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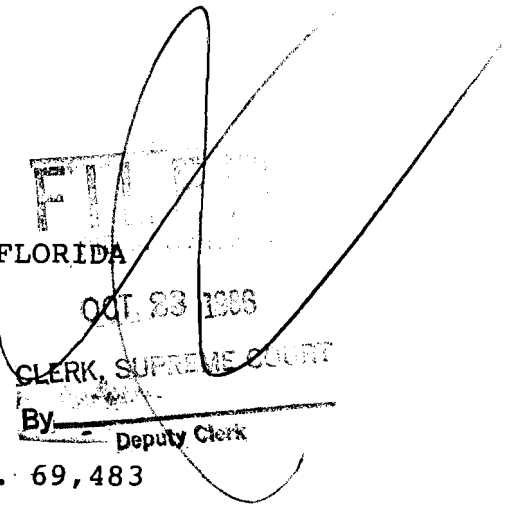

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL AND ELLEN THOMSON,

Petitioners,

v. CASE NO. 69,483

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL
REGULATION,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW OF
A DECISION OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

JURISDICTION BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, Paul and Ellen Thomson, applied to Respondent, the Department of Environmental Regulation, on July 8, 1983, to construct a 36-foot wide covered dock connected to the uplands by a 92-foot long by 8-foot wide walkway on their privately owned submerged land in Jupiter Island Cove, Jupiter, Palm Beach County, Florida. As a result of perceived impact to seagrasses, Respondent provided a notice of Intent to Deny on October 14, 1983. Petitioners were being represented by an engineer, and the engineer obtained from an employee of Respondent an agreement to hold the permit application in abeyance until more detailed information, leading to subsequent design modifications, was provided. Nevertheless, Respondent entered a Final Order of Denial on November 10, 1983. The engineer received a cover letter with the Final Order of Denial, inviting the engineer to meet in a pre-application mode to discuss changes to the application.

The second application was filed January 19, 1984. By then Paul and Ellen Thomson were represented by counsel, and when a second Intent to Deny founded upon res judicata was issued on March 9, 1984, Petitioners filed a Petition for Administrative Hearing. By Procedural Order dated March 27, 1984, Victoria J. Tschinkel, Secretary of the Department of Environmental Regulation, denied the petition for a formal hearing pursuant to

Section 120.57(1), Florida Statutes, and offered an informal Section 120.57(2), Florida Statutes, hearing in the case. Petitioners filed a Motion for Reconsideration and a Memorandum of Law in opposition to the application of res judicata. Respondent entered a Final Order of Denial on May 18, 1984 and on May 30, 1984, Petitioners filed Notice of Appeal to the Board of Trustees of the Internal Improvement Trust Fund. Under the provisions of Rule 17-103.330(3), Florida Administrative Code, Petitioners requested development of a record through a formal proceeding pursuant to Section 120.57(1), Florida Statutes. On September 5, 1984, Respondent adopted an order "granting" development of a record but ignored Petitioner's request for a formal proceeding and simply designated certain documents already on file as the record. Petitioners appealed this refusal to grant an administrative hearing at any point in the proceeding to the Board of Trustees of the Internal Improvement Trust Fund, and to the First District Court of Appeal. A dual appeal was taken since the Respondent's Final Order cited for jurisdiction both Chapters 253 and 403, Florida Statutes. The First District Court of Appeal granted an extension of time pending consideration of the matter by the Board of Trustees of the Internal Improvement Trust Fund. On November 27, 1984 the Board of Trustees dismissed the appeal for lack of subject matter jurisdiction as a result of a statutory change, and the consolidated appeal was heard by the First District Court of Appeal. On February 15, 1985, the First

District Court of Appeal directed an Order to Show Cause to Respondent, regarding the preparation of the record. On June 19, 1985, the First District Court of Appeal dispensed with oral argument, but during consideration of the matter changed its decision, and oral arguments were heard September 10, 1985. The opinion of the First District Court of Appeal was filed May 1, 1986. Petitioners filed Motion for Rehearing on May 9, 1986, and on October 6, 1986, the Motion for Rehearing was denied, presenting the opportunity for Petitioners to bring their case before this court. A more precise and detailed statement of the facts regarding this case can be found in the dissent to the opinion of the court below.

SUMMARY OF THE ARGUMENT

Paul and Ellen Thomson present to this Court their plight in finding that, contrary to all of the cases cited by Respondent, no hearing for either the first or second application was ever held, and they were denied a fair opportunity to be heard. After expending a substantial sum of money for expert consultants to modify their proposal, to save the seagrasses that were of concern to the department, no chance was provided for them to present evidence regarding their second application. The only evidence of departmental review, is a summary intent to deny containing standard-form language. The rigid application of the doctrine of res judicata must be tempered to prevent injustice. The failure of the First District Court of Appeal, to evaluate

these factors places the opinion in direct conflict with a decision of the Third District Court of Appeal, and with two decisions of the Supreme Court of Florida.

ARGUMENT ONE

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH A DECISION OF THE THIRD DISTRICT COURT OF APPEAL, REGARDING FAIR OPPORTUNITY TO BE HEARD.

In the case of Coral Reef Nurseries, Inc. v. The Babcock Company, 410 So.2d 648, (Fla. 3d DCA 1982), the Court determined that the doctrine of res judicata was properly found not to be applicable in the particular circumstances of that case, and noted that the doctrine should be applied with great caution. In determining whether or not the doctrine of res judicata was applicable in the particular zoning matter at issue, the Court stressed that one of the requirements for the application of the doctrine was a fair opportunity to be heard.

The majority opinion in the Court below dismissed the fairness issue in a footnote, stating that any issue with regard to fairness should have been pursued by direct challenge to the Final Order, which was entered upon Petitioner's initial permit application.

Fundamental fairness falls by the wayside in the majority opinion, at this point, because Respondent's rules allow representation by non-attorney personnel, and the Final Order was forwarded to the non-attorney with a letter inviting

reapplication. It was not until after the 30-day period in which appeal could be taken had elapsed, that the problems began to surface regarding res judicata.

The lack of analysis concerning the fair opportunity to be heard, and the complete lack of determination regarding whether caution was applied by Respondent in its review of the second application to prevent manifest injustice, places the opinion of the District Court below in direct conflict with the Third District decision in the Coral Reef Nurseries case.

ARGUMENT TWO

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT REGARDING SUBSTANTIAL CHANGES TO THE SECOND APPLICATION.

In Matthews v. State x. ex. Rel. St. Andrews Bay Transportation Company, 11 Fla. 587, 149 So. 648 (Fla. 1933), this court held that an amended application showing a substantial change was not barred by statutes preventing the Railroad Commission from entertaining a once denied application until the expiration of six months from the date of such denial. The key to the holding was the substantial changes inherent in the second application.

In the Thomson case, after difficulties were encountered with the first application, Petitioners retained environmental experts to review the site, to map the seagrasses, and to propose a modification that would prevent damage to the seagrasses. The DER did not analyze the new report: both Intents to Deny simply contain boilerplate language from statutes or rules.

Once the shading of seagrasses was eliminated, the DER's emphasis shifted to marine soils capable of supporting vegetation, but the evidence was still only a quotation from prior Chapter 253, Florida Statutes, listing areas of concern. No opportunity was provided for the Thomsons to respond to the shift in emphasis, and no bilateral conference, informal hearings, or formal hearings, were held concerning the second application. The drawings included in the dissent to the majority opinion below, clearly evidence the significantly changed circumstances. The failure to acknowledge the changed circumstances, places the majority opinion in direct conflict with this court.

ARGUMENT THREE

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT CONCERNING RIGID APPLICATION OF RES JUDICATA.

Lastly, but certainly most importantly, this court announced that the doctrine of res judicata should not be so rigidly applied as to defeat the ends of justice. Universal Construction Company v. City of Fort Lauderdale, 68 So.2d 366 (Fla. 1953). The ends of justice concerning Paul and Ellen Thomson relate to whether administrative agencies should provide open access to administrative forums for hotly contested cases. Certainly something here went amiss in the administrative process. Both Respondent, and the First District Court of Appeal, provide

administrative hearings to third party intervenors at the drop of a hat, see Booker Creek Preservation v. Mobil Chemical Company, 481 So.2d 10, (Fla. 1st DCA 1985), yet here the land owners of not only the uplands, but the underlying submerged lands, are denied an administrative hearing. The decision in the court below provides carte blanche authority to the DER to invite reapplication for once denied applications and then simply raise the doctrine of res judicata to forever bar judicial enforcement of land owners rights. A presumption of correctness has arisen regarding administrative action, which sweeps the rights of applicants under the rug. The Thomsons came to DER seeking a fair deal, what they received was an administrative fast shuffle. The complete lack of inquiry into the fundamental fairness issue, or whether the application of res judicata would work an injustice, places the opinion below in direct conflict with this court's prior opinion.

CONCLUSION

A direct conflict between the opinion of the Court below and an opinion of the Third District Court of Appeal is clear, as is the conflict with the two cases decided by this Court. In this regard there is no doubt but that the undersigned cannot match the precision or depth of argument contained in the dissent to the majority opinion below.

Should this Court accept jurisdiction, it will find from a review of the record that no opportunity was provided for a

determination of the changed circumstances inherent in the second application. The record also reveals that DER failed to provide the applicant with procedural safeguards in the initial permit proceeding, and by so doing the agency denied to the applicants the due process and equal protection of the law. The agency also had a rule that was clear on its face affording Appellants to the Board of Trustees a formal proceeding in which to develop a record. Lastly, the court would find, that Paul and Ellen Thomson were sold the lands under which their dock was to be constructed by the State of Florida, and that the denial without benefits of the due process safeguards inherent in the administrative hearing process, of the qualified riparian right to build a dock, clearly is contrary to the provisions of the Constitution of the State of Florida. Paul and Ellen Thomson have been to the Department of Environmental Regulation, to the Board of Trustees of the Internal Improvement Trust Fund, and to the First District Court of Appeal, seeking a fair disposition of their case. They find encouragement in the dissent below, and now look to the Justices of this Court, for recognition of the fact that they as applicants have some small rights to challenge the massive bureaucracy seeking to prevent them from making the

only reasonable use of the lands, sold by the State to private individuals for some reason other than the opportunity to pay taxes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five true copies of the Jurisdiction Brief of Petitioners have been hand delivered on this date to the Clerk of the Supreme Court, and a true and correct copy of the same by United States Mail to E. Gary Early, Esquire, Assistant General Counsel, Department of Environmental Regulation, 2600 Blair Stone Road, Tallahassee, Florida 32301, this 23rd day of October, 1986.

ATTORNEY