

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

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

CASE NO. 02-13717 AJ

Plaintiffs,

vs.

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

Defendants.

**ORDER DENYING DEPARTMENT'S
MOTION FOR SUMMARY FINAL JUDGMENT**

THIS CAUSE came before the Court on March 9, 2007 on the Motion for Summary Final Judgment filed by defendants Florida Department of Agriculture and Consumer Services and its Commissioner Charles Bronson (collectively, the "Department"). Having reviewed the Department's motion and Plaintiff's opposing memorandum, heard argument of counsel and being otherwise fully advised in the premises, this Court denies the motion in its entirety for the reasons set forth herein.

1. This is one of five related class action suits pending in Palm Beach, Broward, Miami-Dade, Lee and Orange Circuit Courts. Plaintiffs' Second Amended Class Action Complaint (the "Complaint") seeks to recover full and just compensation resulting from the Department's destruction of thousands of uninfected residential citrus trees in Palm Beach

County under the Citrus Canker Eradication Program. The Complaint states causes of action for inverse condemnation under Count I and for additional compensation under Fla. Stat. § 581.1845 (the “Statute”) under Count III. In February 2006, this Court denied the Department’s motion to dismiss both of these claims. Circuit courts presiding over the related class action suits denied similar motions to dismiss.

2. The Department now seeks summary final judgment as to Counts I and III of the Complaint. With respect to Count I, the common law claim for inverse condemnation, the Department argues it is entitled to summary judgment as a matter of law based on the Florida Supreme Court’s decision in *Patchen v. Florida Department of Agriculture and Consumer Services*, 906 So. 2d 1005 (Fla. 2005). With respect to Count III, the claim for additional compensation under the Statute, the Department argues it has “fully implemented” its obligations under the Statute by offering all eligible property owners, members of the certified class, the opportunity to avail themselves of the Shade Florida cards and Tree Compensation payments provided under the Statute. The Department also asserts the Statute does not create a private cause of action entitling Plaintiffs to pursue additional compensation above and beyond the fixed compensation provided under the Statute. The Department filed the affidavit of Mike Gresham, the Director of the Department’s Division of Administration, in support of its motion for summary judgment under Count III.

3. In resolving a motion for summary judgment, this Court is guided by the following legal standards. Summary judgment is only proper if there is no genuine issue of

material fact and the movant can establish it is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgments are to be granted with restraint because such a motion deprives a party of his right to a trial. *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). The movant bears an extremely high burden and such motions should only be granted where the facts are “so crystallized that nothing remains but questions of law.” *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). When examining the facts presented in a motion for summary judgment, the court must resolve all factual disputes in favor of the non-moving party. *Suncoast Auto Center, Inc. v. Consolidated Prop. and Cas. Ins. Co.*, 880 So. 2d 728 (Fla. 2d DCA 2004). In addition, all reasonable inferences should be resolved against the movant. *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003). “If even the slightest doubt exists as to the inferences to be drawn from the facts, then a summary judgment must be [denied].” *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000).

4. The Department argues it is entitled to summary judgment under Count III because it has “fully implemented” its obligations under the Statute by offering all eligible property owners the opportunity to avail themselves of the Shade Florida cards and Tree Compensation payments provided under the Statute and by tendering Shade Florida cards and Tree Compensation payments to all eligible property owners who submitted applications. The Department also asserts the Statute does not create a private cause of action entitling

Plaintiffs to pursue *additional* compensation above and beyond the fixed compensation provided under the Statute.

5. In response, Plaintiffs argue that whether (or not) the Department has “fully implemented” the Statute by offering Shade Florida cards and Tree Compensation payments to all eligible members of the certified class is irrelevant. Plaintiffs point out their claim under Count III is for *additional* compensation over and above the fixed, minimum amount provided under the Statute. *See* Complaint, ¶¶ 35-36. Plaintiffs argue the claim for *additional* compensation is fully consistent with the Supreme Court’s decision in *Haire v. Florida Department of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004), which held that the compensation provided under the Statute sets a floor, and that determination of the compensation ceiling is reserved for a court of law.

6. Plaintiffs point out that this Court has already entered summary judgment against the Department under Count III, finding the Department liable to pay Plaintiffs *additional* compensation under the Statute in an amount to be determined by a jury. Plaintiffs also argue that this Court and others have previously rejected the Department’s argument that no cause of action exists under the Statute. Finally, Plaintiffs argue that the supporting affidavit of Mike Gresham is inadmissible and/or conflicts with Mr. Gresham’s own deposition testimony, thus creating classic issues of disputed fact precluding summary judgment.

7. This Court agrees with the arguments advanced by Plaintiffs. Plaintiffs' claim under Count III is for *additional* compensation over and above the fixed amount provided under the Statute. Plaintiffs' claim for *additional* compensation is fully consistent with the Supreme Court's decision in *Haire*. This Court has already entered summary judgment against the Department under Count III, finding the Department liable to pay Plaintiffs *additional* compensation under the Statute in an amount to be determined by a jury. This Court has also previously rejected the Department's argument that no cause of action exists under the Statute.

8. With respect to Count I, the Department argues *Patchen* pre-empts Plaintiffs' common law claim for inverse condemnation in favor of the exclusive remedy provided under the Statute.

9. In response, Plaintiffs argue that the Department's reliance on the concurring and dissenting opinions in *Patchen* to assist in interpreting the majority decision is misplaced because the concurring and dissenting opinions do not constitute the decision of the Court. *See Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980). The concurring opinion "does not constitute the law of the case nor the basis of the ultimate decision . . ." *Id.* It does not form the "basis of the ultimate decision unless concurred in by a majority of the Court." *Ephrem v. Phillips*, 99 So. 2d 257, 263 (Fla. 1st DCA 1957) (emphasis added). Plaintiff urge that since none of the concurring or dissenting opinions in *Patchen* were concurred in by a "majority of the Court," those opinions "have no precedential value," form no basis for the

ultimate decision and should not have any influence on this Court. *Mouzon v. Mouzon*, 458 So. 2d 381, 383 (Fla. 5th DCA 1984).

10. Plaintiffs point out that the Department has repeatedly sought to persuade this Court and others of its view of *Patchen* without success. The Department filed virtually identical motions to dismiss in this case as well as in the class actions pending in Broward, Miami-Dade and Orange Circuit Courts presenting the same argument raised here. In each instance, trial courts rejected the Department's interpretation of *Patchen*. In addition, the Department recently moved for summary judgment on inverse condemnation in the related class action suit pending in Miami-Dade Circuit Court. The Department's motion was substantially similar to the motion now pending before this Court. The Miami-Dade Circuit Court denied the Department's motion.

Plaintiffs also point out that the Fourth District manifested its interpretation of *Patchen* in affirming the this Court's order certifying a class of Palm Beach County homeowners pressing their inverse condemnation claim, where the Fourth District held:

We affirm the order certifying the class in the *Mendez* case (4D04-1738) for the same reasons we affirmed certification in *Florida Department of Agriculture and Consumer Services v. City of Pompano Beach*, 829 So. 2d 928 (Fla. 4th DCA), rev. denied, 845 So. 2d 889 (2003). See also *Patchen v. Florida Department of Agriculture and Consumer Services*, 30 Fla. L. Weekly S241 (Fla. Apr. 14, 2005).

See *Florida Department of Agriculture and Consumer Services, et al. v. Mendez*, 901 So. 2d 1020, 1021 (Fla. 4th DCA 2005) (emphasis added).

If *Patchen* eliminated inverse condemnation (the sole cause of action pending at the time) as a viable cause of action in favor of an exclusive statutory remedy – as claimed by the Department – the Fourth District would have reversed class certification and remanded with instructions to dismiss this action, just as the Third District did six years earlier in *Department of Agriculture & Consumer Services v. Varela*, 732 So. 2d 1146 (Fla. 3d DCA 1999).

Additionally, Plaintiffs urge that the Department's interpretation of *Patchen* was also rejected by the Second District in the related class action suit brought on behalf of Lee County homeowners. Appealing the trial court's order granting class certification, the Department's primary argument was the very same argument it is now pressing before this Court: that *Patchen* eliminated the common law claim of inverse condemnation. The Second District affirmed class certification. See *Florida Department of Agriculture and Consumer Services v. Dellaselva*, 926 So. 2d 1293 (Fla. 2d DCA 2006). The Second District's decision did not address the Department's argument that *Patchen* eliminated the remedy of inverse condemnation, manifesting the Court's rejection of that argument. See *Bowles v. D. Mitchell Investments, Inc.*, 365 So. 2d 1028 (Fla. 3d DCA 1978) (opinion that discusses some, but not all arguments raised on appeal implies others were without merit).

11. Finally, Plaintiffs argue that because there is no language in the Statute itself which explicitly addresses, abolishes or pre-empts pending common law claims for inverse condemnation, the Statute will not be found to have changed the common law. See *Thorner*

v. City of Fort Walton Beach, 568 So. 2d 914, 918-19 (Fla. 1990); *Hialeah v. State ex rel. Morris*, 136 Fla. 498, 183 So. 745 (Fla. 1938); *Harold Silver, P.A. v. Farmers Bank & Trust Co.*, 498 So. 2d 984 (Fla. 1st DCA 1984); *Sand Key Associates, Ltd. v. Board of Trustees of Internal Improvement Trust Fund*, 458 So. 2d 369 (Fla. 2d DCA 1984); *Cullen v. Seaboard Air Line Railway*, 63 Fla. 122, 58 So. 182 (Fla. 1912); *Peninsular Supply Co. v. C.B. Day Realty Inc.*, 423 So. 2d 500 (Fla. 3d DCA 1982).

Plaintiffs point out that the Statute not only fails to unequivocally eliminate inverse condemnation, it clearly envisions the possibility of further legal proceedings to recover additional compensation:

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 . . . pursuant to court order for the removal of citrus trees as part of a citrus canker eradication program.

§ 581.1845(4), Fla. Stat. (emphasis added).

12. This Court agrees with the arguments advanced by Plaintiffs in opposition to the Department's motion for summary final judgment as to Count I. This Court and others have repeatedly rejected the Department's view of *Patchen*. There is no language in the majority opinion in *Patchen* which conclusively pre-empts or abrogates the common law claim for inverse condemnation in favor of an exclusive statutory remedy. Since the concurring and dissenting opinions do not constitute the decision of the Court, the majority opinion, standing alone, constitutes the law of the case. Additionally, there is no language

in the Statute itself which addresses, abolishes or pre-empts the common law claim for inverse condemnation. A statute will not be found to have changed the common law unless it unequivocally says so or is so repugnant to the common law that the two cannot coexist. The absence of any explicit language in the Statute changing the common law is conclusive proof the Legislature did not intend to modify or pre-empt the common law claim for inverse condemnation. In fact, the Statute clearly envisions the possibility of further legal proceedings to recover *additional* compensation

13. Based on the foregoing, this Court DENIES the Department's motion for final summary judgment in its entirety. The common law claim for inverse condemnation shall proceed to trial on liability on October 15, 2007. Trial on damages on the claim for additional compensation under the Statute shall be scheduled by separate order.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this _____ day of March, 2007.

SIGNED & DATED

MAR 23 2006

Chambers of Judge
ROBIN L. ROSENBERG
Honorable Robin L. Rosenberg
Circuit Court Judge

Copies provided to:
Counsel of Record

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