zone of exposure to citrus canker, and thus Plaintiffs "have no cause of action" for the removal of such trees.

(R. 661).

The Patchens appealed. On March 6, 2002, the Third District affirmed. (PA. 7-10). In relevant part, the district court held:

As this court has stated:

> 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" 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 we must affirm.
>
> *Markus v. Department of Agriculture & Consumer Servs.*, 785 So. 2d 595, 596 (Fla. 3rd DCA 2001). This court held that the affirmance was "without prejudice to bring an action for inverse condemnation, or to seek such other relief as they deem appropriate." *Id*. Our suggestion was well-intentioned but perhaps ill-advised. Under the current state of the law, the agency need not compensate the owners for the destruction of those trees.
>
> In *Department of Agriculture & Consumer Servs. v. Varela*, this court reversed an order certifying a class of plaintiffs seeking damages for state-destroyed citrus trees within a one hundred and twenty-five foot (125 ft.) radius of diseased trees. 732 So. 2d 1146, 1146 (Fla. 3d DCA 1999). We held that those plaintiffs had no cause of action, as according to *Department of Agriculture v. Polk*, 568 So. 2d 35 (Fla. 1990), those trees have "no marketable value." 732 So. 2d at 1146.
>
> . . .
>
> We recognize that in *Polk*, the court was referring to uninfected commercial nursery stock located within the Department's specified zone of destruction, while in this case, non-commercial, residential trees were destroyed.

(PA. 8-10).

Petitioners sought rehearing, rehearing *en banc* and certification by the Third District. On May 22, 2002, the district court denied rehearing and rehearing *en banc*, but certified the question under review to be one of great public importance. (PA. 11-12). These proceedings followed.

BASIS OF JURISDICTION

Under Art. V, § 3(b)(4), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(v), the Court has jurisdiction to review decisions of district courts that pass upon questions certified to be of great public importance.

STANDARD OF REVIEW

The underlying decision, which affirmed a summary judgment, presents a question of law which is reviewed *de novo*. *Volusia County v. Aberdeen At Ormond Beach*, *L.P.*, 760 So. 2d 126 (Fla. 2000); *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000).

SUMMARY OF ARGUMENT

The certified question must be answered in the negative. The finding in *Polk* of "no marketable value" with respect to commercial nursery stock located within 125 feet of infected trees has no application nor precedential value to inverse condemnation suits brought by the Patchens and other owners of healthy, uninfected, noncommercial, residential citrus trees destroyed by the Department because such trees were located within 1900 feet of trees determined to be infected with citrus canker.

Polk is a narrow, fact-driven decision based on substantial competent evidence presented during a full blown trial on the merits. The determination of whether a

compensable taking has occurred is a fact-driven determination made on a case by case basis. As such, *Polk* does not, as a matter of law, preclude subsequent litigants from proving compensable takings resulting from the destruction of their uninfected citrus trees because the determination of whether a taking has occurred is a fact-driven decision based on the unique facts of each case.

Polk is also inapplicable because the "no marketable value" finding involving the destruction of uninfected commercial nursery stock is inapplicable to inverse condemnation claims brought by owners of uninfected residential citrus trees. Unlike commercial citrus trees, residential citrus trees are not grown for purposes of resale or commercial fruit production. Therefore, the appropriate measure of compensation resulting from the destruction of uninfected residential citrus trees is not measured in terms of "marketable value."

Finally, *Polk* is inapplicable to claims brought by owners of uninfected residential trees destroyed under the Department's 1900 foot policy because *Polk* involved a zone of exposure of only 125 feet.

The district court also erred by disregarding the Patchens' claim for violation of their due process rights and because disputed issues of material fact existed concerning whether the Patchens' trees were located within 1900 feet of any tree actually infected with citrus canker.

ARGUMENT

I. THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE BECAUSE *POLK* IS A NARROW, FACT-SPECIFIC DECISION INVOLVING A COMMERCIAL NURSERY AND A 125 FOOT ZONE OF EXPOSURE

Florida law is clear: the destruction of private property for a public purpose can constitute a taking requiring compensation. *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988). In *Mid-Florida Growers*, this Court addressed the following question certified to be of great public importance:

> Whether the state, pursuant to its police power, has the constitutional authority to destroy healthy, but suspect citrus plants without compensation?

Id. at 102.

The Court held that the destruction of citrus trees uninfected with citrus canker benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. *Id*. at 103. The Court rejected the Department's claim that no compensation was required because the trees that were destroyed had been in the presence of or exposed to canker infested nursery stock and were therefore not healthy. *Id*. at 104. The Court answered the certified question in the negative, concluding that full and just compensation is required when the state,

pursuant to its police power, destroys healthy trees. *Id*. at 105. *See also*, *State Plant Board v. Smith*, 110 So. 2d 401 (Fla. 1959) (just compensation required for destruction of uninfected, healthy trees); *Corneal v. State Plant Board*, 95 So. 2d 1, 4 (Fla. 1957) ("the 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").

Two years following *Mid-Florida Growers*, the case that has given rise to so much controversy made its way to this Court.

1. *Polk* and the "No Marketable Value" Finding

This Court's opinion in *Department of Agriculture and Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990) was a narrow, fact-driven decision resulting from an inverse condemnation suit brought by a commercial nurseryman whose entire nursery stock was destroyed by the Department. As such, it has no application nor precedential value to inverse condemnation suits brought by owners of uninfected, healthy, noncommercial, residential citrus trees destroyed by the Department because they were located within 1900 feet of trees determined to be infected with citrus canker.

Richard Polk owned a commercial nursery engaged in the business of selling mature budded citrus trees. *Id*. at 37. Mr. Polk's entire nursery stock of 510,059

citrus trees was destroyed following the Department's discovery that 10 or fewer trees within his nursery showed actual signs of citrus canker infestation. *Id*. at 37-38. Mr. Polk filed suit claiming the Department's destruction of his entire nursery stock constituted a taking for which he was entitled to compensation under both the Florida and United States Constitutions. *Id*. at 38.

In accord with settled inverse condemnation law, the trial was bifurcated with issues of liability being tried by the court. *Id*. Considerable evidence was presented relating to "the issue of whether the bacterial disease constituted a nuisance or presented an imminent public danger so that destruction without payment of compensation was permissible or whether, under the circumstances, the destruction of the nursery stock was a taking of property for which full and just compensation was due." *Id*. at 39. The parties presented testimony of many witnesses regarding the necessity of destruction of the nursery stock. *Id*. at 40. Based on the evidence, the trial court found that the Department's destruction of a large portion of Mr. Polk's uninfected nursery stock amounted to an unconstitutional taking. *Id*. at 38.

The trial court then determined, <u>based on the evidence presented</u>, that the 10 trees actually infected, and those within 125 feet of them, had "no marketable value." *Id*. at 38. Accordingly, the trial court found that Mr. Polk was entitled to

compensation for all trees burned with the exception of the 10 trees actually diseased and those within 125 feet of the diseased trees. *Id*.

A trial on damages ensued, resulting in an inverse condemnation award in excess of $3 million for the destroyed nursery stock located beyond the 125 foot zone. *Id*. Both sides appealed. The Second District certified the case as being of great public importance and requiring immediate resolution. *Id*.

This Court affirmed the trial court's liability determination in all respects. *Id*. at 43. In reaching its decision, the Court, quoting from its earlier decision in *Mid-Florida Growers*, held that "the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what constitutes just compensation. The trial court's determination of liability in an inverse condemnation suit is presumed correct and will not be disturbed on appeal if supported by competent, substantial evidence." *Id*. at 40. The Court concluded there was substantial competent evidence presented at the liability phase of the trial to support the trial court's conclusion that Mr. Polk was entitled to compensation for all of his destroyed nursery stock except for those trees exhibiting symptoms of the bacterial disease and those located within 125 feet. *Id*.

When properly analyzed, it is clear that this Court's opinion affirming the liability judgment in *Polk* is a narrow, fact-driven decision <u>based on substantial</u>

competent evidence presented during a full blown trial on the merits. As such, *Polk* stands for the limited proposition that Mr. Polk established a compensable taking for all of his destroyed commercial nursery stock, except for the 10 trees determined by the Department to be infected and those trees within 125 feet of the infected trees.

2. The Third District's Misapplication of *Polk*

While the "no marketable value" decision in *Polk* may have made sense in that case based on the evidence presented involving a commercial citrus nursery, it is wholly inapplicable to inverse condemnation suits brought by owners of uninfected, healthy, noncommercial, residential citrus trees. Regrettably, however, at the Department's urging, the Third District has misinterpreted and incorrectly expanded the scope of *Polk*, first through its decision in *Department of Agriculture & Consumer Services v. Varela*, 732 So. 2d 1146 (Fla. 3d DCA 1999) and, most recently, though its decision in the instant case.

Varela involved a class action brought on behalf of Miami-Dade County owners of uninfected, healthy, noncommercial, residential citrus trees destroyed under the CCEP's 125 foot policy. The Department appealed the trial court's non-final order certifying the homeowners' inverse condemnation suit as a class action. The Department urged that *Polk* was binding precedent. The Third District reversed the order granting class certification and directed dismissal, finding that the homeowners

had no cause of action because “those trees within one hundred and twenty-five feet (125 ft.) of [diseased trees], ha[ve] no marketable value.” *Id*.

Newly armed with both chainsaws and an aberrant decision summarily negating the rights of thousands of aggrieved residential property owners, the Department dramatically expanded the kill zone from 125 to 1900 feet in January 2000. As a result of the grossly expanded zone of destruction, the Department destroyed over 333,661 uninfected citrus trees since January 1, 2000 in Broward and Miami-Dade Counties alone. (PA. 14).[2]

The Patchens’ trees were destroyed under the CCEP’s new 1900 foot eradication policy. Their six large, healthy, uninfected, fruit-bearing trees were destroyed on October 31, 2000. (R. 130). The Patchens filed their inverse condemnation suit against the Department eight days later. (R. 1-4). In April 2001, the trial court entered summary judgment against them. (R. 657-662). The trial court’s decision granting summary judgment was based on its misreading of *Polk’s* “no marketable value” language, as misapplied by the Third District in *Varela*. The Patchens’ appeal then made its way up to the Third District. The district court failed to distinguish its earlier misapplication of *Polk*, despite a clear opportunity to do so.

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[2] The vast majority of uninfected trees destroyed since January 2000 were located in these two counties, although small numbers have been destroyed elsewhere.

Instead, the Third District further misinterpreted and improperly expanded the scope of *Polk*.

Contrary to the Department's arguments to the trial court and later the Third District, *Polk* does not establish as a matter of law that no compensable taking can be established for the destruction of uninfected residential trees located within 1900 feet of infected trees because such trees have "no marketable value." This is so for three distinct and independent reasons.

a. *Polk* is limited to its facts and is not binding on subsequent cases.

First, as this Court and others have repeatedly held, the determination of whether a taking has occurred is a fact-driven decision based on the unique facts of each case. *Mid-Florida Growers*, 521 So. 2d at 104; *Schick v. Florida Department of Agriculture*, 504 So. 2d 1318 (Fla. 1st DCA 1987). Indeed, *Polk* was decided based on the evidence unique to that case. The liability determination affirmed by this Court in *Polk* followed a trial on the merits where extensive evidence was presented upon which the trial court relied in determining that no compensation was due for the destruction of those trees actually diseased and those within 125 feet. As such, *Polk* is not binding precedent on subsequent litigants engaged in inverse condemnation battles against the Department resulting from the destruction of their uninfected citrus

trees.[3] It certainly does not preclude the Patchens and other litigants from proving that uninfected residential trees located within 1900 feet of infected trees have value.

Yet, that is precisely what the trial court and later the Third District held here, in reliance on *Polk*, without reference to evidence. Unlike *Polk*, which was based on a fully developed evidentiary record, the trial court summarily rejected the Patchens' claim as a matter of law:

> This Court is bound by the decision of the Third District Court of Appeal in *Varela* and the Florida Supreme Court in *Polk*. Plaintiffs' trees "have no marketable value" under *Varela* because they are within the 1900 foot zone of exposure to citrus canker, and thus Plaintiffs "have no cause of action" for the removal of such trees.

(R. 661).

The Third District followed in tandem:

> Under the current state of the law, the agency need not compensate the owners for the destruction of those trees.
>
> In *Department of Agriculture & Consumer Servs. v. Varela*, ... [W]e held that those plaintiffs had no cause of action, as according to *Department of Agriculture v. Polk*, 568 So. 2d 35 (Fla. 1990), those trees have "no marketable value." 732 So. 2d at 1146.

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[3] While it can be argued that *Polk* is not binding precedent on any subsequent inverse condemnation suits resulting from the destruction of uninfected citrus trees – involving both residential and commercial citrus trees – the Court need not reach that issue in answering the certified question in the instant case.

. . .

> We recognize that in *Polk*, the court was referring to uninfected commercial nursery stock located within the Department's specified zone of destruction, while in this case, non-commercial, residential trees were destroyed. Nevertheless, this court explicitly relied on *Polk* when it decided *Varela*, which like this case, involved non-commercial citrus trees. Unless this court recedes en banc from *Varela* and distinguishes *Polk*, we must affirm the order on appeal.

(PA. 9-10).

Given the obvious distinction between a fully developed trial record in *Polk* and the lack of one here, there was no basis for the trial court's and the Third District's summary application of *Polk* in deciding the instant case. As a result, the Patchens were deprived of the opportunity to present evidence supporting a taking claim and thereby to recover full and just compensation for the taking of their property.

The application of *Polk* in deciding the Patchens' case also departed from established principles of collateral estoppel. Collateral estoppel applies only when an identical issue has been litigated between the same parties. *E.C. v. Katz*, 731 So. 2d 1268 (Fla. 1999). In summarily deciding the Patchens' case, the trial court and the Third District misinterpreted *Polk* as standing for the proposition that the state's 125-foot "exposed citrus tree" policy bound not only the litigants in *Polk*, but all future litigants as well. Both courts were mistaken. *Polk* did no more than hold that the state

prevailed on the factual issue of demonstrating that the trees on Mr. Polk's nursery located within 125 feet of the 10 infected trees had "no marketable value." *Polk*, 568 So. 2d at 39. Only the parties in *Polk* and those in privity with them were bound by that decision. *Katz*, 731 So. 2d at 1269. The trial court's and later the Third District's application of *Polk* in deciding the instant case thus violated Florida's principles of collateral estoppel.

b. Differences between commercial and residential use of citrus trees and differences in measuring value.

Second, *Polk* is inapplicable because the "no marketable value" finding involving uninfected commercial nursery stock is wholly inapplicable to inverse condemnation claims resulting from the destruction of healthy, uninfected, noncommercial, residential citrus trees owned by the Patchens and others.

By definition, the Patchens and other owners of noncommercial, residential citrus trees do not use their citrus trees for commercial purposes. Unlike Richard Polk's nursery, the Patchens and other owners of noncommercial, residential citrus trees do not raise citrus trees for purposes of resale. Moreover, unlike commercial citrus grove owners, the Patchens and other owners of noncommercial, residential citrus trees are not primarily engaged in the business of selling fruit grown on their trees. Rather, the Patchens and other owners of noncommercial, residential citrus

trees use their trees for home consumption of fruit, for shade and aesthetics, and for personal enjoyment. Thus, noncommercial, residential citrus trees have value to their owners independent of any "marketable value." Absent their destruction, these uninfected, healthy, noncommercial, residential citrus trees would continue to bear fruit for home consumption, continue to provide shade and aesthetics to the properties upon which they are situated, and provide continued enjoyment for their owners.

The decision in *Polk* finding that trees within 125 feet of those actually diseased had "no marketable value" is also plainly inapplicable in determining the amount of full and just compensation for the destruction of uninfected, healthy, noncommercial, residential citrus trees. The Patchens and other owners of uninfected, healthy, noncommercial, residential trees are entitled to recover full and just compensation measured by the replacement cost of their destroyed trees. *See*, *Fiske v. Moczik*, 329 So. 2d 35 (Fla. 2d DCA 1976).

c. The expansion of the kill zone from 125 to 1900 feet.

Third, *Polk* is inapplicable to claims brought by owners of uninfected, noncommercial, residential citrus trees destroyed under the Department's 1900 foot policy because *Polk* involved a zone of exposure of 125 feet. Given this substantial difference in measurement alone, there is no logical basis to conclude that *Polk* precludes the Patchens and other Florida property owners whose uninfected,

residential citrus trees were destroyed solely because they were located <u>within 1900 feet</u> of citrus trees determined to be infected with citrus canker from seeking full and just compensation resulting from the destruction of their property for a public purpose.

Unlike the factual finding in *Polk* that uninfected commercial trees <u>within 125 feet</u> of infected trees have "no marketable value," there was <u>no evidence</u> presented below that uninfected residential citrus trees located <u>within 1900 feet</u> of infected trees do not have value. Instead, the decisions below were based solely on the improperly expanded application of *Polk* (and *Varela*).

Yet *Polk* is easily distinguishable. Its finding of "no marketable value" was based on a zone of exposure extending out 125 feet. The CCEP's expanded zone of destruction out to 1900 feet, an area equal to 260 acres, is 230 times greater than the prior 125 foot policy.

Polk's holding that no compensation was due for "exposed" trees located within 125 feet of an infected tree was based on evidence presented to the trial court demonstrating that trees within 125 feet presented an inherent danger of becoming infected and therefore had "no marketable value." In the instant case, there was no evidence presented that <u>uninfected</u>, <u>healthy</u>, <u>noncommercial</u>, <u>residential</u> trees located within 1900 feet of infected trees present an inherent danger of becoming infected.

Nor was any evidence presented that such trees are inherently worthless. Indeed, the finding in *Polk* that all trees beyond 125 feet have value suggests that all uninfected residential citrus trees destroyed between 125 and 1900 feet do, in fact, have value. Thus, the Department's argument that it need not pay compensation for the destruction of uninfected, healthy, noncommercial, residential trees within the expanded 1900 kill zone is without foundation.

II. THE DECISION BELOW DISREGARDS THE PATCHENS' CLAIMS FOR VIOLATION OF THEIR DUE PROCESS RIGHTS AND THE EXISTENCE OF DISPUTED ISSUES OF MATERIAL FACT CONCERNING WHETHER THEIR TREES WERE LOCATED WITHIN 1900 FEET OF A TREE ACTUALLY INFECTED WITH CITRUS CANKER[4]

In affirming the decision below, the district court overlooked two important issues raised by the Patchens. First, the district court failed to recognize that the Patchens' inverse condemnation claim sought relief for violation of their due process rights. The district court erroneously declared in a footnote that they had not. (PA. 8). Second, in reviewing the summary judgment entered below, the district court failed to give proper weight to the existence of disputed issues of material fact

[4] This Court has jurisdiction to review all other issues arising in the case that have been properly preserved and presented below. *Tillman v. State*, 471 So. 2d 32 (Fla. 1985); *Miami Gardens, Inc. v. Conway*, 102 So. 2d 622 (Fla. 1958); *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983); *Vance v. Bliss Properties*, 149 So. 370 (Fla. 1933).

concerning whether any of the trees located within 1900 feet of the Patchens' trees were, in fact, infected with citrus canker at all.

1. <u>The District Court's Decision Ignored the Patchens' Claims for Violation of Their Due Process Rights</u>

The district court's decision was premised on the mistaken conclusion that "[T]he property owners did not allege any violation of their due process rights." (PA. 8). To the contrary, the Patchens' claim was based upon allegations that their due process rights were violated. The Patchens' complaint included the following allegations:

> 1. This is an action for inverse condemnation by Plaintiffs against Defendant for the taking of Plaintiffs' property for a purported public purpose <u>without due process of law</u> or full compensation paid therefore in violation of the Fifth Amendment of the Constitution of the United States and Article X, Sec. 6 of the Constitution of the State of Florida.
>
> . . .
>
> 4. On October 31, 2000, Defendant entered the property of Plaintiffs <u>without notice or due process of law</u>, and by armed force, and destroyed all of Plaintiffs' citrus trees.
>
> . . .
>
> 7. <u>Defendant acted without due process of law</u> and without paying full compensation to the Plaintiffs for the property taken thus violating the Fifth Amendment to the Constitution of the United States

> and Article X, Section 6 of the Constitution of the State of Florida.
>
> Wherefore, Plaintiffs seek full compensation for the property destroyed and taken and damages to Plaintiffs' remaining property. Plaintiffs pray that the Court determine liability in this cause and empanel a jury of twelve members pursuant to Fla. Stat. Chap. 73 to determine full compensation to Plaintiffs and to award attorneys' fees, interest, and all expenses of this action. Plaintiffs pray for any additional and further relief to which they may be entitled as may be just.

(R. 2-4) (emphasis added).

Inverse condemnation is the appropriate remedy where governmental action takes private property without due process of law. *State Road Department of Florida v. Tharp*, 1 So. 2d 868 (Fla. 1941); *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. 1st DCA 1964). In *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487 (Fla. 1st DCA 1975), the court held that inverse condemnation was the appropriate remedy when the owners' property was demolished without notice:

> Sub judice, however, the complaint clearly alleges that the buildings were destroyed by the City which could have only resulted from a direct physical invasion. The complaint also alleges an illegal act by the City when it demolished Petitioners' buildings <u>without proper notice</u>.

Id. at 489 (emphasis added).

The Third District previously found that the Department's procedure for challenging its planned destruction of trees, even when notice is given, is not meaningful. In *Markus v. Department of Agriculture & Consumer Servs.*, 785 So. 2d 595 (Fla. 3d DCA 2001), the court characterized the "due process" provided by the Department as meaningless:

> The final agency order is nothing but a "Dear Resident" 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. . . .

Id. at 596 (emphasis added).

Due process of law must be meaningful. Otherwise, the concept of "due process" itself would be an oxymoron. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Based on the Third District's conclusion that the procedure established by the Department is not meaningful – even where notice is provided – it follows that where, as here, no notice was given at all, the procedure is utterly meaningless.

2. Disputed Issues of Fact Exist Concerning Whether Any Trees Within 1900 Feet of the Patchens' Trees Were Actually Infected With Citrus Canker

The district court also overlooked the fact that the Patchens' appeal resulted from the grant of summary judgment. In reviewing a summary judgment, all disputed issues of fact and inferences to be drawn therefrom must be viewed in the light most

favorable to the Patchens, as the non-movants. *Westinghouse Electric Supply Company v. Midway Shopping Mall, Inc.*, 277 So. 2d 809 (Fla. 3d DCA 1973); *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29 (Fla. 1977); *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985).

The district court's decision was premised upon the erroneous conclusion that the Patchens' trees were exposed to infected trees: "Canker-infested trees were allegedly found by trained pathologists on Sunset Island III, across an expanse of water, but within 1900 feet of the Patchens' property." (PA. 8). To the contrary, while the Patchens' trees were located within 1900 feet of locations the Department claimed were home to infected trees, the Patchens were deprived of the opportunity to challenge that finding by being denied notice and due process. In addition, the Patchens disputed the competence of the Department's findings, challenged the shallow training of its "pathologists," and disclosed that some of the supposed "infected" trees did not exist at all. (R. 128-135, 153-155). On review of the summary judgment, the Patchens were entitled to the benefit of all reasonable inferences that the finding of infection in non-existent trees by poorly trained personnel impeached the credibility of all the findings of infestation, especially where the Department admitted that no laboratory analysis was made of any of the supposedly infected trees. (R. 158-161).

CONCLUSION

Based on the foregoing arguments and authorities, the Patchens respectfully urge the Court to answer the certified question in the negative, to quash the Third District's decision, and direct the trial court to determine whether a taking has occurred based on the specific facts and circumstances present in this case.

Respectfully submitted,

ROBERT C. GILBERT, P.A.
220 Alhambra Circle
Suite 400
Coral Gables, FL 33134
Tel: (305) 529-9100
Fax: (305) 529-1612

By:____________________________
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Robert C. Gilbert
Florida Bar No. 561861

WEISS SEROTA HELFMAN PASTORIZA & GUEDES, P.A.
Joseph H. Serota
2665 South Bayshore Drive
Suite 420
Miami, FL 33133
Tel: (305) 854-0800
Fax: (305) 854-2323

Attorneys for Petitioners

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true and correct copies of the foregoing have been furnished, by U.S. Mail, to the individuals identified below, this _____ day of July, 2002:

Wesley R. Parsons, Esq.
Adorno & Yoss, P.A.
2601 South Bayshore Drive
Suite 1600
Miami, FL 33133
Co-Counsel for Respondents

Jerold I. Budney, Esq.
Greenberg Traurig, P.A.
515 East Las Olas Boulevard
Suite 1500
Fort Lauderdale, FL 33301
Co-Counsel for Respondents

Robert A. Ginsburg
Miami-Dade County Attorney
Robert A. Duvall, III
Assistant County Attorney
111 NW First Street
Suite 2810
Miami, FL 33128
Co-Counsel for Amici
Miami-Dade County

Edward A. Dion
Broward County Attorney
Andrew J. Meyers
Chief Appellate Counsel
Tamara M. Scrudders
Assistant County Attorney
115 South Andrews Avenue
Suite 423
Fort Lauderdale, FL 33301
Co-Counsel for Amici
Broward County

By:_____________________________

Robert C. Gilbert
Florida Bar No. 561861

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the font used in this computer-generated brief is Times New Roman, 14-point, and complies with Fla. R. App. P. 9.210(a)(2).

By:______________________________

Robert C. Gilbert
Florida Bar No. 561861