

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

WILLIAM DAWS, JR., et al.,

Plaintiff,

v.

Case No. 2014 CA 2951

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Defendant.

ORDER ON EVIDENTIARY HEARING AND HEARING ON SUMMARY
JUDGEMENT MOTION

THIS CAUSE came before the Court on September 19, 2016 for evidentiary hearing on the plaintiffs' request for temporary injunctive relief and on any factual issues relating to the existence of administrative remedies and on the motion of defendant Florida Fish and Wildlife Conservation Commission [FWC] for summary judgement.

The Parties

The plaintiffs are twelve property owners and one tenant whose homestead property is either adjacent to

or surrounded by the publicly owned land known as the Blackwater Wildlife Management Area [BWA]. The FWC is the executive branch agency responsible for wildlife management; as pertinent to this case, FWC's authority comes from the Florida Constitution.

The Persons Present

The parties and their counsel were present at the hearing. Eight witnesses [seven plaintiffs and a non-plaintiff witness who has lived adjacent to the WMA since 1994] testified at the hearing. In addition to the September 19, 2016 testimony, the parties filed affidavits of all thirteen plaintiffs and the affidavit of Diane Eggemann, FWC Director of the Division of Hunting and Game Management; the affidavits were admitted into evidence by the parties' stipulations.

Prior Hearing

At the prior hearing on July 20, 2016, the FWC contended that the Court lacked jurisdiction due to the

plaintiffs' having allegedly failed to exhaust administrative remedies. The plaintiffs were initially seeking an injunction prohibiting the FWC from continuing to allow deer dog hunting. At the September 19 hearing, the plaintiff contended that, because the FWC's authority pertinent to this case derived from the Florida Constitution rather than from the statutes, only the judicial branch has jurisdiction over the case and there are no administrative remedies to be pursued. FWC acknowledged that the plaintiff is correct, and confirmed FWC is not contending that there has been any failure to exhaust administrative remedies.¹

¹This case is not controlled by or even similar to the 2002 case of Northwest Florida Rural Property Owner's Association, Inc. v. Florida Fish and Wildlife Commission, Leon County Circuit Court case no 2002-CA-2358. There, Circuit Judge Janet Ferris found the non-property-owning association plaintiff had no standing. Further, after that case concluded, FWC adopted a rule clarifying the distinction between cases where FWC set policy pursuant to its constitutionally granted authority [DOAH has no jurisdiction, only the circuit court does] and cases involving FWC's actions pursuant to legislative authority; see Rule 68A-1.008(5)(c)(1), Florida Administrative Code and Respondent FWC's motion for summary final order/motion to dismiss in O'Neal v. Fish and Wildlife Conservation Commission, Division of Administrative Hearing Case No. 2014-5667RP, submitted December 23, 2014, attached to motion of Daws plaintiffs' request to take judicial notice.

Summary of Proceedings

The plaintiffs called seven party witnesses and one property owner/non-party witness. The defendant called no witnesses. A summary of pertinent parts of the testimony is attached as Exhibit A. After the witness testimony, the attorneys argued the defense motion for summary judgement and the plaintiffs' motion for temporary injunctive relief.

1. The Commission argued its motion for summary judgement, and the plaintiffs responded. The Commission contended there is no per se taking and no non per se taking claim. The Commission contends it is not taking any action to interfere with the plaintiffs' right to the quiet enjoyment of their property. The Commission is a little different than other agencies, so there is a constitutional basis for FWC to act and in those cases, the jurisdiction is with the Court, rather than with DOAH or FWC. FWC contends it is trying to strike a balance between the hunters and the owners.

2. The plaintiffs argued their motion for temporary injunctive relief, and argued against the summary judgement. The plaintiffs contend it is not a balancing test [between those who want to hunt on public land and those who own private property alongside public land] that is appropriate. The state cannot take property without compensation. The plaintiffs are asking that the Court declare that the trespassing of dogs and hunters during deer dog hunting season constitutes a nuisance, and asks the Court to enjoin the nuisance. The plaintiffs are also asking for compensation for the inverse condemnation that is allegedly taking place as the result of the FWC-sanctioned nuisance posed by the trespassing accompanying the deer dog hunting. It is up to the Commission to figure out how the abatement of the nuisance can be accomplished.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the demeanor, credibility and testimony of the witnesses and other evidentiary exhibits, the Court

having taken judicial notice of the matters noticed in the plaintiffs' September 15, 2016 request to take judicial notice [relating to a silencer ban rule case], the parties having essentially stipulated to the undisputed underlying facts set forth herein, and the Court being otherwise fully advised in the premises, it is hereby

FOUND AND CONCLUDED as follows:

1. All of the plaintiffs legally own or occupy property adjacent to the Blackwater Wildlife Management Area [WMA], and each is constitutionally entitled to the quiet enjoyment of their property.

2. FWC is responsible for management of Florida's wild animal life, including the management of hunting. Article IV, Section 9, Florida Constitution.

3. The Blackwater WMA is located in Okaloosa and Santa Rosa counties, contains more than 200,000 acres of public lands. The Blackwater WMA is interspersed

with several privately-owned properties, including those of the plaintiffs.

4. Consistent with its constitutional wild game management responsibilities, FWC has adopted rules relating to hunting in the Blackwater WMA and issues permits to hunters desirous of hunting deer in the Blackwater WMA.

5. FWC rules recognize some 44 days per year [more than 10% of the year] during which hunters may participate in "deer dog hunting", using dogs to run and flush deer as part of hunting deer.²

6. During deer dog hunting, hunters release their dogs on public land portions of the Blackwater WMA, then listen and wait for the dogs to maneuver the deer to a location the hunters can kill the deer; while chasing the deer, the dogs follow the deer oblivious to whether the deer are staying on public lands or are

²FN "Still hunting" [no dogs involved] on the Blackwater WMA public lands is not problematic to the private property owners, does not interfere with their use and enjoyment of their property, and is therefore not involved in the private property owners' requests for relief.

going on private land owned by private landowners in the area.

7. During deer dog hunting days [and during other days for that matter], the deer dogs do not respect the no trespassing signs posted on the privately owned lands adjacent to and, in some cases, such as that of plaintiff Betty Tolbert, surrounded by the Blackwater WMA. It is not disputed that, despite FWC efforts over the years, the deer-chasing dogs frequently trespass on and run through the private property of the plaintiff property owners and non-plaintiff property owners living adjacent to the Blackwater WMA.

8. The credible testimony clearly and convincingly established that during the 12.1% of the year that comprises the FWC-approved deer dog hunting days, the plaintiffs' rights to the quiet enjoyment of their property has been invaded and interfered with, by the deer dogs involved in FWC deer dog hunting.

9. FWC has reportedly allowed deer dog hunting in the Blackwater WMA for decades; the property owners have been trying to protect their property from the dogs and hunters' trespassing since at least the late 1990s.

10. The case brought by the Northwest Florida Rural Property Owners, referenced in footnote 1 above, is apparently one of the first cases.

11. FWC has, over the years, tried to work with the private property owners, to achieve a balanced compromise that would allow dog-owning hunters the opportunity to participate in deer dog hunting on public land without too great an imposition on private property owners, adopting a Responsible Hunter rule.

12. The Responsible Hunter rule provides circumstances under which the FWC game wardens will respond to calls from private property owners, if the owners catch the trespassing deer hunting dogs.

13. The clear and convincing evidence demonstrates without questions that the so-called Responsible Hunter is not particularly helpful to private property owners who are no longer young and able-bodied, as catching a deer-chasing dog is not an easy task even for a healthy, younger person.

14. The clear and convincing, credible testimony establishes that many of the private property owners are effectively denied the use and enjoyment of their property during the 12.1% of the year when FWC allows deer dog hunting on the adjacent Blackwater WMA.

15. Property owners are harassed by hunters as dogs trespass despite no trespassing signs and fences, with property owners reasonably and understandably afraid to have family get together on their property during deer dog season, which overlaps with holidays such as time around Thanksgiving and Christmas, due to the inability to prevent invasion of the property by hunting dogs and hunters.

16. Apart from interfering with private property owners' enjoyment of their property during special times during the year, the deer-chasing trespassing dogs have harmed and harassed the livestock [cattle and horses] and other animals [dogs] owned by the private property owners.

17. Dogs chasing deer across the land of private property owners have caused horses to run into fences, with resulting cuts and have chased horses across non-fenced areas, with injuries to the horses as they encounter unseen holes and branches.

18. Some of the retired private property owners are retired military whose own right to engage in still hunting on their own property is taken when the trespassing deer-chasing dogs come running through the private property owners' own property, disturbing and chasing off any deer which happened to be on the private property.

19. The case should not be viewed as weighing competing interests of the private property owners against the desires of the FWC-authorized public hunters.

20. The rights of the private property owners to the enjoyment of their private land are not conditioned upon, nor subject to, those who want to hunt adjacent public lands.

21. The rights of private property owners cannot and should not be interfered with by state government and those authorized to participate in deer dog hunting.

22. The testimony of plaintiffs William Daws, Mary King, Monica Joiner, Regina Hunt, Sara King, Hershel Holt and Betty Tolbert and the non-plaintiff property owner David Youngblood, and the facts in the affidavit of FWC Division Director Diane Eggemann are in agreement, and there are no genuine issues of material fact underlying the parties' dispute.

The Summary Judgement Motion

23. In its August 19, 2016 motion, FWC seeks the entry of judgement in its favor as a matter of law, contending the plaintiffs cannot and should not be granted relief.

24. In support of its motion, FWC argues that it is entitled to judgement as a matter of law based on legal doctrines of the separation of powers, sovereign immunity and prior court rulings. The court rulings cited are the rulings of Judge Ferris in Northwest Florida Rural Property Owners v. FWC, 2002-CA-2358, particularly the order of October 21, 2004.

25. As indicated above, the parties at the September 19, 2016 hearing acknowledged that that case is not applicable here for two reasons: the plaintiff was a non-property owner and Judge Ferris found a lack of standing and that case ignored the fact stipulated to by the parties that administrative remedies are not available when the policy decisions [based on

constitutional authority]of the FWC are involved, something made clear by the FWC in its papers in the DOAH case, O'Neal v. FWC, 14-5667RP [attached to the plaintiffs' September 15, 2016 request for judicial notice].

26. In its separation of powers argument, the FWC contends that the Court would violate Florida's mandate prohibiting executive branch powers from being exercised by the Judicial Branch. If that were what the plaintiffs were arguing, the FWC may have a point. However, the plaintiffs are no longer asking the Court to change the FWC rules or regulations, nor to micromanage the deer hunting program that is part of FWC's wild game management responsibility. In their response to the FWC motion, the plaintiffs state in paragraph 42:

42. In their Amended Complaint and their Amended Motion for Temporary Injunction, the Plaintiffs request, in part, the following relief:

That the court enter a temporary and a permanent injunction enjoining Defendant Florida Fish and Wildlife Conservation Commission from allowing individuals to hunt deer with free-running dogs in the portion of the Blackwater WMA in which the [Plaintiffs' Properties are] located -- to wit, that portion of the Blackwater WMA which is located east of Belandville Road, north to the Alabama/Florida State Line, and south to Highway 4.

The Plaintiffs agree that the separation of powers doctrine would bar this Court from granting such relief, and, thus, the Plaintiffs hereby withdraw their requests for the above-state relief.

Plaintiffs' Response, p. 14, paragraph 42. The Plaintiffs also point out that the separation of powers doctrine does not preclude the Court from entering declaratory and injunctive relief against a state agency which has violated " substantive rights without

giving equal benefit in return". State Rd. Dep't v. Newhall Drainage Dist., 54 So.2d 48, 50 (Fla. 1951).

Instead, the plaintiffs are requesting that the "flood of hunters and their dogs" trespassing on and invading their properties during the 44 deer dog hunting days constitutes a nuisance the plaintiffs are entitled to have abated, and constitutes a taking of the plaintiffs' property. FWC has not demonstrated its entitlement to a summary judgement in this case on the basis of the separation of powers. The motion for summary judgement on separation of powers grounds is denied.

27. In arguing that sovereign immunity entitles FWC to summary judgement in this action for nuisance, injunctive and declaratory relief and damages arising from a taking of the plaintiff's property, the FWC request relies on misstating the relief the plaintiffs are seeking. On page 8 of their August 19, 2016 motion, FWC states:

Plaintiffs are asking this court to issue an order (injunction) which would effectively change the rules that have been properly enacted by FWC.

Id., at p. 8. The plaintiffs are no longer asking that relief, having clarified in their response (p. 14) that they are withdrawing that request. (Id., supra). Accordingly, the summary judgement is moot on this ground. Further, the cases cited and argued by the plaintiffs [Newhall, supra, Crowley Museum and Nature Center, Inc. v. Southwest Florida Water Management District, 993 So.2d 605 (Fla. 2d DCA 2008) and Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So2d. 912 (Fla.1985)] demonstrate that FWC is not immune from liability for constitutionally based taking claims nor from nuisance claims. See, also, Florida Department of Natural Resources v. Garci, 753 So.2d72 (Fla. 2000) and FOC Lawshe Limited Partnership v. International Paper Company, 574 S.E.2d 228 (S.C. Ct.

App. 2002). The motion for summary judgement on sovereign immunity grounds is denied.

29. FWC also contends the plaintiffs have not stated a cause of action for declaratory and injunctive relief, or for a taking claim. The pending complaint does, in fact, set forth sufficient facts to demonstrate proper claims pursuant to chapter 86 for declaratory relief, as well as proper claims for injunctive relief and claims for per se and non-per se taking claims under the circumstances present here. The motion for summary judgment requested on these grounds is denied

The Amended Motion for Temporary Injunction

30. The plaintiffs have withdrawn their requests for temporary injunctions prohibiting the FWC from allowing deer dog hunting or issuing permits for deer dog hunting in the portion of the Blackwater WMA where the plaintiffs' properties are located. Instead, the plaintiffs seek a finding that the dogs trespassing on

the plaintiffs' property as a result of FWC allowing deer dog hunting constitutes a nuisance, and seek entry of a temporary injunction requiring the FWC to abate the nuisance in whatever manner it deems appropriate. The plaintiffs also seek acknowledgement that FWC's continuing to allow deer dog hunting to go on despite FWC's clear knowledge of the invasion of and interference with the plaintiffs' property rights constitutes a taking. Whether, and the extent to which, FWC's actions constitute a taking will be decided based on the evidence submitted at the jury trial of this case, as will the amount of any resulting damages. For now, it is clear that the trespasses onto the plaintiffs' property and the interference with the plaintiffs' property rights is a direct result of the FWC's continued allowance of the deer dog hunting in an area known to contain private property, and does constitute a nuisance. The plaintiffs are entitled to entry of an injunction requiring FWC to abate the nuisance during the pendency of these proceedings.

ORDER

Based on the foregoing, it is hereby

ORDERED as follows:

1. The FWC motion for summary judgement is denied.
2. The plaintiffs' request for injunctive relief is granted. FWC is hereby required to abate the nuisance of the deer hunting dogs from trespassing onto the property of the plaintiffs, and of the deer dogs and their hunters from interfering with the plaintiffs' right to the quiet enjoyment of their private property.
3. The case is set for a case management conference on November 7, 2016 at 3:30 p.m.E.T. for the purpose of setting the case for jury trial and to address any remaining legal issues.

ORDERED this 30th day of September, 2016 in
Tallahassee, Leon County, Florida.



KAREN GIEVERS
Circuit Judge

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