IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL AND ELLEN THOMSON

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION

Respondent.

CASE NO. 69,483

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

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, State of Florida Department of Environmental Regulation (Department), generally agrees with the chronology of events as set forth by Petitioners, Paul and Ellen Thomson in their initial brief. However, the Department feels that inaccuracies in Petitioners' statement of the case and facts warrant submission of this statement.

Petitioners applied to the Department to construct a thirty-six foot wide octagonal gazebo which was to be connected to a restaurant deck by a ninety-two foot long by eight foot wide walkway. On October 14, 1984, the Department issued its notice of intent to deny which specified the expected water quality and resource impacts of the project. Included as the bases of the denial were the project's impact on seagrasses and on established marine soils capable of sustaining seagrass growth. The notice clearly set forth the procedure for requesting a hearing including the time frames which were to be met and the address of the office to which petitions for hearing were to be sent. In addition, the notice very clearly stated that failure to follow the point of entry procedure would lead to a waiver of the right to contest the findings contained in the notice. Subsequent to the issuance of the notice of intent, an agent of Petitioners contacted the Department's field inspector, apparently to arrange a "continuance" in the processing of the application. The nature of the conversation is unclear, although Petitioners' agent claims that the field inspector agreed to "put a hold on the application and delay the proceedings." On October 27, 1983,

Petitioners' agent mailed a letter to the Department's office in West Palm Beach requesting a "continuance." At no time did Petitioners file a petition for hearing as specified in the notice of intent, nor did they request an extension of time in accordance with the Department's rules. On November 10, 1983, the Department, in accordance with the notice of intent, issued its Final Order denying the permit for the gazebo and walkway on the basis of the negative environmental factors set forth in the notice.

Soon thereafter Petitioners filed another application for a permit to construct an irregularly shaped gazebo which was again to be connected to the restaurant deck by the previously denied walkway. Accompanying the second application was a seagrass survey which showed the location of the existing seagrass beds in the area of the gazebo. The survey did not attempt to locate areas in which the established marine soils suitable for producing seagrass growth did not exist and, more importantly, the survey did not extend to areas covered by the walkway. On March 9, 1984, after having reviewed the application and finding it to be substantially identical in both form and impact to the first application, the Department issued its second notice of intent to deny, which applied the doctrine of res judicata to the project. On March 13, 1984, a petition for hearing was filed. On March 27, 1984, the Secretary of the Department issued a Procedural Order denying the petition for a Section 120.57(1) hearing, granting a Section 120.57(2) hearing and allowing Petitioners ten (10) days in which to file a memorandum of law in opposition to the application of res judicata. Petitioners filed

a Motion for Reconsideration and a Memorandum of Law in Support of Petitioner's Motion for Reconsideration. On May 18, 1984, the Department issued its Final Order denying the application. The appeal to the First District Court of Appeal ensued.

Subsequent to the filing of the appeal, Petitioners moved to develop a record through Section 120.57(1), as authorized pursuant to Florida Administrative Code Rule 17-103.330(3). The Department granted the motion and thereafter defined the record as those materials, if any, listed in Section 120.58(1)(b)5., Florida Statutes. Petitioners have never filed a notice of appeal regarding that order.

After some procedural steps were taken regarding a simultaneous appeal to the Board of Trustees of the Internal Improvement Trust Fund, this case was heard by the First District Court of Appeal. The Court entered an opinion affirming the Department's Final Order of May 1, 1986, and denied rehearing on October 6, 1986. The instant appeal ensued.

SUMMARY OF THE ARGUMENT

The lower court opinion in this case has correctly applied the doctrine of res judicata to the facts of this case. The cases cited by Petitioners do not contain rules of law which directly and expressly conflict with the lower court's opinion. Petitioners' project as currently designed has been found to have harmful impacts on the environment. Rather than make a good faith effort to address the grounds for permit denial, Petitioners made insignificant design modifications in an effort to relitigate issues which were previously adjudicated. The Department's application of res judicata in this case was proper, and this honorable Court should decline to accept conflict jurisdiction.

ISSUE ONE

THE LOWER COURT OPINION INVOLVED IN THIS APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASE OF CORAL REEF NURSERIES, INC. V. THE BABCOCK COMPANY.

The basis for Petitioners' claim that res judicata should not be applied to their second dredge and fill permit application is that they were not provided with a fair opportunity to be heard in the initial permit proceeding. That assertion is patently false. Petitioners received a notice of proposed agency action denying the initial application on environmental grounds. The notice specifically set forth the procedures for requesting a hearing which included both time frames and locations for requesting a hearing. In addition, the notice clearly informed Petitioners that failure to timely request a hearing would constitute a waiver of that right resulting in the factual assertions in the notice becoming final. Finally, the notice informed Petitioners that if they requested a hearing they would "have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross examination and submit rebuttal evidence . . . and to be represented by counsel." (R-0040)

By providing Petitioners with the notice and opportunity for hearing, the Department fully complied with the conditions precedent to an application of res judicata as set forth in Coral Reef Nurseries, Inc. v. The Babcock Company, 410 So 2d 648 (Fla. 3rd DCA 1982). In the Coral Reef case, the Third District Court of Appeal set forth the elements of procedural due process

which must be afforded to a party in the initial proceeding. Those elements are:

1. due notice;
2. a fair opportunity to be heard in person and through counsel;
3. the right to present evidence; and
4. the right to cross examine adverse witnesses.

Id. at 652.

In this case all of the elements required by Coral Reef were provided by the Department. The fact that Petitioners chose not to avail themselves of the adequate remedies provided is inconsequential in determining whether procedural due process was afforded. As the First District Court of Appeal stated in its opinion in this case, "it is the opportunity to be heard, rather than an actual hearing, which is critical. . . Appellants were thereby afforded a fair opportunity for a hearing, and the conclusive effect of DER's initial adjudication is thus not vitiated by appellants' decision not to request a hearing." Thomson v. Department of Environmental Regulation, 493 So. 2d 1032, 1034 (Fla. 1st DCA 1986). In addition, this Court has, since as far back as 1926, held that:

> The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction,

> or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate. (e.s.)

Hay v. Salisbury, 92 Fla. 446, 109 So. 617, 620 (Fla. 1926).

It is apparent that the Department actions in this case fully comply with the concepts of procedural due process as set forth in Coral Reef. The Coral Reef case does not conflict with the case at bar.

ISSUE TWO

THE LOWER COURT OPINION INVOLVED IN THIS APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASE OF MATTHEWS V. STATE EX REL. ST. ANDREWS BAY TRANSPORTATION CO.

Petitioners assert that the changes made to their permit application entitle them to relitigate the merits of their project under the holding in Matthews v. State ex rel. St. Andrews Bay Transportation Company, 111 Fla. 587, 149 So 648 (Fla. 1933). Matthews stands for the proposition that substantially changed circumstances will justify a re-examination of an application. In that case, an application for a bus route was erroneously determined to be for intrastate service rather than interstate service. Standards for issuance or denial of the two different types of service were different, thus justifying a re-examination of the issue in light of the new circumstances.

In this case, virtually nothing was changed between the first and second applications. Although some cosmetic changes were made to the configuration of the proposed roofed structure, the seagrass survey touted by Petitioners as justifying a different result for the second application does not extend into a substantial portion of the project area. In addition, adverse environmental impacts of the project on established marine soils, which constituted an independent basis for the first denial, were not addressed by Petitioners in the second application at all. The configuration of the proposed walkway, the areal extent of the project, the condition of the site, the construction material and the method of construction were not changed at all from the first application to the second. The majority opinion of the lower court, after a review of the record, acknowledges that Petitioners did make some changes to the project, but found these "minor design modifications" to be inconsequential. Thomson, supra at 1035.

The Matthews case holds that substantial changes to an application allow for re-examination of an application. In this case both the record and the majority opinion show that there were no substantial changes made to the application. The Matthews case does not conflict with the case at bar.

ISSUE THREE

THE LOWER COURT OPINION INVOLVED IN THIS APPEAL DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH THE CASE OF UNIVERSAL CONSTRUCTION CO. V. CITY OF FORT LAUDERDALE

Petitioners claim that the ends of justice have not been met in this case, thereby causing this case to conflict with Universal Construction Company v. City of Fort Lauderdale, 68 So. 2d 366 (Fla. 1953). As discussed in Issue One, the Department's actions in providing a point of entry to Petitioners met and exceeded the requirements of law. It is hardly a breach of fundamental fairness by the Department that, after full disclosure of rights, Petitioners chose to forego a hearing.

This case is not one of a lack of fundamental fairness. Rather it is a case of dissatisfaction and perhaps disappointment that a project desired by Petitioners is environmentally unacceptable. Petitioner's first application was denied on valid environmental grounds. They have since shown no changed conditions or new facts which would change the project's environmental impact. Until Petitioners make some substantial change to the application, or until they show some changed circumstances or conditions in the area which would lead the Department to a different result, the grounds for permit denial remain valid.

It is apparent that the Department's actions in this case fully complied with all applicable laws and were not unjust. The Universal Construction case does not conflict with the case at bar.

CONCLUSION

The Department has acted in a proper and lawful manner throughout the course of this litigation. The doctrine of res judicata as applied by the Department is firmly entrenched in Florida law. see e.g. Coral Reef Nurseries, supra; United States Fidelity and Guaranty Company v. Odoms, 444 So. 2d 78 (Fla 5th DCA 1984). Clearly, the rules of law applied by the lower court to the facts of this case are not in conflict with the cases cited by Petitioners. Rather than redesigning their project to eliminate its harmful water quality and natural resource impacts, Petitioners attempted to relitigate issues already determined. Insignificant, cosmetic changes of the kind made by Petitioners in this case should not entitle a party to a second bite of the apple. For the reasons set forth herein, no conflict exists between the decision below and the cases cited by Petitioners. Therefore, review of the lower court's opinion by this Court on the basis of conflict is inappropriate. The Department respectfully requests that this honorable Court decline to accept conflict jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of Respondent's Answer Brief on Jurisdiction has been sent by U.S. Mail to Robert A. Routa, Esquire, ROBERTS, EGAN & ROUTA, P.A., 217 South Adams Street, Post Office Box 1386, Tallahassee, Florida 32302, this 14 day of November, 1986, in Tallahassee, Florida.

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Assistant General Counsel