Third District Court of Appeal

State of Florida

Opinion filed September 30, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2077
Lower Tribunal No. 03-8255

Dr. Evelyn Lopez-Brignoni, et al.,
Appellants/Cross-Appellees,

vs.

Florida Department of Agriculture and Consumer Services, et al.,
Appellees/Cross-Appellants.

An Appeal from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Bruce S. Rogow, P.A., and Bruce S. Rogow, and Tara A. Campion (Fort Lauderdale); Grossman Roth Yaffa Cohen, P.A., and Robert C. Gilbert; Weiss Serota Helfman Cole & Bierman, P.L., and Joseph H. Serota, and Edward G. Guedes, and Eric S. Kay; Lytal, Reiter, Smith, Ivey & Fronrath, LLP, and William S. Williams (West Palm Beach), for appellants/cross-appellees.

Clarke Silverglate, P.A., and Wesley R. Parsons, and Shannon P. McKenna, for appellees/cross-appellants.

Before LINDSEY, HENDON, and LOBREE, JJ.

LINDSEY, J.

Appellants, representatives of a certified class of Miami-Dade County Homeowners whose healthy citrus trees were destroyed as part of the Citrus Canker Eradication Program (the "CCEP"), appeal a final judgment entered after a non-jury liability trial in favor of Appellees, the Florida Department of Agriculture and Consumer Services and the Florida Commissioner of Agriculture (collectively, the "Department"). The Department cross-appeals an order granting partial summary judgment in favor of the Homeowners, finding liability against the Department under section 581.1845, Florida Statutes (2009).[1] For the reasons set forth below, we reverse the final judgment, affirm the cross-appeal, and remand for further proceedings consistent herewith.

I. BACKGROUND

This case arises from the destruction of healthy residential citrus trees located within 1900 feet of a citrus tree infected with citrus canker, a bacterial infection causing lesions on the leaves, stems, and fruit. These healthy trees were destroyed by the Department as part of the CCEP.[2] Five named plaintiffs representing 97,302 Miami-Dade Homeowners whose healthy trees were destroyed sued the Department

[1] Section 581.1845 was effective until June 30, 2010.

[2] Efforts to eradicate citrus canker in Florida date back to 1914. See Haire v. Fla. Dept. of Agric. & Consumer Servs., 870 So. 2d 774, 778-79 (Fla. 2004) (outlining the history of citrus canker in Florida).

seeking full compensation under a theory of inverse condemnation[3] pursuant to both the Florida and United States Constitutions (Counts I and II, respectively). The Homeowners also sought compensation under section 581.1845 (Count III).

A lengthy procedural history precedes this appeal, a recitation of which is necessary as it informs our decision herein. Since the inception of this case, four citrus canker trials have taken place in Broward, Palm Beach, Lee, and Orange counties. In all four of those cases the Department was found liable for inverse condemnation, juries awarded compensation, and the judgments have been affirmed on appeal:

- Broward County: Dep't of Agric. & Consumer Servs. v. Bogorff, 35 So. 3d 84 (Fla. 4th DCA 2010) (affirming), rev. denied, 48 So. 3d 835 (Fla. 2010), cert. denied, 131 S. Ct. 2874 (2011).

- Palm Beach County: Fla. Dep't of Agric. & Consumer Servs. v. Mendez, 126 So. 3d 367 (Fla. 4th DCA 2013) (affirming the order on liability but reversing on compensation and remanding for retrial due to the improper exclusion of relevant testimony) ("Mendez I"); see also Fla. Comm'r of Agric. v. Mendez, 229 So. 3d 351 (Fla. 4th DCA 2016) (affirming the $23.6 million verdict after retrial) ("Mendez II").

- Lee County: Fla. Dep't of Agric. & Consumer Servs. v. Dolliver, 209 So. 3d 578 (Fla. 2d DCA 2016) (per curiam affirmed).

[3] "Inverse condemnation has been defined as the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." City of Jacksonville v. Schumann, 167 So. 2d 95, 98 (Fla. 1st DCA 1964) (citations omitted).

- Orange County: Fla. Dep't of Agric. & Consumer Servs. v. Ayers, 192 So. 3d 68 (Fla. 5th DCA 2016) (per curiam affirmed).

This case started in October of 2000 when a group of homeowners from Miami-Dade and Broward counties sued the Department in the Seventeenth Judicial Circuit in and for Broward County. The case involving the Miami-Dade Homeowners was later transferred and refiled in the Eleventh Judicial Circuit. See Fla. Dept. of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So. 2d 928, 932 (Fla. 4th DCA 2002) (affirming class certification with respect to the Broward homeowners but directing the Seventeenth Circuit to remove the Miami-Dade Homeowners from the class).

In early 2006, the trial court entered an order adopting the Broward Circuit Court's 2002 class certification order in its entirety. On certiorari review, this Court quashed that order and remanded with directions for the trial court to conduct its own class certification hearing and enter its own order as provided by Florida Rule of Civil Procedure 1.220. Fla. Dep't of Agric. v. In re Citrus Canker Litig., 941 So. 2d 461 (Fla. 3d DCA 2006).

Later that year, and prior to the trial court certifying the Miami-Dade class, the trial court entered an order granting partial summary judgment as to liability against the Department pursuant to Count III, the statutory claim for additional compensation under section 581.1845 (the "2006 Liability Order"). The 2006

Liability Order provided that "Plaintiffs' claims under Count III shall proceed solely on the issue of damages."

Over two years later, in December of 2008, the trial court stayed the case pending the outcome of the appeal of the initial case filed in the Seventeenth Judicial Circuit. The Department appealed the stay. This Court affirmed, and the case remained stayed in the trial court until the Fourth District issued its ruling. See Dep't of Agric. & Consumer Servs. v. In re Citrus Canker Litig., 20 So. 3d 864, 864 (Fla. 3d DCA 2009). In May 2010, the Fourth District affirmed the Seventeenth Circuit Court's order awarding compensation to the Broward homeowners. See Bogorff, 35 So. 3d 84.

Thereafter, in June of 2010, the trial court held a hearing and entered an order certifying the class.[4] The Department appealed. This Court affirmed the certification in Florida Department of Agriculture & Consumer Services v. Lopez-Brignoni, 114 So. 3d 1138 (Fla. 3d DCA 2012) ("Lopez-Brignoni I"). The trial court set the case for a non-jury liability trial and notice was provided to the certified class.[5] In advance of the liability trial, both sides filed a series of pretrial motions,

[4] The certified class consists of "[a]ll owners of citrus trees situated within Miami-Dade 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."

[5] Thirty-two class members timely excluded themselves.

requests for judicial notice, and trial briefs addressing the same liability issues that were raised and decided in Bogorff, Mendez I, and Dolliver. In their Omnibus Pre-Trial Motion Regarding Certain Issues Relating to the Liability Trial, the Homeowners urged the court to apply Bogorff, Mendez I, and Dolliver to the liability determination in this case. The Department opposed, arguing a full trial was required.[6]

The trial proceeded over six days between May 9, 2016, and June 2, 2016. The court received testimony from 17 witnesses and admitted 75 exhibits into evidence. The testimony and exhibits were similar to the testimony and exhibits admitted during the liability trials in Bogorff, Mendez I, Dolliver, and Ayers. To avoid repetition, the parties stipulated that the former testimony of many of the key witnesses from the liability trials in Bogorff, Mendez I, Dolliver and Ayers would be submitted to the court in lieu of their personal appearance. The Department denied liability and raised public nuisance as its principal defense.

Over a year later, on August 4, 2017, the trial court issued its Order on Liability (the "2017 Liability Order"), concluding that the Department was not liable under Counts I and II for inverse condemnation. To facilitate appellate review, the

[6] The pre-trial motions and requests for judicial notice were pending at the time of trial. At the outset, the court acknowledged the pending motions and other matters and denied the Department's motion to decertify the class. The court then indicated that the other pretrial motions could be "carried with the case," given that the trial was non-jury.

parties filed a joint stipulation for entry of a directed verdict or involuntary dismissal in favor of the Department on the issue of damages under Count III, the statutory claim for compensation under section 581.1845. The trial court entered an Order Granting Directed Verdict or Involuntary Dismissal in favor of the Department on Count III and subsequently entered Final Judgement in favor of the Department. The Homeowners timely appealed the 2017 Liability Order and the Department timely cross-appealed the 2006 Liability Order.

II. STANDARDS OF REVIEW

This Court reviews a judgment rendered after a bench trial to determine whether the trial court's determinations of factual matters are supported by competent, substantial evidence. Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc., 521 So. 2d 101, 104 (Fla. 1988); Hass Automation v. Fox, 243 So. 3d 1017, 1023 (Fla. 3d DCA 2018). Applications of the law—legal conclusions—are reviewed de novo. Musi v. Credo, LLC, 273 So. 3d 93, 96 (Fla. 3d DCA 2019); Hass Automation, 243 So. 3d at 1023; Trump Endeavor 12 LLC v. Fernich, Inc., 216 So. 3d 704, 707 (Fla. 3d DCA 2017) (applying de novo standard of review to trial court's application of the law to its factual determinations).

III. ANALYSIS

As previously explained, there are two orders before us on appeal. The Homeowners appeal the trial court's 2017 Liability Order, which found no liability

on the part of the Department for the Homeowners' inverse condemnation claims (Counts I and II). The Department cross-appeals the trial court's 2006 Liability Order granting partial summary judgment in favor the Homeowners on their statutory claim for additional compensation under section 581.1845 (Count III). We first address the Homeowner's appeal of the 2017 Liability Order.

A. The 2017 Liability Order

In its 2017 Liability Order, the trial court found no liability on the part of the Department for inverse condemnation based primarily on two grounds: (1) "Plaintiff's failed to prove they owned compensable property for which full compensation had not been provided, under existing precedent of the Third District Court of Appeal" and (2) "citrus exposed to the disease of citrus canker and removed in the eradication program constituted the abatement of a public nuisance."

The trial court's finding that the Homeowners failed to prove they owned compensable property resulted from the court's rejection, as a matter of law, of the valuation of the Homeowners' trees. In the 2017 Liability Order, the trial court acknowledged that this "valuation methodology was identical to that presented during the class certification hearing."

In resolving this issue, we look to the appeal of the trial court's order certifying the class in June of 2010. See Lopez-Brignoni I, 114 So. 3d 1138. In

that appeal, Judge Lagoa,[7] writing for the majority, addressed the Department's argument challenging the methodology for compensating the Homeowners:

> We find the Department's argument without merit as the homeowners have specifically limited their claim for damages in the amended motion for class certification to the replacement cost of the destroyed trees, and the homeowners are not seeking subjective damages such as loss of shade, ornamentation, fruit, or privacy. As the trial court found in its order granting the amended motion for class certification, although the amount of compensation for the replacement cost of the destroyed trees may differ among homeowners, "the methodology for establishing compensation will result in a uniform result, thus avoiding the necessity of holding individual damage hearings." Therefore, the replacement cost measure of damages serves as an adequate methodology for determining any possible compensation to the homeowners.

Id. at 1143.

The Dissent disagreed that the Homeowners' replacement cost methodology was adequate and took the position that the formula was deficient as a matter of law. Id. at 1144 (Rothenberg, J., dissenting). The Department moved for rehearing en banc, which was denied. See Florida Dept. of Agric. & Consumer Services v. Lopez-Brignoni, 114 So. 3d 1135 (Fla. 3d DCA 2013).[8]

[7] At that time, Judge Barbara Lagoa was a judge on the Third District Court of Appeal. Subsequent thereto, she was appointed to the Florida Supreme Court and later to the Eleventh Circuit Court of Appeals, where she now presides.

[8] See also id. at 1136 (Logue, J., dissenting)

Despite this Court's majority opinion and this Court's subsequent denial of the Department's motion for rehearing en banc, the trial court agreed with the dissents that the Homeowners' valuation methodology was "deficient as a matter of law." The Homeowners argue that the trial court erred in failing to follow this Court's decision by failing to apply the law of the case doctrine. We agree.

"The law of the case doctrine applies where successive appeals are taken in the same case." United Auto. Ins. Co. v. Comprehensive Health Ctr., 173 So. 3d 1061, 1065 (Fla. 3d DCA 2015) (citing Delta Prop. Mgmt. v. Profile Invs., Inc., 87 So. 3d 765, 770 (Fla. 2012); Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001)). The doctrine "provides that 'questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.'" Id. (quoting McGregor v. Provident Trust Co. of Phila., 119 Fla. 718, 162 So. 323, 327 (1935)). Moreover, "a lower court cannot change the law of the case as established by the highest court hearing the case, and a trial court must 'follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case.'" Id. (quoting Juliano, 801 So. 2d at 106).

Here, the law of the case with respect to the legal sufficiency of the Homeowner's valuation methodology was established in the prior class certification appeal. See Lopez-Brignoni I, 114 So. 3d at 1143. This Court considered the

Department's argument that the valuation methodology was legally insufficient and explicitly rejected that argument, finding it to be "without merit." Id. We therefore conclude that the trial court erred in adopting the view of the dissents and rejecting the opinion of this Court in derogation of the law of the case doctrine.

We next consider the trial court's finding that the Department is not liable for the destruction of healthy, residential citrus trees because the trees are a public nuisance.[9] They are not.

In its order, the trial court relies on Department of Agriculture & Consumer Services v. Polk, 568 So. 2d 35 (Fla. 1990), a case in which the Florida Supreme Court held that a commercial citrus tree nursery was not entitled to compensation for healthy trees destroyed within 125 feet of a diseased tree. As the Fourth District explained in City of Pompano Beach, "The 125 foot radius was adopted in the 1980s as a result of a study conducted in Argentina. However, that study did not take into account what would happen in an urban setting." 792 So. 2d at 542. In early 2000, following the results of a new study, the 125-foot radius was expanded to 1900 feet. Id. at 543.

Following Polk and the subsequent expansion of the buffer zone to 1900 feet, the question remained whether Polk applied to *noncommercial, residential* citrus

[9] This argument was also considered in the prior class certification appeal. This Court similarly found no merit to this argument without further discussion. Lopez-Brignoni I, 114 So. 3d at 1140-41.

trees within 1900 feet of trees infected with citrus canker. This exact question was answered in Patchen v. Florida Department of Agriculture & Consumer Services, 906 So. 2d 1005 (Fla. 2005), a case that is absent from the trial court's discussion of Florida caselaw on public nuisance.[10]

In Patchen, the Florida Supreme Court held that Polk is inapplicable to the Department's destruction of uninfected, healthy *noncommercial, residential* citrus trees within 1900 feet of trees infected with citrus canker. Id. at 1006. As the Fourth District explained in Mendez I, the Supreme Court in Patchen reasoned that "homeowners whose trees were within the ambit of section 581.1845 were not governed by Polk because the Legislature itself had established that they were due compensation for their trees." 126 So. 3d at 370. There is no dispute that the Homeowners in this case are covered by section 581.1845. Indeed, as the trial court explained in the 2017 Liability Order, "[a]ll class members received unconditional offers of compensation" under the programs established by section 581.1845.

[10] This Court certified the following question as one of great public importance:

> Does the Florida Supreme Court's 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, also apply to the Department's destruction of uninfected, healthy *noncommercial, residential* citrus trees within 1900 feet of trees infected with citrus canker?

Patchen, 906 So. 2d 1005, 1005-06 (Fla. 2005).

Consequently, because the Legislature established that the Homeowners were due compensation for their trees, Polk simply does not apply in this case, and the trial court erred in concluding otherwise.

B. The 2006 Liability Order

In Count III of their operative complaint, the Homeowners sought compensation pursuant to section 581.1845, Florida Statutes (2009). Section 581.1845, titled "Citrus canker eradication; compensation to homeowners whose trees have been removed" provides, in pertinent part, as follows:

> (1) The Department of Agriculture and Consumer Services shall provide compensation to eligible homeowners whose citrus trees have been removed under a citrus canker eradication program. Funds to pay this compensation may be derived from both state and federal matching sources and shall be specifically appropriated by law. Eligible homeowners shall be compensated subject to the availability of funds. . . .
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> . . . .
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> (3) The amount of compensation for each tree removed from residential property by the citrus canker eradication program shall be $55 per tree. 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.
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> (4) The specification of a per-tree amount paid for the residential citrus canker compensation program does not limit the amount of any other compensation that may be paid by another entity or pursuant to court order for the

> removal of citrus trees as part of a citrus canker eradication program.

In short, section 581.1845 provides for compensation in the amount of $55 per tree, subject to the availability of funds.[11] Moreover, section 581.1845(4) states that the per tree amount "*does not limit the amount of any other compensation that may be paid by another entity or pursuant to court order . . . .*" (Emphasis added).

In 2006, the Homeowners moved for partial summary judgment on their claim for compensation in addition to the base compensation created by section 581.1845. According to the Homeowners, they were entitled to entry of judgment as a matter of law based on two Florida Supreme Court decisions: Haire and Patchen. In Haire, the Court held as follows:

> In this case, we conclude that under the statutory scheme the State is obligated to provide more than token compensation if the State has destroyed a healthy, albeit exposed tree. Section 581.1845 expressly states that the specified per-tree amount "does not limit the amount of any other compensation that may be paid . . . *pursuant to court order* for the removal of citrus trees as part of a citrus canker eradication program." § 581.1845(4) (emphasis supplied).
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> . . . .

[11] Homeowners eligible for the Shade Dade or Shade Florida Card may not receive compensation for the *first* citrus tree removed. "The statutes do not further define a Shade Dade or Shade Florida Card. However, a press release from the Department announcing the program indicates that these are gift cards redeemable at Wal–Mart for non-citrus trees and other garden related items." Haire, 870 So. 2d at 780.

> In accord with our precedent, **we conclude that the schedule established by the Legislature sets a floor but does not determine the amount of compensation**. When the State destroys private property, the State is obligated to pay just and fair compensation as determined in a court of law. We emphasize that the fact that the Legislature has determined that all citrus trees within 1900 feet of an infected tree must be destroyed does not necessarily support a finding that healthy, but exposed, residential citrus trees have no value.

870 So. 2d at 785 (footnotes omitted) (emphasis added). In Patchen, the Court further explained that "[H]omeowners and others similarly situated who meet the requirements of section 581.1845(2)(a), (b), and (c), may receive compensation pursuant to that statute as construed and upheld in our decision in [Haire]." Patchen, 906 So. 2d at 1008.

The trial court agreed with the Homeowners and granted their motion "as to liability pursuant to Count III, the statutory claim brought under § 581.1845, Florida Statutes." Following entry of the trial court's 2006 Liability Order, the Department appealed the trial court's class certification order. There, the Department argued that the Homeowners "have neither a private cause of action for additional compensation under section 581.1845, Florida Statutes, nor a claim for inverse condemnation . . . ." Lopez-Brignoni I, 114 So. 3d at 1140. This Court found no merit to that argument and, relying on both Haire and Patchen, explained as follows:

> [I]t is not only beyond legislative purview to displace the constitutional requirement of just compensation upon a taking, but section 581.1845 expressly contemplates the

> entry of a court order obligating the State to compensate a homeowner for the destruction of his or her residential citrus trees under the CCEP in excess of the statutory per-tree amount. The Florida Supreme Court, finding the statute remedial, gave section 581.1845 its plain meaning, "which is to provide compensation to homeowners who had trees destroyed on or after January 1, 1995." Patchen, 906 So. 2d at 1008. Although the concurring and dissenting opinions in Patchen suggest concern over whether the majority opinion impliedly eliminated the right to pursue an inverse condemnation claim for the destruction of residential citrus trees, the majority opinion limits the scope of its opinion to the certified question posed. See Patchen, 906 So. 2d at 1005–09. Accordingly, "[i]f the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount." Bogorff, 35 So. 3d at 91.

Lopez-Brignoni I, 114 So. 3d at 1141-42 (footnote omitted).

In their cross-appeal, the Department contends that the trial court erred in granting partial summary judgment of liability based on section 581.1845 because no private cause of action exists for additional compensation under the statute. We agree with the Homeowners that this argument was considered and rejected in Lopez-Brignoni I, which held, based on Haire and Patchen, that the Homeowners have a private cause of action under section 581.1845.[12] We therefore affirm the trial court's 2006 Liability Order.

IV. CONCLUSION

[12] We also note that the homeowners in Broward, Lee, Orange and Palm Beach Counties have all maintained causes of action and been awarded compensation under the statute.

For the reasons set forth above, we reverse the Final Judgment in favor of the Department as to the 2017 Liability Order. On the cross-appeal, we affirm the trial court's 2006 Liability Order in favor of the Homeowners. Accordingly, we remand to the trial court with directions to proceed to a trial before a 12-person jury to decide the amount of compensation.[13]

Reversed in part, affirmed in part, and remanded.

[13] "[T]he trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation." Mid-Florida Growers, 521 So. 2d at 104.