

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND  
FOR PALM BEACH COUNTY FLORIDA

CASE NO.: 2002CA013717 AJ

DAVID MENDEZ AND LILLIAN  
MENDEZ, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

FLORIDA DEPARTMENT OF  
AGRICULTURE AND CONSUMER  
SERVICES, et al.,

Defendants.

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**ORDER ON LIABILITY CLAIMS AND DEFENSES**

THIS CAUSE came before the Court for a non-jury trial from October 15, 2007, through October 29, 2007, on the issue of liability under Plaintiffs' claim for inverse condemnation in Count I of Plaintiffs' Second Amended Class Action Complaint. Present before the Court were the Plaintiff, David Mendez, on behalf of himself and all others similarly situated (collectively referred to as "Plaintiffs" and/or "Class") and Defendant Craig Meyer, Deputy Commissioner for the Department, on behalf of the Florida Department of Agriculture and Consumer Services ("Department") and Charles H. Bronson, in his official capacity as Commissioner of the Florida Department of Agriculture and Consumer Services, (collectively referred to as "Department" and/or "Defendants").

Based upon the parties' Joint Pretrial Stipulation, the evidence presented consisting of testimony and exhibits, arguments of counsel and applicable law, this Court **FINDS, ORDERS AND ADJUDGES** as follows:<sup>1</sup>

### I. SUMMARY

This case arises from a class action complaint brought by David Mendez and Lillian Mendez, on behalf of themselves and all others similarly situated. The Class consists of all owners of citrus trees within Palm Beach County not used for commercial purposes which were both (1) not determined by the Department to be infected with citrus canker and (2) destroyed by the Department under the Citrus Canker Eradication Program ("CCEP"). The Defendants destroyed Plaintiffs' "exposed" citrus trees, that is, trees which were not determined to be infected with citrus canker but were located within 1,900 feet of another citrus tree determined to be infected with citrus canker (hereinafter referred to as "exposed citrus tree(s)"). The Department destroyed sixty-six thousand four hundred and sixty eight (66,468) residential citrus trees owned by members of the Class in Palm Beach County from January 1, 2000 until the end of the eradication program in early 2006. The 66,468 destroyed residential citrus trees were located on 40,937 owners' property in Palm Beach County.

The primary issue in this case is whether the Defendants' physical destruction of the Plaintiffs' exposed citrus trees constitutes a "taking" under Article X, § 6(a) of the Florida Constitution requiring full and just compensation. The Plaintiffs have not challenged the validity of the Defendants' actions under the State's police powers. This Court assumes that the State, acting through the Department of Agriculture and Consumer Services, acted within permissible constitutional boundaries by destroying the privately owned non-commercial citrus trees in Palm

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<sup>1</sup> All Plaintiffs, as defined by the certified class, are bound by this Order except those persons listed in the Plaintiffs' Notice of Filing List of Exclusions, filed on October 29, 2007. (DE # 275).

Beach County. The disputed issue in this case is whether the Plaintiffs' exposed citrus trees had compensable value at the time of their destruction.

This Court concludes, based on the specific record evidence introduced at trial and following applicable legal precedent, that the Defendants' destruction of the Plaintiffs' exposed citrus trees, which were not determined to be infected with citrus canker but were located within 1,900 feet of another tree determined to be infected with citrus canker, constitutes a "taking" under Article X, § 6(a) of the Florida Constitution requiring full and just compensation. The Court's conclusion is based on the following findings: (1) the Defendants implemented the CCEP in order to protect the commercial citrus industry in the State of Florida and thereby to benefit the public welfare; (2) the Plaintiffs' exposed citrus trees had compensable value because the trees did not have symptoms of citrus canker, showed no outward signs of infection and otherwise appeared healthy; and (3) the Plaintiffs' exposed citrus trees were not for sale in a commercial nursery, and thus, their value for commercial purposes is irrelevant.

This Court also concludes that the Plaintiffs' exposed citrus trees did not pose an imminent threat to public health, safety or welfare and did not constitute a public nuisance.<sup>2</sup> The nature of the harm that can occur from the spread of citrus canker does not constitute an "imminent public harm" or "public nuisance," as those terms have been defined and interpreted under Florida law. Citrus canker does not destroy the tree or affect the citrus fruit for human consumption. Citrus canker is a cosmetic disease that can impact the appearance of the fruit and leaves and can cause yield loss – that is, fruit drop before the fruit becomes mature. Yet, even assuming that the spread of citrus canker potentially could constitute an "imminent public harm" or a "public nuisance," the Defendants have failed to present persuasive evidence that all, or

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<sup>2</sup> The Defendants raise this as an affirmative defense.

even a majority, of the Plaintiffs' exposed citrus trees necessarily will become infected with citrus canker or will become infected imminently to constitute a "public nuisance."

Lastly, this Court concludes that Defendants' affirmative defense of superseding cause is inapplicable, as a matter of law, because superseding cause is a defense in a cause of action in negligence and cannot be properly claimed in an inverse condemnation action. Even assuming the superseding cause defense is available as an affirmative defense in this action, this Court concludes that the Defendants have failed to satisfy their burden of demonstrating a superseding cause. The Court's conclusion is based on its findings that the injunctions issued in an inverse condemnation action are not independent from the underlying act, and furthermore, constitute a foreseeable remedy. Thus, the affirmative defense of superseding cause fails.

Based on the foregoing, this Court finds for Plaintiffs and the Class and against the Defendants on the issue of liability under the claim for inverse condemnation in Count I of the Second Amended Class Complaint. Defendants' destruction of Plaintiffs' exposed citrus trees constitutes a "taking" requiring full and just compensation. As such, this case shall proceed to jury trial on March 31, 2008, on the issue of damages to determine the amount of compensation due to Plaintiffs and the Class.

## II. PROCEDURAL BACKGROUND

On November 14, 2002, Plaintiffs David Mendez and Lillian Mendez, on behalf of themselves and all others similarly situated, filed a Class Action Complaint for Inverse Condemnation against Defendants Florida Department of Agriculture and Consumer Services, and Charles H. Bronson.<sup>3</sup> (DE # 1). Plaintiffs allege a taking of their property without just

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<sup>3</sup> This is one of five related class action lawsuits brought on behalf of Florida homeowners whose residential citrus trees were destroyed under the CCEP. The other suits are pending in Broward, Lee, Miami-Dade and Orange Circuit Courts. This matter was the first to proceed to trial on liability for inverse condemnation.

compensation and seek to recover full and just compensation on behalf of all Palm Beach County property owners whose uninfected, healthy citrus trees have been destroyed since January 1, 2000, pursuant to the CCEP.

On June 16, 2003, Plaintiffs filed their Motion for Class Certification. (DE # 10). On April 26, 2004, this Court certified the Class as follows:

All owners of citrus trees within Palm Beach County, incorporated or otherwise, not used for commercial purposes, which were not determined by the Department to be infected with citrus canker and which were destroyed under the CCEP on or after January 1, 2000.

In certifying the Class, this Court determined that the Class satisfied all of the elements set forth by Florida Rule of Civil Procedure 1.220(a). (DE # 42). This Court also found that, in addition to the four elements set forth in Rule 1.220(a), the Plaintiffs must satisfy at least one of the three subsections of Florida Rule of Civil Procedure 1.220(b). This Court found that the Plaintiffs satisfied Rule 1.220(b)(3) which “mandates that questions of law and/or fact common to Plaintiffs’ claims and the claims of each Class member predominate over questions of law and/or fact affecting only individual Class members, and that class representation be superior to other methods for the fair and efficient adjudication of this controversy.” The Fourth District Court of Appeal affirmed this Court’s order certifying the class. *Castin v. Florida Dep’t of Agric. & Consumer Servs., et al.*, 901 So. 2d 1020 (Fla. 4th DCA 2005).

On December 15, 2005, Plaintiffs filed their Second Amended Class Action Complaint, wherein they state their claims in three counts: Count I—Inverse Condemnation under Article X, § 6(a) Fla. Const., Count II—Declaratory Judgment Concerning § 581.1845, Fla. Stat., and Count III—Additional Compensation Under § 581.1845, Fla. Stat. (DE #55). On March 16, 2006, Defendants responded to the Second Amended Class Action Complaint by answering and

asserting several affirmative defenses, including the third and fourth defenses as to liability, respectively: (a) injunctions, orders or refusals to issue search warrants by the trial courts delayed the CCEP resulting in the spread of citrus canker which constituted the actual cause or a superseding cause, in whole or in part, of the damages alleged by the Plaintiffs (the “superseding cause” defense); and (b) the Department was entitled to destroy and remove citrus trees which presented an imminent threat to public health, safety, or welfare, or were a public nuisance, without compensation (the “public nuisance” defense). (DE # 64).

On April 24, 2006, Plaintiffs filed their Motion for Partial Summary Judgment of Liability, which they amended on August 31, 2006, as Plaintiffs’ Amended Motion for Partial Summary Judgment of Liability as to Counts I and III of Second Amended Class Action Complaint. (DE # 70 and 83, respectively). Plaintiffs asserted therein that the Class was entitled to judgment of liability under Count I (Inverse Condemnation under Article X, § 6(a) Fla. Const.) and Count III (Additional Compensation Under § 581.1845, Fla. Stat.) pursuant to the Florida Supreme Court’s decisions in *Haire v. Florida Department of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004) and *Patchen v. Florida Department of Agriculture and Consumer Services*, 906 So.2d 1005 (Fla. 2005). Further, Plaintiffs asserted that the Department’s fourth affirmative defense, public nuisance, is the only liability defense propounded by the Department, but that this defense is no longer applicable based on the Florida Supreme Court’s decisions in *Haire* and *Patchen*. Additionally, Plaintiffs stated the Department’s remaining affirmative defenses are either legally insufficient or relate solely to damages issues.

On December 7, 2006, this Court granted Plaintiffs’ Motion for Partial Summary Judgment of Liability as to Count III, the statutory claim brought under § 581.1845 of the Florida

Statutes. This Court further denied Plaintiffs' Motion for Partial Summary Judgment Motion of Liability as to Count I, the common law claim for inverse condemnation, based on disputed materials facts on the Department's third and fourth affirmative defenses. (DE # 96).

On June 15, 2007, Plaintiffs filed their Renewed and Supplemental Motion for Summary Judgment of Liability as to Count I. (DE # 143). On July 12, 2007, Plaintiffs' Motion was denied by Order of this Court. (DE # 164).

On September 28, 2007, Plaintiffs' filed another Renewed Motion for Summary Judgment of Liability on Inverse Condemnation. (DE # 226). On October 11, 2007, at a hearing on the pre-trial motions, this Court denied the Plaintiffs' Motion with respect to Defendants' fourth affirmative defense, the "public nuisance" defense, and deferred ruling on the third affirmative defense, the "superseding cause" defense.

### **III. STIPULATED FACTS AND ISSUES NOT IN DISPUTE**

The parties stipulated to the following facts and issues which required no proof at trial:

1. The liability trial covers Plaintiffs' claim for inverse condemnation under Article 10, § 6(a) of the Florida Constitution, to recover compensation on behalf of Palm Beach County homeowners whose residential citrus trees were physically destroyed by Defendants on or after January 1, 2000, under the CCEP.

2. The certified Class is comprised of:

All owners of citrus trees within Palm Beach County, incorporated or otherwise, not used for commercial purposes, which were not determined by the Department to be infected with citrus canker and which were destroyed under the CCEP from January 1, 2000 to the present.

3. This Court has subject matter jurisdiction over this action pursuant to § 26.012 of the Florida Statutes. The aggregate claim or amount in controversy of the Class exceeds Fifteen Thousand Dollars (\$15,000.00), exclusive of interest, costs and attorneys' fees.

4. Venue is proper pursuant to §§ 47.011 and 73.021 of the Florida Statutes, because all of the alleged takings relevant to this Action occurred in Palm Beach County, Florida.

5. Defendant Florida Department of Agriculture and Consumer Services is the governmental agency of the State of Florida responsible for adopting and implementing the CCEP, a joint state-federal program. Commissioner Charles Bronson is the duly elected head of the Department.

6. Class representative Plaintiffs David Mendez and Lillian Mendez have owned a single family home located 22584 SW 64th Way, Boca Raton, Palm Beach County, Florida 33428, as of March 20, 2001, and at the time of the class certification hearing on March 2, 2004.

7. As of March 20, 2001, four citrus trees were located on the Mendez' residential property in Palm Beach County, Florida.

8. On or about March 20, 2001, the four citrus trees located on the Mendez' property were physically destroyed by Defendants under the CCEP.

9. According to the Pest Incident Control Database ("PICS"), between January 1, 2000, and the end of the CCEP in 2006, Defendant physically destroyed a total of 66,468 residential citrus trees owned by members of the Class:

- a. 1,944 of these trees were destroyed between January 1, 2000 and October 26, 2000;
  - b. 10,156 of these trees were destroyed between October 27, 2000 and April 6, 2004;
  - c. 5,211 of these trees were destroyed between April 7, 2004 and August 11, 2004;
- and

d. 49,157 of these trees were destroyed between August 12, 2004 through the date that the CCEP ended in early 2006.

10. According to PICS, the 66,468 residential citrus trees owned by members of the Class and physically destroyed by Defendants between January 1, 2000 and the end of the CCEP in 2006, were located on 40,937 owners' properties in Palm Beach County, Florida.

11. According to PICS, between January 1, 2000 and the end of the CCEP in 2006, Defendants physically destroyed a total of 5,691 residential citrus trees in Palm Beach County which were classified as "positive."

a. 39 of these trees were destroyed between January 1, 2000 and October 26, 2000;

b. 405 of these trees were destroyed between October 27, 2000 and April 6, 2004;

c. 253 of these trees were destroyed between April 7, 2004 and August 11, 2004; and

d. 4,994 of these trees were destroyed between August 12, 2004, through the date the CCEP ended in early 2006.

12. According to PICS, between January 1, 2000 and the end of the CCEP in 2006, Defendants physically destroyed a total of 682,204 residential citrus trees throughout the State of Florida under the CCEP: 577,253 of these trees were classified as "exposed" and 104,951 trees were classified as "positive."

13. According to PICS, the 577,253 citrus trees classified as "exposed" and physically destroyed by Defendants between January 1, 2000 and the end of the CCEP in 2006 were located on 281,959 residential properties throughout the State of Florida.

14. Defendants first confirmed the existence of Asian-strain citrus canker in Palm Beach County on November 29, 1999.

15. The first legal action seeking compensation for homeowners whose residential citrus trees were destroyed under the CCEP's 1,900 foot policy was commenced on October 27, 2000 in Broward County Circuit Court in *City of Pompano Beach, et al. v. Florida Department of Agriculture, et al.*, No. 00-18394 (08) CACE (Fla. 17th Cir. Ct. Jan. 24, 2002) ("*City of Pompano Beach*").

16. The first legal action seeking to enjoin Defendants' destruction of residential citrus trees which were not actually determined to be infected with citrus canker under the 1,900 foot policy was commenced on October 27, 2000, in Broward County Circuit Court in *City of Pompano Beach*.

17. The first Injunction preventing Defendants from destroying citrus trees which were not actually determined to be infected with citrus canker under the 1,900 foot policy was entered subsequent to October 27, 2000, in Broward County Circuit Court in *City of Pompano Beach*.

18. On January 10, 2006, the United States Department of Agriculture notified Defendants it would no longer fund the CCEP.

19. In early 2006, Defendants discontinued the CCEP.

#### **IV. LEGAL ISSUES IN DISPUTE FOR THIS COURT'S DETERMINATION**

This Court must determine the following legal issues:

1. Whether the Defendants' physical destruction, under the CCEP, of the Plaintiffs' exposed citrus trees, which were not determined to be infected with citrus canker but were located within 1,900 feet of another citrus tree determined to be infected with citrus canker, constitutes a taking under Article X, § 6(a) of the Florida Constitution.

2. Whether the Plaintiffs' exposed citrus trees, which were not determined to be infected with citrus canker but were located within 1,900 feet of another tree determined to be infected with citrus canker, presents an imminent threat to public health, safety or welfare, or constitute a public nuisance.
3. Whether injunctions, orders or refusals to issue search warrants entered or occurring in this action and/or in other actions constitute the actual or a superseding cause, relieving the Defendants of liability for the physical destruction, under the CCEP, of the Plaintiffs' exposed citrus trees.

## V. BACKGROUND OF CANKER ERADICATION EFFORTS IN FLORIDA

A summary of the efforts to eradicate citrus canker in Florida over the years provides a useful context in which to evaluate the issues presented in this case. These eradication efforts have been described extensively by the Florida Supreme Court in *Haire v. Florida Department of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004). Also, witnesses at the trial in this case, including the Plaintiffs' expert witness on citrus canker, Dr. Laverne "Pete" Timmer; the Defendants' expert witness on citrus canker, Dr. Timothy Schubert; the Department's Deputy Commissioner, Mr. Craig Meyer; and the Department's Director of the Division of Plant Industry, Mr. Richard Gaskalla, presented testimony about the eradication efforts in Florida.

Citrus canker is a disease that is caused by citrus canker bacteria, which attack the fruits, leaves and stems of citrus plants. *Haire*, 870 So. 2d at 778. Citrus canker was discovered in Florida in 1914 and efforts to eradicate canker began when it first was discovered. *Id.* Dr. Schubert testified that Asia-strain canker first was discovered in Florida in the early 1900's. Schubert testified that citrus canker is now widely distributed throughout many of the world's citrus-producing nations including the United States, Brazil, Argentina, and Asia. Schubert,

along with Dr. Timmer and Mr. Gaskalla, testified that, in the mid-1980's, the Asian strain of citrus canker was discovered in Manatee County. Canker was considered eradicated in 1992; thus, the eradication program stopped briefly in 1994. *Id.* In 1995, however, an outbreak of Asian-strain citrus was discovered around the Miami International Airport. *Id.* Schubert and Gaskalla testified that, based on laboratory analysis, the Department concluded that the disease had been present in South Florida for approximately two to three years. Gaskalla testified that, in the Fall of 1995, the Department re-activated the CCEP following the confirmed diagnosis of Asian-strain citrus in Miami-Dade County.

Gaskalla and Schubert testified that the CCEP initially called for the destruction of all citrus trees actually determined to be infected with citrus canker and that all other citrus trees within 125 feet of the infected tree be severely pruned or buck-horned. Gaskalla and Schubert further testified that when the Department found that this criteria was ineffective to stop the spread of canker, the Department expanded the CCEP by destroying all citrus trees actually determined to be infected with citrus canker as well as all other citrus trees within 125 feet. In Miami-Dade County in the mid-1990's, the Department determined that the destruction of citrus trees within 125 feet of an infected tree was not reducing the occurrences of citrus canker. *Id.*

Gaskalla, Meyer and Schubert all testified that, for a period of approximately twelve to eighteen months beginning in early 1998, the Department placed a moratorium on the continued destruction of uninfected citrus trees under the CCEP. During the moratorium, the only citrus trees destroyed by the Department were trees actually determined to be infected with citrus canker. While the statewide moratorium on the destruction of uninfected citrus trees was in effect, the Department decided to initiate a study, now known as the "Gottwald study," that would measure the distances that citrus canker would spread in South Florida. *Id.* at 779. The

Gottwald study concluded that the eradication program which used the 125 foot radius was inadequate. *Id.*

Gaskalla and Meyer testified that, in November 1999, the Citrus Canker Technical Advisory Task Force (“CCTATF”), a body of regulatory individuals, scientists and citrus industry representatives, formally recommended that the Department adopt a policy to destroy all citrus trees within a 1,900 foot radius of a diseased citrus tree in order to eradicate citrus canker. The Department agreed to expand the CCEP’s zone of eradication to 1,900 feet effective January 1, 2000, and implemented the new regulatory policy of destroying all citrus trees located within 1,900 feet of every canker infected citrus tree. This policy remained in effect from January 2000 through early January 2006.

## VI. ANALYSIS

### A. Legal Principles

#### 1. Inverse Condemnation

In an inverse condemnation suit, this Court is the trier of all issues, legal and factual, except for the question of what constitutes just compensation. *Dep’t of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). The trial court’s determination of liability in inverse condemnation is presumed correct and will not be disturbed on appeal if supported by competent, substantial evidence. *Atlantic Int’l Inv. v. State*, 478 So. 2d 805, 808 (Fla. 1985). Of course, purely legal determinations are reviewed *de novo*. *Gosselin v. Gosselin*, 869 So. 2d 667, 668 (Fla. 4th DCA 2004).

Inverse condemnation is a cause of action by a property owner to recover the value of property that has been *de facto* taken by a government agency having the power of eminent domain but where no formal exercise of that power has been undertaken. *Sarasota Welfare*

*Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d DCA 1995); *City of Pompano Beach v. Yardarm Rest., Inc.*, 641 So. 2d 1377, 1384 (Fla. 4th DCA 1984). A “taking” has been described as:

Entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

*Poe v. State Road Dep't*, 127 So. 2d 898, 900 (Fla. 1st DCA 1961).

As the Fourth District Court of Appeal explained in *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), one of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.” *Id.* at 1170 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). When the government acts for the benefit of the public as a whole, a select group of citizens should not bear the expenses. The destruction of healthy trees benefits the citrus industry, and in turn, Florida’s economy. The activity of destroying healthy trees to stop canker essentially confers a public benefit rather than preventing a public harm. If a state regulation which destroys private property creates a public benefit, such action is more likely a constitutional taking. *Mid-Florida Growers, Inc.*, 521 So. 2d at 103.

Florida courts repeatedly have held that a taking can occur when the government, validly exercising its police power, enacts a regulation or imposes a condition that interferes with private property rights. *Florida Game & Fresh Water Fish Comm’n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. 2d DCA 1994). “[I]t 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.” *Dep’t of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 39 (Fla. 1990); *Mid-Florida Growers, Inc.*, 521 So.

2d at 103; *Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984); *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981).

## 2. Applicable Law Regarding Canker Eradication and Constitutional Taking

The State's eradication efforts are evaluated within the context of both relevant statutory law and case decisions. The State's eradication efforts must conform to the constitutional limitations placed upon the State's police power. The absolute destruction of private property by the State is an extreme exercise of its police power and is justified only within the narrowest limits of actual necessity, unless the State pays full and just compensation. *Corneal v. State Plant Bd.*, 95 So. 2d 1 (Fla. 1957). Generally, when the State, pursuant to its police power, destroys healthy but suspect citrus trees, it must provide full and just compensation to the owners of the trees. *Mid-Florida Growers, Inc.*, 521 So. 2d at 105. Whether the destroyed citrus trees were healthy at the time of their destruction and whether those trees had any compensable value at the time of their destruction is a factual inquiry. The factors set forth in *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380-81 (Fla. 1981) are relevant to this factual inquiry.<sup>4</sup>

The analysis of whether an exposed citrus tree has compensable value depends on whether the subject tree is used for commercial purposes or belongs to a homeowner. The Florida Supreme Court in *Haire* observed that any tree for sale in a commercial nursery that is exposed to citrus canker had no value for commercial purposes. "This would be particularly so

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<sup>4</sup> The *Graham* factors are:

1. Whether there is a physical invasion of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

*Graham*, 399 So. 2d at 1380-81.

of commercial nursery stock, as no grower would knowingly buy exposed trees.” *Id.* at 1050 n.4. But, because citrus canker does not necessarily destroy the tree or affect fruit for human consumption, “that rationale would not make homeowners’ citrus trees worthless.” *Id.*

Indeed, the Florida Supreme Court, in its most recent decision addressing citrus canker and the issue of value, refused to extend its decision in *Polk*, 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, to the Department’s destruction of uninfected, healthy residential citrus trees within 1,900 feet of a tree infected with citrus canker. *Patchen v. Dep’t of Agric. & Consumer Servs.*, 906 So. 2d 1005, 1005-06 (Fla. 2005).<sup>5</sup>

The State’s destruction of healthy citrus trees may be properly undertaken without payment of full and just compensation if the bacterial disease of canker, as presented in this matter, constituted a nuisance or presented an imminent public danger. *Dep’t of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990). Common law “nuisance” generally has been described as anything “which either annoys, injures or endangers the comfort, health, repose or safety of the citizen, or which unlawfully interferes with or tends to obstruct, or in any way render unsafe and insecure other persons in life or in the use of their property.” *Prior v. White*, 180 So. 347, 355 (Fla. 1938) (quoting 3 *McQuillin on Municipal Corporations*, 2d Ed., p. 122).

In the context of eradication programs, the Florida Supreme Court has commented on the constitutional limitations placed upon the State’s broad police power as requiring actions that “are really necessary to preserve and protect the public health, safety and welfare.” *Corneal*, 95 So. 2d at 4. “[N]o case-and none cited-holding that a healthy plant or animal, not imminently

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<sup>5</sup> Thus, the *Patchen* case leaves open the precise issue that this Court now faces in the instant action.

dangerous, may be destroyed without compensation to the owner in order to protect a neighbor's plant or animal of the same specie." *Id.* at 6. Only in cases of obvious and immediate danger can the State, in the exercise of its police power, summarily destroy private property in order to protect the public. *State Plant Bd. v. Smith*, 110 So. 2d 401, 408 (Fla. 1959). The Florida Supreme Court used the examples of domestic animals that are infected with a contagious disease and an emergency created by conflagration, in which a building may be destroyed, as representative of conditions that pose a threat to public health and safety. *Corneal*, 95 So. 2d at 4.

The Florida Supreme Court defined those instances in which the constitutional requirement of 'just compensation' does not compel the State to reimburse the owner whose property is destroyed when "[s]uch property is incapable of any lawful use, it is of no value, and it is a source of public danger." *Smith*, 110 So. 2d at 407. The Court further noted that "[t]he seizure of such goods is justified because the danger exists that the property deemed malfic will be distributed to the public to its injury, or used for an illegal purpose ..." *Id.* at 408.

In *Polk*, the trial court considered whether Polk's nursery constituted a nuisance or imminent public danger because of the presence of a bacterial disease. The trial court determined that the bacterial disease found at the nursery did not present a nuisance or an imminent danger and therefore the State's destruction of those trees constituted a constitutional taking. *Polk v. Conner et al.*, Case No. GC-G-86-3964. (Pls.' Ex. 300.) As a result, the trial court concluded that Polk was entitled to compensation for all citrus nursery stock destroyed except for those trees exhibiting symptoms of the bacterial disease and those located within 125 feet. *Id.* The Supreme Court of Florida upheld the trial court's determinations. *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990).

Section 581.184(2)(a) of the Florida Statutes provides, in part: “The department shall remove and destroy all infected citrus trees and all citrus trees exposed to infection ....” A citrus tree is infected when it “harbor[s] the citrus canker bacteria and exhibit[s] visible symptoms of the disease.” § 581.184(1)(a), Fla. Stat. (2003). A citrus tree is exposed to infection when it is “located within 1,900 feet of an infected tree.” § 581.184(1)(b), Fla. Stat. (2003). Prior to the Citrus Canker Law, and its amendments, that extended the destruction of trees to all citrus trees located within 1,900 feet of an infected citrus tree, there was no statutorily determined distance for removal of exposed, but not infected citrus trees.<sup>6</sup>

With respect to compensation, Section 581.1845 of the Florida Statutes provides for compensation to homeowners whose trees have been removed under the CCEP. Eligible homeowners receive \$100 or \$55 for each destroyed tree, depending on when the trees were destroyed, § 581.1845(3), (6), Fla. Stat. (2003). However, if “the homeowner’s property is eligible for a Shade Dade or a Shade Florida Card, the homeowner may not receive compensation under this section for the first citrus tree removed from the property as part of a citrus canker eradication program. § 581.1845(3), Fla. Stat. (2003). The per-tree amount paid under this compensation program “does not limit the amount of any other compensation that may be paid by another entity or pursuant to court order.” § 581.1845(4), Fla. Stat. (2003).

The Florida Supreme Court held that this statutory compensation constituted a compensation floor that is consistent with the established principle that “the determination of what is just compensation...is a judicial function that cannot be performed by the Legislature.” *Haire*, 870 So. 2d at 785 (quoting *Spafford v. Brevard County*, 110 So. 451, 454 (1926)).

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<sup>6</sup> Prior to 2000, the Legislature defined citrus trees “[e]xposed to infection” as those “harboring the citrus canker bacteria due to their proximity to infected citrus trees, and which do not yet exhibit visible symptoms of the disease but which will develop symptoms over time, at which point such trees will have infected other citrus trees.” Ch. 2000-308, § 2, at 3226, Laws of Fla.

Finally, the State's eradication program, which was authorized by the Citrus Canker Law and its amendments, has been upheld as constitutional by the Florida Supreme Court. *Haire*, 870 So. 2d at 774.

### **B. Analysis Regarding Constitutional Taking**

The record evidence and arguments presented were directed to whether the actions of the Department constitute a "taking" requiring full and just compensation. The specific critical and disputed issue in this trial is whether the Plaintiffs' exposed citrus trees had compensable value when the Defendants destroyed the trees.

This Court must consider whether, under the specific factual circumstances presented, the Department's destruction of the Plaintiffs' exposed citrus trees constitutes a taking of property for which full and just compensation is now due, and/or whether citrus canker constitutes a public nuisance or presents an imminent public danger so that destruction without payment or just compensation is permissible.<sup>7</sup> See *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990). As a corollary, the danger/nuisance issue depends, in large measure, on whether the destruction of property conferred a public benefit or prevented a public harm as those terms have been defined.

In this case, the evidence is undisputed that the Department's policy to eradicate citrus canker in Florida conferred a public benefit on the commercial citrus industry in the State of Florida, thereby preventing an "economic harm" to the citrus industry. The evidentiary

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<sup>7</sup> The compensable value issue can be viewed from at least two angles. First, value can be evaluated as a basic component of a constitutional taking cause of action (i.e., whether the property has any inherent use or value). The related issue is the one asserted as an affirmative defense in this case (i.e., whether the property constitutes a public nuisance or poses an imminent threat or harm such that it has no "net" value). The cases do not always make clear which specific aspect of value is being scrutinized. In light of this uncertainty, this Court addresses compensable value as both an element of a cause of action for inverse condemnation and as an affirmative defense.

presentation at trial relating to the public benefit conferred on the commercial industry included both testimonial and documentary evidence.

Deputy Commissioner of the Florida Department of Agriculture and Consumer Affairs, Craig Meyer<sup>8</sup> testified that three reasons existed for the Department's policy to eradicate citrus in the State of Florida: (1) to prevent canker from spreading into citrus groves for the protection of the commercial industry; (2) to prevent the imposition of trade barriers for the protection of the commercial industry; and (3) to make it safe for people to grow citrus in their yards. Meyer estimated the economic impact of citrus canker on the commercial citrus industry in Florida at \$342 million annually. Meyer testified that the "Citrus Nursery Industry, valued with a \$34,000,000 economic impact, would essentially be put out of business if citrus canker is allowed to persist in Florida." (Pls.' Ex. 225, Interrog. Resp. No. 3.)

Dr. Timothy Schubert,<sup>9</sup> the Administrator of the Plant Pathology Section of the Florida Department of Agriculture and Consumer Services, Division of Plant Industry since 1992, and the Department's expert at trial on citrus canker and plant pathology, testified that a prosperous citrus industry contributes to the benefit of the State of Florida. Schubert testified that, initially, the Department's policy to eradicate citrus canker in Florida benefited the commercial citrus grower and then, the consumer who later bought the fruit at a lower price. Schubert testified that the eradication program was designed to protect all citrus growers in Florida including persons who grow citrus for pleasure.

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<sup>8</sup> Throughout the period from October 1997 to the present, Mr. Meyer has had primary executive responsibility within the Department for all decisions relating to citrus canker.

<sup>9</sup> Dr. Schubert received his Ph.D. in plant pathology from the University of Missouri. He has 65 publications listed on his curriculum vitae. (Defs.' Ex. 1.) He has served as the President of the Florida Phytopathological Society from 1997-1999 and is a member of the American Phytopathological Society. He has been involved in the Department's eradication program since 1984 and has performed diagnoses of "A strain" citrus canker in thousands of field samples.

Mr. Richard Gaskalla, the Director of the Division of Plant Industry (“DPI”)<sup>10</sup>, Florida Department of Agriculture and Consumer Services, who reported directly to Deputy Commissioner Meyer and had primary oversight of the CCEP from 1995-2006, testified that citrus canker is viewed worldwide as a serious economic danger and that fruit will not make “pack out” if citrus canker is found. Gaskalla testified that each shipment of fruit must be inspected before it is sent out and if citrus canker is found, the shipment could not be sent. Gaskalla further testified that the cost of living with citrus canker was \$200 million/year as compared to the eradication program which had a cost on average of \$30 million/year (not taking into account reimbursement and/or compensation to homeowners for the destruction of their trees).

In a December 9, 2005, letter to homeowners regarding the \$100 Shade Florida voucher program, Charles H. Bronson, Commissioner of the Florida Department of Agriculture and Consumer Services, on behalf of the Department, acknowledged the magnitude and importance of the commercial citrus industry in the State of Florida; Bronson wrote: “I greatly appreciate the sacrifice you have made in the effort to eradicate citrus canker from Florida. This bacterial disease poses a serious threat to the state’s more than nine billion dollar citrus industry as well as thousands of residential citrus trees that have not yet been impacted.” (Pls.’ Ex. 231.) Again, in a second letter dated May 25, 2006, to homeowners regarding the \$100 Shade Florida voucher program, Commissioner Bronson wrote: “I appreciate the sacrifices citizens have made in this effort to protect Florida citrus ...” (Pls.’ Ex. 172.)

In addition to the evidence presented at trial on the issue of “public benefit,” this Court notes that the legislative history of Chapter 2000-308, the predecessor to the present Citrus

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<sup>10</sup> DPI is the division within the Department with primary responsibility for implementing all regulatory decisions relating to the CCEP.

Canker law, reflects that the Department's policy to eradicate citrus canker in Florida conferred a "public benefit" on the commercial citrus industry in the State of Florida. *See Fla. Fiscal Policy Comm., Agric. & Consumer Servs. Comm., SB 1114 (2000), Staff Analysis.* The Florida Legislature found the citrus industry was vital to the State's economy, contributed eight billion dollars in revenue and employed nearly 100,000 people. The Florida Legislature further found an emergency existed in South Florida regarding the spread of citrus canker which could ultimately cause quarantines to be imposed on the shipment of fresh fruit. Ch. 2000-308, § 2, at 3225, Laws of Fla. If not eradicated quickly, the canker would spread to other parts of the state and destroy the citrus industry. *See id.*

As a result, this Court finds that the Defendants' physical destruction, under the CCEP, of the Plaintiffs' exposed citrus trees conferred a "public benefit". This Court's determination of whether the Department's destruction of the Plaintiffs' exposed citrus trees constitutes a taking also necessarily involves some analysis of value. *See Polk*, 568 So. 2d at 40 n.4. This Court is mindful that, in addressing the issue of the value of the Plaintiffs' exposed citrus trees, it cannot encroach upon the exclusive province of the jury by determining the amount of compensation due for property taken.

When the Plaintiffs sought class certification in this case, they stipulated to "replacement cost" as the proper measure of damages or "value" of their exposed citrus trees. In the Fourth District Court of Appeal's opinion affirming class certification, the appellate court relied upon the same reasons when it affirmed certification in *Florida Department of Agriculture and Consumer Services v. City of Pompano Beach*, 829 So. 2d 928 (Fla. 4th DCA), *review denied*, 845 So. 2d 889 (Fla. 2003).

In *City of Pompano Beach*, the Fourth District Court of Appeal noted: "Courts across this state have acknowledged that a measure of damages for loss of property is 'replacement cost.'" *Id.* at 931 (citing *Fiske v. Moczik*, 329 So. 2d 35 (Fla. 2d DCA 1976) (reasonable cost of replacing trees may be proper measure of damages); *Nilsson v. Hiscox*, 158 So.2d 799 (Fla. 1st DCA 1963) (damages for conversion is the value of trees); *Atl. Coast Line R.R. v. Saffold*, 178 So. 288, 290 (Fla. 1938) (if property on land is injured or destroyed, measure of damages is the value of the property injured or destroyed)). The Fourth District Court of Appeal commented on the "varied nature of damages found in inverse condemnation cases, which appears to be dictated by the particular facts of the case." *Id.*; see, e.g., *Dade County v. Gen. Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972).

None of the Plaintiffs' exposed citrus trees had visible symptoms of citrus canker; by any measure, the exposed trees were healthy at the time of their destruction. Furthermore, no witnesses, including the Defendants' expert witnesses, could opine with a reasonable degree of scientific certainty as to whether all, or most, of the Plaintiffs' exposed citrus trees would become infected with canker or when the exposed citrus trees would become infected.

As the Plaintiffs' exposed citrus trees were not used in a commercial setting, no record evidence exists of any stigma or other loss of use attached to a residential citrus tree simply because it is within the 1,900 foot zone of an infected tree. On the contrary, sufficient evidence was presented at trial that the Plaintiffs' exposed citrus trees had value and that there are different methodologies for determining the value of the trees.

This Court credits the testimony introduced at trial (as outlined below) in concluding that the Plaintiffs' exposed citrus trees had some compensable value. This Court, however, does not make specific determinations regarding the appropriate methodology for valuation of the

destroyed citrus trees or the projected value of the destroyed trees, as this is a matter for the jury's determination.

Plaintiffs' expert witness, Mr. John Harris<sup>11</sup>, a tree and landscape appraiser, certified by the International Society of Arboriculture ("ISA"), testified as to several factors that one considers in an appraisal of a tree: (1) the health condition of the tree; (2) the placement of the tree on the property; (3) the type of property that the tree is on; (4) the size of the tree; (5) the location or region the tree is in; (6) the variety of the tree; and (7) the height of the tree. Harris conducted two private appraisals of residential properties in Deerfield Beach that had citrus trees within 1,900 feet of an infected tree. (Pls.' Ex. 90.) Harris performed a visual inspection of those citrus trees and found no visible evidence of citrus canker. Harris reported, as to both appraisals, that "[b]ecause these Citrus trees do not have the Citrus Canker, they have value for the landscape that is lost when they are removed."<sup>12</sup> Harris determined that each of the citrus trees had appraised values ranging from \$230 to \$1,060.

Further, Mr. Eric Hoyer, also a professional tree appraiser certified by the ISA, presented testimony on behalf of the Plaintiffs on the issue of the value of the trees. He has conducted appraisals of ornamental trees in the past and testified that citrus trees on a residential property are considered to be ornamental trees. The factors that Hoyer considers to determine the value of an ornamental tree are: size, species, condition and location.

Hoyer, upon reviewing the Control Form for the Mendez property (Pls.' Ex. 280), opined that the Mendez trees had value. To determine the value of a plant, Hoyer relies upon Plant

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<sup>11</sup> Mr. Harris teaches at Florida Atlantic University and has been appraising trees since 1991. Harris founded Earth Advisors, Inc. in 1992. Harris formerly was an expert witness for the Department. (Pls.' Ex. 90.)

<sup>12</sup> Mr. Talbot Cooper, one of Plaintiffs' experts on the growth and management of citrus trees, also testified that all citrus trees which are not demonstrating visible signs of citrus canker but are located within 1,900 feet of a canker infected tree have value. (Pls.' Ex. 304).

Finders and individual price lists from nurseries that sell citrus trees. Hoyer testified that the replacement value of a tree is the cost of a tree available at a nursery at the same or comparable size. Hoyer testified that he would be able to determine the appraised value or replacement cost of all of the trees destroyed based on the information that the Department gathered on the Control Forms. Hoyer testified that the valuations are based on the condition of the trees at the time that they are removed. Hoyer testified that, on the date of their destruction, the Plaintiffs' four trees had compensable value above the amount offered by the State. Hoyer also testified that all Class members' trees destroyed under the CCEP had compensable value.

Plaintiff's expert, Dr. Timmer, testified that if no symptoms of citrus canker are found on a tree, the assumption is that the tree is healthy. Timmer has observed healthy trees in close proximity to infected trees. Timmer said that there is a probability that some trees around an infected tree are, or will be, infected. However, if the infected tree is removed, there is a presumption that the canker disease will not spread further. Timmer concluded that if an exposed tree never became infected, it is as healthy as any other healthy tree.

Testimony by a Department representative and the documentary evidence in this case also support this Court's finding that the trees owned by Plaintiffs and the Class had compensable value. At a March 1999 Florida Citrus Canker Technical Advisory Task Force ("FCCTATF") meeting, Mr. Meyer told the group that "the 125 feet is a compensation issue and not a regulatory issue from the Department's standpoint." (Pls.' Ex. 12, pg. 10.) At the same time, DPI Deputy Connie Riherd performed an analysis concerning the average value of Miami-Dade County residential citrus trees destroyed under the CCEP. (Pls.' Exs. 9, 107.) At the May 1999 FCCTATF meeting, Meyer reported that the Department was woefully under-funded if the State was required to pay for residential trees destroyed beyond 125 feet. Meyer told the

FCCTATF that \$200 per tree “would be way low” and that Riherd had concluded the “average citrus tree in Dade County” would probably price out at about \$438. (Pls.’ Ex. 15, p.6.)

In sum, Plaintiffs demonstrated that their exposed citrus trees had compensable value at the time that they were destroyed by the Defendants. This Court concludes that the Department’s destruction of the Plaintiffs’ exposed citrus trees, under the specific facts presented, resulted in a taking of property that had inherent compensable value.

**C. The Exposed Trees Do Not Present an Imminent Harm or Constitute a Public Nuisance**

The Defendants argue, as an affirmative defense, that the Plaintiffs’ exposed citrus trees present an imminent threat to public health, safety or welfare, or are a public nuisance. For this reason, the Defendants argue that the Department was entitled to destroy and remove trees without compensation. The Defendants’ reliance upon the affirmative defense of “imminent public harm” or “public nuisance” constitutes the essence of the Department’s eradication policy and its position in trial. The Defendants argue that the scientific evidence underlying the 1,900 foot eradication policy and its own experience in fighting citrus canker compels a finding by this Court that the Plaintiffs’ exposed trees within 1,900 feet of an infected tree pose an imminent threat to public health, safety or welfare, or constitute a public nuisance. The Defendants argue that exposed trees within 1,900 feet of an infected tree are a public nuisance because exposed citrus trees spread citrus canker to other healthy trees. If this Court were to find that the exposed trees constitute a public nuisance or pose an imminent public harm, no taking would occur and no compensation would be required. *See Polk*, 568 So. 2d at 39 n.4.

This Court concludes that the nature of the harm of the spread of citrus canker does not constitute an “imminent public harm” or “public nuisance”, as those terms have been defined and interpreted under Florida law. The overwhelming record evidence in this case indicates that

citrus canker does not pose a threat to the health or safety of humans or animals. Ample testimonial evidence was presented at trial as to the adverse consequences of citrus canker but the same evidence rebuts the notion that canker exposure, by itself, constitutes a public nuisance or poses an imminent threat. Simply, the record evidence compels the conclusion that the Plaintiffs' exposed citrus trees do not present an imminent threat to public health, safety or welfare, or constitute a public nuisance, and that canker is a cosmetic disease affecting citrus trees. This conclusion is not to diminish the real and adverse economic impact canker has visited upon the State's commercial citrus industry.

For example, according to Mr. Gaskalla, the primary physical impact of citrus canker is the loss of leaves and tree limbs and premature fruit drop. Gaskalla testified that the Department never issued a public health warning not to eat fruit that had been infected with or was exposed to citrus canker.

Mr. Meyer testified that there were not any threatened or actual recalls of citrus because of canker. Meyer further said that no threat existed that citrus canker would endanger the lives of humans or animals or pose a threat to property. Meyer, in comparing citrus canker to another citrus disease, citrus greening, testified that Dr. Timothy Gottwald scored citrus canker as a "3" and citrus greening as a "10" (with "10" reflecting the more serious disease on a scale of 1-10).

Dr. Timothy Schubert testified, on a scale of 10, that citrus canker is a "4" and citrus greening is at the top of the scale. In terms of its biological impact, according to Dr. Schubert, citrus canker is not a lethal disease. The canker infected fruit still are usable for juice and they can be eaten fresh.

Dr. Armando Bergamin-Filho<sup>13</sup>, the Defendants' expert in plant pathology, who testified in this trial by videotape deposition<sup>14</sup>, said that a citrus tree will not die as a result of citrus canker but rather, the yield will be less and the value of the fruit in the commercial market will be much less. Bergamin Filho testified that the main problem is that citrus canker will reduce the amount of fruit that a tree produces and increase the cost of production. A homeowner who has a citrus tree in his or her backyard still would be able to grow fruit on the tree and eat the fruit on the tree. Bergamin Filho testified that the average tree would not die from having citrus canker.

Dr. Laverne "Pete" Timmer<sup>15</sup>, the Plaintiffs' expert in citrus, plant pathology, citrus canker and plant epidemiology as it relates to citrus canker, testified in this trial that citrus canker is a bacterial disease, not a systemic disease. Timmer explained that systemic diseases have the potential to cause danger to the tree itself. Citrus greening is an example of a systemic disease. Citrus canker, on the other hand, is more of a leaf spotting and can impact the appearance of the fruit and is highly unlikely to kill the tree. It can cause yield loss – that is, fruit drop before the fruit becomes mature. Timmer ranked citrus greening as a "9" to "10" in severity of disease (on a scale of 1-10) and citrus canker as a "5." Timmer said that citrus canker, however, does not cause any of the same affects on a citrus tree as citrus greening. Citrus greening can be fatal and canker cannot, even though canker can look worse than greening. Timmer further testified that

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<sup>13</sup> Dr. Bergamin-Filho has been a professor of Plant Pathology at the University of Sao Paulo since 1974. His concentration is on the epidemiology of plant diseases. He has published in the area of citrus canker and has worked with citrus canker both in the laboratory and in citrus grove settings. (Defs.' Ex. 79.)

<sup>14</sup> The testimony was by videotape deposition in the case of *Kathryn Cox, et al. v. Florida Dep't of Agric. & Consumer Servs., et al.*, Case No. 05-61478-CIV-MORENO.

<sup>15</sup> Dr. Timmer was a professor at the University of Florida from December 1978 through May 2007. He received tenure in 1983 and worked in the Citrus Research and Education Center ("CREC") of the University of Florida. He has published over 100 referee publications, over 100 technical reports, and over 100 popular articles. (Pls.' Ex. 123.) He co-authored the 2004-2007 Florida Citrus Pest Management Guide: Citrus Guide, as part of a series of the Plant Pathology Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida. (Pls.' Exs. 190-193, respectively.)

citrus canker does not render the tree unable to bear fruit; does not render the fruit inedible other than premature fruit dropping; and does not render the citrus unusable to bear juice.

Dr. Jack Whiteside<sup>16</sup>, another of the Plaintiffs' experts whose previous testimony was introduced in this trial<sup>17</sup>, testified that citrus canker causes a leaf spot. (Pls.' Ex. 308.) Whiteside said that canker does not normally cause any leaf distortion and the leaf damage can never be considered sufficiently severe to affect the tree as a whole. Whiteside testified that citrus canker is not severe enough to cause a loss of fruit; rather, it causes a blemish, mostly on grapefruits. According to Whiteside, aside from a blemish, citrus canker is not known to impact the quality of the fruit. Similarly, citrus canker will not impact the quality of juice. Whiteside rendered his opinion that citrus canker is not a real danger because appropriate spraying methods are used and are generally sufficiently effective for a citrus crop to remain economic. Whiteside also opined to a reasonable degree of scientific probability that he did not believe that citrus canker needed to be eradicated in Florida in order to protect the commercial citrus industry.

Dr. Heinz Wutscher<sup>18</sup>, another of Plaintiffs' experts who also testified in this trial<sup>19</sup>, said that the effect of citrus canker on citrus trees is that it causes lesions, spots, pustules on the leaves and on the fruit and it can only affect the trees for a limited period of time, at the maximum ninety days after growth flush. Wutscher further testified that citrus canker does not affect the quality of the fruit, except the visual quality, and has no affect on juice because the visual

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<sup>16</sup> Dr. Whiteside received his Ph.D. from the University of London, England and worked as the chief plant pathologist in Zimbabwe until he came to the University of Florida Citrus Research and Education Center. He retired from the University of Florida in 1991.

<sup>17</sup> The testimony was by videotape deposition in the case of *City of Pompano Beach, et al., v. Florida Dep't of Agric. & Consumer Servs., et al.*, Case No. 00-108394 CACE07.

<sup>18</sup> Dr. Wutscher received his Ph.D. in pomology, free tree science, from Cornell University in 1967. He worked for the United States Department of Agriculture at a citrus experimentation station and has published 159 articles, all of which with one or two exceptions, are in the area of citrus. He retired from the U.S. Department of Agriculture in 1999.

<sup>19</sup> The testimony was by videotape deposition in the case of *City of Pompano Beach et al., v. Florida Dep't of Agric. & Consumer Servs., et al.*, Case No. 00-108394 CACE07.

appearance of juice fruit is not important. Wutscher stated that 95% of oranges in Florida are used for juice and 50% of grapefruit are used for juice. Under no circumstances has Wutscher ever heard of citrus canker causing the death of a tree.

Mr. Cooper characterized citrus canker primarily as a leaf and fruit spotting disease. Cooper testified that canker does not kill the tree and does not render the fruit on the trees inedible as fresh fruit, other than in the commercial market. Specifically, Cooper said that he did not think that fruits produced on dooryard citrus trees that are not expressing any visible symptoms of citrus canker, but are located within 1,900 feet of the visibly infected citrus tree, are unsafe to eat. Cooper concluded that he does not think that these trees pose a threat. By contrast, Cooper testified that "greasy spot disease" is the most harmful disease in his experience. Cooper testified that he believes that a homeowner safely could juice a piece of citrus fruit with lesions on it and consume it. Cooper does not believe that it would be a threat to one's health.

This Court credits this body of testimony and the record evidence and concludes that the nature of the harm that can occur from the spread of citrus canker does not constitute an "imminent public harm" or a "public nuisance." However, even assuming that the spread of citrus canker could – in some instances – constitute an "imminent public harm" or a "public nuisance," the Defendants in this case have not shown that the Plaintiffs' exposed citrus trees necessarily will become infected. The record evidence, including evidence presented by the Defendants' own witnesses, simply does not support a finding that all, or even a majority, of the exposed citrus trees will become infected or that the exposed citrus trees will spread citrus

canker to non-exposed citrus trees; or, to the extent that citrus canker will spread, that the spread of canker is imminent.<sup>20</sup>

All of the Plaintiffs' exposed citrus trees visually were inspected, with a high level of accuracy in detecting canker, at least twice prior to or at the time of their destruction. (Pls.' Exs. 277, 278, 279.) According to Schubert and Gaskalla, the visual diagnostic procedure is 99% accurate in identifying citrus canker symptoms and none were detected on the Plaintiffs' trees. (Pls.' Exs. 133, 134.) Furthermore, visible canker symptoms are revealed within a short time of infection. Schubert testified that the usual time to detect a visible canker lesion is three weeks but that a trained person can detect the canker in the seven to ten day time period. Dr. Timmer testified that it could take from five to seven days for visible canker symptoms to show on citrus.

Gaskalla presented the most extensive testimony as to how information was gathered on the trees that fell within a 1,900 foot zone.<sup>21</sup> Gaskalla testified that all of the trees that were inspected were evaluated based on a Form which provided for the citrus variety, the tree condition, the property information, and the type and size of the tree. (Pls.' Ex. 133.) Surveyors from the Department, who were trained in citrus canker symptom recognition, conducted surveys to identify citrus canker. The surveyors visually inspected all of the citrus trees within 1,900 feet of an infected tree and recorded the information contained in Exhibit 133 on a Control Form. (Pls.' Ex. 134.) If the surveyor visibly saw citrus canker symptoms on the tree, the surveyor was

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<sup>20</sup> For example, Gaskalla testified that the Plaintiffs' property was inspected three times over the course of one year and their four citrus trees never were determined to be infected as of the time of their destruction in March 2001, despite their location within 1,900 feet of an infected tree. Other evidence suggests that it could take up to ten (10) years before visible symptoms of canker will appear on citrus.

<sup>21</sup> Mr. Eric Black's testimony was presented through two transcripts from prior proceedings in *Castin v. Department of Agriculture and Consumer Services*, 901 So. 2d 1020 (Fla. 4th DCA 2005), and the class certification hearing in this case, respectively. (Pls.' Exs. 302, 303) (selected portions of the transcripts were admitted into evidence without objection). Black's testimony in the class certification hearing provides additional background information as to how the trees within the 1,900 foot zone were inspected and how the Department gathered and recorded information relating to the inspections. (Pls.' Ex. 303).

required to notify his or her supervisor after which a diagnostician or plant pathologist would go to the property to determine if the tree was infected with citrus canker. The pathologist would clip samples from the tree and send the samples to the lab.

Gaskalla testified that the laboratory diagnostic procedure is as close to 100% accurate as possible in identifying citrus canker symptoms. This procedure was followed for every residential property in Palm Beach County where citrus trees were located within 1,900 feet of an infected citrus tree. The trees were identified and recorded as either "exposed" (within 1,900 feet of the infected tree and not recorded as "positive") or "positive" (infected with citrus canker) on the Control Form.

An "exposed" citrus tree, by definition, did not have visible citrus canker symptoms. A "positive" tree did have visible citrus canker symptoms, including discoloration and lesions on the fruit, stems and leaves. Once a tree was classified as "exposed," a Department surveyor would return to the site of the tree at least on one other occasion at the time of the destruction of the tree to inspect and record the status of the tree prior to its destruction. Gaskalla and Schubert testified that the Department personnel never observed any visible symptoms of citrus canker on the Plaintiffs' exposed citrus trees. The Plaintiffs' exposed citrus trees never were determined to be "positive" with citrus canker. Dr. Schubert concluded that there is no way to know, with a reasonable degree of scientific certainty, that an exposed tree will become a "positive" tree, as no technology exists to determine if an exposed citrus tree would become infected or when a tree will become infected.

Schubert also testified that no scientific study exists to show that all of the trees within the 1,900 foot zone will become infected with citrus canker. Schubert noted that the Gottwald study never predicted that all of the trees in the study site would become infected with canker.

Schubert testified that the Gottwald study is the only study that the Defendants relied upon to support the 1,900 foot policy.<sup>22</sup>

Similarly, Dr. Whiteside testified that "... in any situation if you found the disease far removed from the original sources – original tree, one could never be sure that the organism had necessarily jumped from the original tree to the – to the outside tree. I don't see how you could ever be sure of that, because there could be other ways of contaminating a tree." (Pls.' Ex. 308.)

Schubert once held the opinion that it would take from three to four years for all exposed trees within a 1,900 foot radius of an infected tree to become infected. However, in accounting for the storms prevailing in Florida from 1996 to the early 2000's, Schubert now believes that it will take from two to three years for all exposed trees within a 1,900 foot radius of an infected tree to become infected. However, the Defendants' own statements undercut even that assertion.

Mr. Meyer, when asked in an interrogatory question, "[W]hat percentage of citrus trees within 1,900-feet of an infected tree will become infected with citrus canker within one, three, five or ten years of the infection of the initially-infected tree?" responded:

The answer to this question will vary depending on applicable conditions. Under the right environmental circumstances all trees may become infected in one year, or ten years may be required for all trees to become infected. Conversely, only a very small percentage of trees may become infected in one year or ten years. There is no model available to allow a precise prediction of exactly how many or what percentage of trees will become infected.

(Pls.' Ex. 225.)

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<sup>22</sup> Dr. Bergamin-Filho conducted his study in São Paulo, Brazil, in approximately August 2003, in which he analyzed more than 100 groves where canker was identified and eradicated using the 30 meter rule. According to Bergamin-Filho, the results of his study were very similar to the results of the Gottwald study. He found that to capture 95% of the diseased trees, a radius of 396 meters was necessary to use for eradication purposes. Bergamin-Filho said that the only difference that he saw between his study and the Gottwald study is that the Gottwald study took place in an urban area and Bergamin-Filho's study was conducted in a commercial area.

Schubert provided, through his PowerPoint presentations at trial, an overview of the pathology of citrus canker and based on that pathology, the implications for the epidemiology or spread of citrus canker. Schubert's presentation helps explain why it is uncertain whether and when an exposed tree will become infected with citrus. Schubert explained that existing lesions on a tree provide a reservoir of inoculum, defined as bacterial cells in mass. Inoculum does not live for a long time staying on fruit. Rather, inoculum must find citrus to infect and once the inoculum is in the lesion, it finds conditions to split out. Not all inoculum makes a successful journey to a new tree, leaf, stem or fruit and inoculum seldom makes a new infection. An inoculum source must be present and the inoculum must make a one way stop to the new location. There is no efficient vector which can transport the bacteria. Also, inoculum can transport but fail to do something. Only one to five percent of inoculum in an active epidemic actually succeeds in causing new infection; however, this still may result in hundreds to thousands of cells successfully making the trip to a new location.

According to Schubert, when the inoculum lands at the new location, it must enter small breathing pores on the trees, leaves or stems called the stomatal apertures or it must enter wounds in the citrus tissue to become citrus canker. It is not enough for the inoculum simply to land at the new location to cause citrus canker. Timmer testified that if bacteria lands on a tree without an infection, the tree can survive for considerable periods of time. If the bacterium does not infect other trees when it lands, it eventually will die out.

Schubert acknowledged that it is impossible to know where all of the inoculum is located. There is no technology available to identify the incubating infections or the incubating inoculum. As a result, plant pathologists rarely deal with individual plants; they deal with populations of plants. Plant pathologists cannot predict the ultimate outcome of every plant that encounters a

pathogen. What plant pathologists can do is to make scientific conclusions about populations of plants.

In sum, based on the record evidence presented in this trial, the nature of the harm that can occur from the spread of citrus canker in the context of residential citrus trees does not constitute an “imminent public harm” or “public nuisance”. As a result, this Court concludes that the Defendants’ affirmative defense fails.

**D. No Actual or Superseding Cause Relieved Defendants of Liability**

The Defendants state in their third Affirmative Defense that:

The damages alleged by Plaintiffs were caused by the injunctions, orders, or refusal to issue search warrants, entered or occurring in this action and in other actions, which hindered and delayed the CCEP resulting in the spread of citrus canker, and the infection by and exposure to citrus canker of healthy trees.

The Defendants argue that the injunctions, orders, and refusals to issue search warrants constituted the actual cause, or a superseding cause, responsible for the spread of the citrus canker and the ultimate destruction of Plaintiffs’ exposed trees. The Department relies upon *Rubano v. Department of Transportation*, 656 So. 2d 1264 (Fla. 1995) for the proposition that causation is an element that must be proven in a cause of action for inverse condemnation. *Rubano*, 656 So. 2d at 1266 (recognizing that “[p]roof that the governmental body has effected a taking of the property is an essential element of an inverse condemnation action”). Defendants interpret the Court’s use of the word “effected” to mean “caused,” and therefore conclude that proof that the governmental body caused the taking is an essential element of inverse condemnation. The Department maintains that causation is an element of inverse condemnation and, because the Department did not cause the taking, it therefore is relieved of liability.

There is no case law in Florida explicitly discussing “causation” or “proximate cause” as elements of inverse condemnation.<sup>23</sup> In Florida, the definition of, and jury instructions regarding, “causation” is given in the context of causes of action for negligence. Therefore, it logically follows that a defense of “superseding cause” is applicable in actions for negligence.

An inverse condemnation action is not synonymous with a negligence claim. “Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto [actually] taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken.” *City of Pompano Beach v. Yardarm Rest., Inc.*, 641 So. 2d 1377 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1197 (Fla. 1995); *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d DCA 1995). A “taking” occurs when an owner is denied substantially all economically beneficial or productive use of the land [property]. *Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 60 (Fla. 5th DCA 2006).

The Defendants’ destruction of citrus trees in order to eradicate canker was an intentional, not a negligent, act. An intentional act in the law of torts means that “the actor acts for the purpose of causing an invasion of another’s interest or knows that such an invasion is resulting, or is substantially certain to result, from his conduct. It is not enough that the act itself is intentionally done.” *Deane v. Johnston*, 104 So. 2d 3, 8 (Fla. 1958).

In Florida, affirmative defenses in an inverse condemnation action include: (1) a property interest was previously secured by the condemning authority by prescriptive use; *see Hillsborough County Aviation Authority v. Benitez*, 200 So. 2d 194 (Fla. 2d DCA 1967); (2) the

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<sup>23</sup> This Court finds that the Department’s attempt to support its causation argument by citing case law from California and Virginia is not persuasive. The cases cited by the Department are distinguishable because the constitutions of these states expressly prohibit “damage” to private property without just compensation, a protection that does not appear in Florida’s Constitution.

defendant was the owner of the wrongfully appropriated property; see *Florida Power and Light Company v. Rader*, 306 So. 2d 565 (Fla. 4th DCA 1975); *Delaney v. Department of Transportation*, 306 So. 2d 203 (Fla. 1st DCA 1975); and (3) the government's destruction of property occurred during the proper exercise of its police power; see *Patchen v. State Department of Agriculture and Consumer Services*, 817 So. 2d 854 (Fla. 3d DCA 2002), review granted, 829 So. 2d 919 (Fla. 2002). While the Department has cited to a Virginia case and a California case allowing the defense of superseding cause in an inverse condemnation action, such cases are not binding on this Court and, furthermore, they are distinguishable from the this action. Florida case law does not provide a negligence defense of superseding/intervening cause in an inverse condemnation action, and logic does not provide a basis for creating one now.

Even if a novel superseding cause defense, patterned after traditional negligence principles, was applicable to an inverse condemnation action, the Defendants still must show that the superseding cause was independent of the original tortious act. Where a superseding cause is found to have been "completely independent" of the alleged wrong, the intervening cause supersedes the prior wrong as the proximate cause of the injury by breaking the sequence between the challenged actions and the injury. *Goldberg v. Florida Power & Light, Co.*, 899 So. 2d 1105, 1116 (Fla. 2005); *St. Fort v. Post, Buckley, Schuh & Jernigan*, 902 So. 2d 244, 249 (Fla. 4th DCA 2005).

This Court finds that the injunctions, orders, and refusals to issue search warrants are not completely and truly independent of the Department's actions. Even assuming, however, that the actions were independent, the Defendants still would have to prove that they were not a reasonable foreseeable consequence of their actions. The traditional defense of superseding causation is not available where the superseding act was foreseeable. The question of whether

an intervening cause is foreseeable is for the trier of fact. “In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts.” *Crislip v. Holland*, 401 So. 2d 1115, 1117 (Fla. 4th DCA 1981). “It is only when an intervening cause is completely independent of, and not in any way set in motion by, the tortfeasor’s negligence that the intervening cause relieves a tortfeasor from liability.” *Deese v. McKinnonville Hunting Club, Inc.*, 874 So. 2d 1282, 1287-88 (Fla. 1st DCA 2004).

Where a superseding cause is found to be foreseeable, the original tortfeasor may still be held liable. *Gibson v. Avis Rent-a-Car Sys., Inc.*, 386 So. 2d 520, 522 (Fla. 1980); *Stahl v. Metro. Dade County*, 438 So. 2d 14 (Fla. 3d DCA 1983) (an intervening cause does not break the causal connection between the injury and the alleged negligence if the intervention of such forces was itself probable or foreseeable). Injunctions are remedies in inverse condemnation actions. See *City of Dania Beach v. Konschnik*, 763 So. 2d 555 (Fla. 4th DCA 2000) (in an inverse condemnation action, a temporary injunction was not warranted where the city was required to open an alleyway behind appellee’s property); *DiChristopher v. Bd. of County Comm’rs*, 908 So. 2d 492 (Fla. 5th DCA 2005) (landowner sought a temporary injunction to enjoin the County from flooding his property as part of its mosquito control program).

Because injunctions are remedies in inverse condemnation actions, they therefore are a foreseeable consequence of inverse condemnation litigation. Also, the record evidence clearly shows that the Department was on notice that the filing of a lawsuit by others to enjoin the actions of the Defendants was a foreseeable consequence of the destruction of citrus trees.

Mr. Gaskalla testified that he knew there would be obstacles to expanding the eradication zone from 125 feet to 1,900 feet. Gaskalla further stated that it was not a surprise to him that there may be stiff opposition, including legal challenges and that he probably talked about it.

Mr. Meyer testified that the Department was anticipating not only litigation with regard to increasing the cut zone from 125 feet to 1,900 feet, but was also anticipating and had discussed injunctions. Meyer acknowledged that litigation was not unforeseen. Meyer testified that he understood that a challenge to the science underpinning the 1,900 foot zone was inevitable.

At a June 22, 1999 meeting of the FCCTATF, during general discussions about implementing a two-mile buffer zone to stop the spread of canker to the north, Meyer's statements were summarized in the minutes prepared from the meeting and include a summary of his comments that, "we may cut more than 125 feet and let the legal people sort out if we have any financial restitution to make where we go beyond 125 feet" and "if we get a hot spot, we will be much more aggressive now than before. So we will be testing our science eventually in court when we do that, but we don't have the money to do the two-mile buffer." (Pls.' Ex. 16.)

At the next meeting of the FCCTATF on July 16, 1999, Meyer's statements were summarized in the minutes prepared from the meeting and include a summary of his comments, "[T]he scientific paper with the 1,900 feet data will eventually be tested in court and as to how much farther beyond 125 feet can we take out without having to pay compensation to the owners if the owners are resistant;...this 1,900 feet is very important to us because we are going to be testing this thing. We will be sued and are going to be asked in court as to why we go to 1,900 feet instead of 125 feet and the answer will be because of this group's meetings." (Pls' Ex 17.)

Again, at the following meeting of the FCCTATF Meeting on February 3, 2000, the summary of the minutes reflect that “Craig Meyer discussed his ideas as to what he expected further lawsuits might entail and he mentioned if we see litigation, it will be about over the issue from 125 feet to 1,900 feet and the point he wanted to make in the case of an injunction, from the latest science we have, if we got pushed back to only taking out the 125 feet, we will lose the battle.”<sup>24</sup> (Pls.’ Ex. 21.)

Lastly, Mr. Meyer testified that he never sought a legal opinion prior to implementing the 1,900 foot policy from in house counsel or outside counsel concerning the Department’s potential liability for compensation to residential homeowners.

Additional evidence which reflects that the Department contemplated litigation, including injunctive relief sought by homeowners, is reflected in the Immediate Final Order (“IFO”) issued by the Department which clearly spells out that a homeowner had five (5) days from the date of receipt of the IFO to “appeal and seek a stay of our action from the department and the appellate court...you have to exhaust your administrative remedies through an appeal before you can seek injunctive relief.” (Pls.’ Ex. 184.)

In summary, this Court concludes that Defendant’s third affirmative defense of superseding cause is inapplicable because: (1) a superseding cause is a defense in a cause of action in negligence; (2) a superseding cause cannot be properly claimed in a cause of action in inverse condemnation; (3) injunctions issued in an inverse condemnation action are not independent from the underlying act; (4) an injunction is a foreseeable remedy in an inverse

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<sup>24</sup> In response to the question, “[W]hat kind of liability do the injunctees put themselves in? Don’t they put themselves in legal jeopardy?” the summary minutes reflect that Mr. Meyer replied, “that is exactly our first line of defense if anyone asks for an injunction. We will insist on a bond and we insist that the value of the bond is somewhat related to the value of the citrus industry, which is a bond that is so high, no one will be able to leap that hurdle. That is our first line of defense.”


condemnation action; and (5) the record evidence shows that the Department was aware of the risk of litigation. Even if the defense was available in an inverse condemnation suit in Florida, the Defendants have failed to prove this defense.

## VII. CONCLUSION

Based on the record evidence introduced at trial, this Court finds:

1. The Defendants' physical destruction, under the CCEP, of the Plaintiffs' exposed citrus trees, which were not determined to be infected with citrus canker but were located within 1,900 feet of another citrus tree determined to be infected with citrus canker, constitutes a taking under Article X, § 6(a) of the Florida Constitution.
2. The Plaintiffs' exposed citrus trees, which were not determined to be infected with citrus canker but were located within 1,900 feet of another citrus tree determined to be infected with citrus canker, do not present an imminent threat to public health, safety or welfare, or constitute a public nuisance.
3. The injunctions, orders or refusals to issue search warrants entered or occurring in this action and/or in other actions do not constitute the actual or a superseding cause, relieving the Defendants of liability for the physical destruction, under the CCEP, of the Plaintiffs' exposed citrus trees.

**DONE and ORDERED** in West Palm Beach, Palm Beach County, Florida, this the 7<sup>th</sup> day of December, 2007.

  
Robin L. Rosenberg  
Circuit Judge

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