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State Loses Major Canker-Sore Takings Case

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Overview

The Florida Court of Appeals has held that a Florida Department of Agriculture and Consumer Services (DACS) rule requiring the destruction of healthy trees within 1,900 feet of trees infected with citrus canker amounts to a taking of private property, and required the state to pay a multi-million dollar judgment to the affected landowners.[1] The case is striking for how the court viewed the agency action, and the court's respect for property rights.

Facts of the Case and Jury Trial

The case involved a class action lawsuit brought by over 50,000 owners of healthy citrus trees in Broward County, Florida. The dispute arose when the DACS, as part of its citrus canker eradication program (CCEP), cut down over 100,000 healthy, non-commercial citrus that were within 1,900 feet of infected trees for the alleged reason that the disease was a "public nuisance." The 1,900-foot regulation was based on a determination by the Florida legislature that citrus canker constituted a public nuisance. Citrus canker is a disease caused by a bacterium that causes lesions on the leaves, stems, and fruit of citrus trees. Though the fruit is still fit for human consumption, the bacterium causes the fruit to become unsightly and significantly affects the vitality of citrus trees. The disease is very persistent when it becomes established in a certain area and may be further spread by hurricanes.

The plaintiff class, including private citrus owners and the City of Pompano Beach, FL, as well as several private individuals, filed claims against the State of Florida and the Florida DACS from 2001-2007 alleging "inverse condemnation" – a situation where the government takes private property, but fails to pay for it as constitutionally required (both state and federal). The citrus owners further alleged that the state lacked evidence to enforce the 1,900-foot regulation and could not successfully establish that the privately-owned, healthy trees were "imminently dangerous" and constituted a public nuisance. Thus, the citrus owners asked for substantial damages and a pre-judgment interest payment for the loss of their citrus trees. The case proceeded to trial and the jury was presented with conflicting expert testimony and conflicting evidence regarding the basis for the 1,900-foot regulation and the damages owed to the citrus owners.

At the close of the trial proceedings, the jury returned a verdict pegging compensation for the citrus owner class at $11,531,463.00. After the court applied certain set-offs and pre-judgment interest, the amount was reduced to $8,043,542.00. The jury found that the action of DACS was, indeed, a taking by the state – in essence, an inverse condemnation situation (even though the court never used the phrase

'inverse condemnation"). In addition, when the jury weighed the credibility and reliability of state's experts and the citrus owners' experts and evidence, they found the citrus owners' evidence and expert testimony more reliable and convincing.

Appellate Opinion

The DACS appealed the jury's verdict and argued that the trial court improperly rejected its evidence in favor of evidence offered by the plaintiffs. They further argued that there was no inverse condemnation, because the trees lacked any "compensable value" and that the trial court and jury applied the wrong test for determining whether a "taking" had occurred. DACS also argued that the state legislature had abolished the common law of inverse condemnation and replaced it with a statutory law governing actions brought under the concept of inverse condemnation. Finally, they argued that the court applied the wrong measure for assessment of damages for the healthy trees destroyed in the CCEP.

The appellate court affirmed the trial court and jury's determination on all counts- a huge defeat to the DACS regulation. First of all, the appellate court addressed the validity of the 1,900-foot regulation. They concluded that no substantial evidence was present to support the plaintiff's determination that trees within 1,900 feet of a tree infected with citrus canker were harmful or destructive. On the contrary, the appellate court stated that there was substantial "competent" evidence made available by experts that healthy, non-infected, privately owned citrus trees (even though within the 1,900 foot zone) were not harmful or destructive. The citrus owners were able to establish that the trees taken under the CCEP produced fruit, juice, shade, pleasing aromas, and "agreeable vistas"- and the destruction of those attributes justified the need for compensation. Of note, an expert testified at trial that "no study using an acceptable scientific method supports a conclusion that healthy trees so situated will necessarily develop citrus canker or bring trouble or damage to anybody." The appellate court specifically noted that the jury is allowed to weigh the evidence and expert testimony and assess the credibility as it sees fit. While government agencies are normally entitled to deference on the rules that they develop, the court's language seems to indicate that they believed the DACS rule to be so out-of-bounds that a discussion of deference was not even necessary. Thus, the rule was arbitrary and capricious (even though the court never used those terms).

The appellate court also determined that there was no substantial evidence present to support DACS's reliance on the legislature's determination that citrus canker is a public nuisance, because, as the court noted, the state cannot "transform private property into public property without compensation." The DACS and State of Florida strenuously argued that the privately owned healthy trees located within 1,900-feet of an exposed tree were likely to become exposed to the disease, develop cankers and become worthless. Thus, the trees constituted a public nuisance that held no value, because of the harm to the citrus industry in the state. But, the court disagreed, instead stating that a "physical invasion of private property is the clearest example of a governmental taking for which just compensation is due."

The DACS also tried to argue that the trial judge used the wrong legal test for regulatory takings. The appellate court disagreed, noting that the trial judge appropriately applied a multi-factor test to decide whether the DACS's 1,900-foot regulation went too far and justified compensation. On that point, the court stated that the "government has regulatory power for the very purpose of safeguarding the rights of citizens, not for destroying them." Even though the state labeled citrus canker as a "public nuisance," the DACS was not justified in taking private property without just compensation. Generally, in cases of government taking of private property without compensation, the courts apply the multi-factor test set forth in *Penn Central.*[2] This test is a multi-factored balancing test where the court looks at the

character, nature, and extent of the interference as a whole, instead of "discrete segments of the owner's property rights," to determine whether there has been a compensable taking.[3] The appellate court, however, determined that the DACS rule was so far out-of-bounds that balancing wasn't even required. The court stated, "[t]he facts of this case require no application of multi-part recondite tests to determine whether the state regulation has gone too far and must pay just compensation. Cutting down and destroying healthy non-commercial trees of private citizens could hardly be more definitively a taking."

Next, the DACS argued that the Florida State Legislature eliminated the possibility of a common law claim for inverse condemnation of citrus trees and replaced it with a specific statutory claim. However, the court disagreed and reiterated that common law and statutory claims of inverse condemnation "do not displace the constitutional requirement for just compensation" when the state destroys private property.

The DACS also argued that the damages award of nearly $11.5 million was out of bounds and that the jury had used the wrong method for calculating damages. The court scolded DACS on this point. The appellate court stated, "Like most arguments of DACS in this dispute, it seems to have been made without regard to history, positive law, or precedent." Even though the legislature had set a maximum compensation to be paid in state statute, the court found that "just compensation" must be linked to the act of destruction. Thus, the proper method of measuring damages is "inextricably bound up with the particular circumstances of the case. The court also pointed out that making the DACS and state pay the interest accrued from the time of the filing of the class action claim was not unreasonable or unfair.

Further Developments

The DACS subsequently appealed the trial court's order denying their request for costs as the prevailing party. The DACS claimed that it was the prevailing party because the plaintiffs were awarded less than what they had sought. The court disagreed and termed the state's argument "frivolous."[4]

The DACS also sought writs of execution on the judgments recovered against the DACS in two separate class-action cases. These cases were consolidated on appeal. [5]

In one class-action suit, the trial court held that the state's eminent domain statute applied in damages from inverse condemnation cases and allowed the plaintiffs to proceed without requiring DACS to go through appropriations under another state statute. The other trial court held that the plaintiffs would have to proceed through the state's appropriations statute. The court declared the statute constitutional.

On appeal, the court held that the plaintiffs were required to go through the state's appropriation statute. The court held that the eminent domain statute did not apply to inverse condemnation damage awards. The plaintiffs argued that the appropriations statute was unconstitutional as applied to their situation. The court held that it could not decide the issue. One set of plaintiffs failed to preserve the issue for appeal when the trial court did not rule on the constitutional question. The other set of plaintiffs' claim was not yet "ripe" for decision. The court held that because the plaintiffs had not yet availed themselves of the appropriations process, the statute was not yet ripe to review in their circumstances because the legislature could appropriate the full amount of the awards in a statute directed at payment to the plaintiffs.

Conclusion

The court's decision in very instructive in this case on the property rights issue. While the regulation at issue was promulgated to help the citrus industry, the 1,900-foot rule was not supported by the evidence and constituted unnecessary over-regulation by the State of Florida and the DACS. One appellate judge

wrote a concurring opinion to emphasize the legal right of individual homeowners to receive the constitutionally-required compensation. This judge stated, "[t]he State's actions in cutting down these trees most assuredly constituted "takings," whether under the regulatory takings or physical takings analysis, that demanded just compensation." The concurring judge also stated, citing Joseph Story, that the "sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary."

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[1] Florida Dept. of Agriculture & Consumer Services v. Borgoff, *et al.*, 35 So. 3d 84 (Fla. Ct. App. 2010).

[2] Penn Central Transportation Co. *et al*. v. New York City, 438 U.S. 104 (1978).

[3] It appears that the trial court used some form of this test.

[4] Florida Department of Agriculture and Consumer Services, et al., 54 So. 3d 1026 (Fla. Ct. App. 2011).

[5] Florida Dept. of Agriculture & Consumer Services v. Mendez, No. 4D11-4644 and 4D12-196, 2012 Fla. App. LEXIS 12116 (Fla. Ct. App., Jul. 25, 2012).