OA 5-3-94

IN THE SUPREME COURT OF FLORIDA

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MAR 11 1994
CLERK, SUPREME COURT
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WIREGRASS RANCH, INC.

Petitioner,

vs.

SADDLEBROOK RESORTS, INC. and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondents.
_____/

Case No. 82,463

DCA No. 92-01653

PETITIONER'S REPLY BRIEF

APPEAL FROM DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

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SUMMARY OF THE ARGUMENT

When a petition for a §120.57 hearing is voluntarily dismissed or withdrawn by a petitioner, the agency ceases to have jurisdiction to proceed further with the §120.57 hearing. The voluntary dismissal of the petition permits the Agency to continue to act on the permit application according to the jurisdiction vested in the agency by the general permitting statute, in this case §373.413, *Fla. Stat.*

SWFWMD counsel correctly advised the Governing Board of the Agency that the Agency did not have authority to enter a final order on the Wiregrass Petition because the voluntary dismissal of that Petition divested the Agency of its review jurisdiction. SWFWMD counsel also correctly advised the Governing Board that had the Agency earlier exercised its rule-making power to incorporate the *Fla.R.Civ.P.* as a rule of the Agency, Wiregrass would have been unable to withdraw or voluntarily dismiss its Petition after the announcement of the Hearing Officer's proposed order. Saddlebrook's indignation with either the advice given by SWFWMD counsel or the Agency's conduct in following that advice is not warranted.

This Court has held that in the absence of precedent in its own District, a trial court must follow the precedent of other District Courts of Appeal. Saddlebrook has offered no reason to support the proposition that an agency should be allowed greater freedom in this regard than a trial court.

The Second District Court of Appeal erred in not following the precedent established by both the First and Fifth District Courts

of Appeal. In refusing to follow that precedent, two judges of the Second District Court of Appeal have created a new rule of law which will have unintended and, in all likelihood, unforeseen consequences on administrative proceedings.

In the majority opinion, the Second District Court of Appeal has overlooked the fact that an agency has power to act upon an application for a permit because of the jurisdiction vested in the agency by a general "permitting" statute. This jurisdiction to grant or deny an application for a permit, a process judicially referred to as "free-form" decision making, is not exercised pursuant to the provisions of Chapter 120, *Fla. Stat.* Review jurisdiction under Chapter 120, is invoked by a "substantially affected" party who does so by filing a petition which opposes the proposed agency action, the product of the "free-form" process of the general permitting statute. In confusing the informal review proceeding available to affected parties under §120.57(2) with the procedures associated with the permitting process established by §373.413, the Second District Court of Appeal has held that all permitting proceedings are now subject to the provisions of Chapter 120, a result which finds no precedent in Florida and is plainly wrong.

The majority of the Second District Court of Appeal has wrongly assumed that a permit applicant who invokes the general permitting jurisdiction of the Agency by filing a permit application also invokes review jurisdiction under Chapter 120. With this flawed premise, an erroneous conclusion is inevitable:

the permit applicant must also be the only person entitled to voluntarily dismiss a proceeding commenced by an affected party under Chapter 120.

ARGUMENT

I. SADDLEBROOK FAILS TO ACKNOWLEDGE THE ERROR OF THE MAJORITY OF THE SECOND DISTRICT COURT OF APPEAL IN REJECTING ESTABLISHED PRECEDENT THAT, ABSENT A RULE TO THE CONTRARY, AN AGENCY IS DEPRIVED OF FURTHER REVIEW JURISDICTION IN A CHAPTER 120 PROCEEDING UPON THE PETITIONER'S VOLUNTARY DISMISSAL OF HIS PETITION

Saddlebrook's argument has no basis other than the majority decision of the Second District Court of Appeal in *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.*, 18 Fla. L. Weekly, D1590, (Fla. 2d DCA 1993), because there is no other authority, no other law, no other rule, and no other precedent.

To sustain the majority of the Second District Court of Appeal, this Court must overrule the decision of the First District Court of Appeal in *John A. McCoy Florida SNF Trust v. DHRS*, 589 So. 2d 351 (Fla. 1st DCA 1991) and must distinguish the decision of the Fifth District Court of Appeal in *C.E. Middlebrooks v. St.Johns River Water Management District*, 529 So. 2d 1167 (Fla. 5th DCA 1988) by ignoring the Court's own exegesis of its opinion.

The absence of precedent for the decision of the majority below is made painfully obvious by Saddlebrook's tortured attempt to distinguish *Middlebrooks*. See Brief of Saddlebrook, pages 31 through 34. Saddlebrook's only authority for its position is the decision of the majority below.

Saddlebrook argues that because the affected party who petitioned for a Chapter 120 hearing was not the permit applicant, the withdrawal of the petition for a Chapter 120 hearing by that

affected party could not divest the agency of its review jurisdiction. This argument ignores the long line of cases holding that withdrawal of a Chapter 120 petition, whether the petitioner is the permit applicant or not, does divest the agency of review jurisdiction. *Rudloe v. Department of Environmental Regulation*, 517 So. 2d 731 (Fla. 1st DCA 1987); *Humana of Florida, Inc. v. Department of Health*, 500 So. 2d 186 (Fla. 1st DCA 1986) *rev.denied*, 506 So. 2d 1041 (Fla. 1987); *Orange County v. Debra, Inc.*, 451 So. 2d 868 (Fla. 1st DCA 1983); *RHPC, Inc. v. Department of Health & Rehabilitative Services*, 509 So. 2d 1267 (Fla. 1st DCA 1987).[1]

Taking its cue from the Second District Court of Appeal, Saddlebrook erroneously asserts that a Chapter 120 proceeding is the process through which an agency exercises its permitting jurisdiction. Permitting occurs pursuant to the provisions of the general permitting statute, in this case §373.413, *Fla. Stat.*, which grants authority to the agency to issue permits. The Administrative Procedure Act, Chapter 120 *Fla. Stat.*, governs the procedures to be followed when a substantially affected person files a petition in opposition to proposed agency action. The withdrawal or voluntary dismissal of the 120 petition divests the agency only of jurisdiction to act on the 120 petition, not, as assumed by the majority below, of jurisdiction to act on the permit

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[1]Saddlebrook and the Second District Court of Appeal are wrong when they assert that there is no basis for a non-applicant petitioner to voluntarily dismiss a petition (Saddlebrook Brief at 17); the cases cited clearly authorize the non-applicant petitioner in a Chapter 120 proceeding to voluntarily dismiss his petition.

application. Upon the petitioner's withdrawal or voluntary dismissal of the Chapter 120 petition, the proposed agency action which prompted the filing of that petition becomes final agency action.

The analysis of the case law set forth by Wiregrass in its main brief has not been affected by Saddlebrook's attempt to distinguish those cases.[2] What is patent is that if the principles of *McCoy, Middlebrooks, Rudloe, RHPC,* and *Debra* are applied to this case, the result compelled is different from that required by the majority in the Second District.

In arguing that *McCoy* is wrong, Saddlebrook attempts to distinguish the line of cases upon which *McCoy* is based on other than substantive grounds. Saddlebrook refers to the fact that the appeals in both *Humana* and *Rudloe* were filed by third party intervenors who had failed to timely file their own petitions. What Saddlebrook fails to recognize is that the holdings in both of

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[2]Saddlebrook's argument that case law concerning agency action in regulation of occupations, trades and professions is applicable is not availing due to the very strong State interests of the preservation of health, safety and welfare of the public which are invoked in agency regulation of occupations and professions. Those agencies have broader discretion in their exercise of power and have powers to set forth the terms and conditions for the issuance of a certificate regarding a trade, occupation or profession including the authority to specify the conditions under which such certificates shall be held and shall be revoked. *Couch v. Turlington*, 465 So. 2d 557 (Fla. 1st DCA 1985).

Saddlebrook's reliance on the holding in *Department of Professional Regulation v. Marrero*, 536 So. 2d 1094 (Fla. 1st DCA 1988) is misplaced because that case turned on the fact that the applicant did not exhaust his administrative remedies. Similarly, in *Department of Environmental Regulation v. Letchworth*, 573 So. 2d 967 (Fla. 1st DCA 1991), the employee, in a veteran's preference case, was allowed to retract from his withdrawal of his petition.

those cases are based not on the rights of intervenors in a Chapter 120 proceeding, but on the well-established rule that where a petition for an administrative proceeding is withdrawn or voluntarily dismissed, the agency is divested of jurisdiction to continue with that Chapter 120 proceeding. *Rudloe v. Department of Environmental Regulation* at 732; *Humana of Florida, Inc. v. Department of Health* at 187.

Saddlebrook's attempts to distinguish *RHPC* and *Debra* are also unsuccessful. Saddlebrook argues that in both of those cases the withdrawal of a petition divested the agency of jurisdiction to continue the Chapter 120 proceeding because the petitioners were also the permit applicants. The decisions in each of those cases turned on the general rule that the withdrawal of a petition for a Chapter 120 proceeding divests the agency of the authority to continue with the proceeding and enter a final order. *RHPC, Inc. v. Department of Health* at 1268; *Orange County v. Debra, Inc.* at 869.

Because Saddlebrook did not timely file a petition in the SWFWMD 120 proceeding, its position is analogous to that of the intervenors in *Humana* and *Rudloe*. After Wiregrass withdrew its petition, Saddlebrook was without standing to continue the Chapter 120 hearing.[3] As the Court stated in *Rudloe v. Department of Environmental Regulation* at 733, the respondents (like Saddlebrook)

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[3]In withdrawing the petition, counsel for Wiregrass made the unrebutted point that the recommendations and findings of the Hearing Officer went far beyond the subject matter of the proceedings before him, thus necessitating the voluntary dismissal.(R:1480, 4/27/92 Letter of Wiregrass Counsel).

has "missed their clear point of entry and are not entitled to a second chance."

Decisions of the District Courts of Appeal are the law in Florida unless those decisions are overruled by the Florida Supreme Court. *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980). District Courts of Appeal are courts of final appellate jurisdiction, and in the absence of interdistrict conflict, the decision of a District Courts of Appeal binds all trial courts. *Pardo v. State*, 596 So. 2d 665 (Fla. 1992); *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985). In *Pardo*, this Court stated:

> The prior hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. *Pardo v. State* at 666.

This Court stated that the rationale behind precedent is to preserve stability and predictability in the law.

When Wiregrass voluntarily dismissed and withdrew its 120 petition, SWFWMD correctly followed the decisions in *John A. McCoy Florida SNF Trust v. DHRS, RHPC, Inc. v. Department of Health and Rehabilitative Services, Rudloe v. Department of Environment Regulation*, and *Humana of Florida, Inc. v. Department of Health and Rehabilitative Services* holding that the voluntary dismissal of the petition divested the agency of jurisdiction over the Chapter 120 proceeding and of the ability to enter a final order. This authority nullifies Saddlebrook's assertion that counsel for SWFWMD "sided" with Wiregrass. (Saddlebrook Brief at p.6)

The precedent that the dismissal of a petition by the petitioner divests an agency of jurisdiction to continue a Chapter 120 proceeding is well established. Saddlebrook and its counsel were on notice that if Saddlebrook wished to insure the entry of a final order in the 120 proceeding, Saddlebrook was required to file a counterpetition in the same 120 proceeding[4] to preclude the possibility that Wiregrass would voluntarily dismiss or withdraw its petition. Counsel's unfamiliarity with existing law is no basis for asking this Court to maintain an unwarranted decisional precedent or to monument a lawyer's procedural error.[5]

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[4]SWFWMD's Notice of Proposed Agency Action, sent on May 3, 1991 to Saddlebrook stated the proposed agency action and the procedure to follow in order to request an administrative hearing pursuant to §120.57, *Fla. Stat.* That notice included the sentence, "Failure to file a request for hearing within this time period shall constitute a waiver of any right such person may have to request a hearing under §120.57, F.S." (R:Vol.I, p. 15).

[5]SWFWMD has now adopted a rule incorporating the *Fla.R.Civ.P.* The argument advanced by the majority decision in the Second District Court of Appeal and Saddlebrook that such a rule cannot be enacted because it confers jurisdiction on the Agency is without merit. A rule is defined in §120.52(16), *Fla.Stat.*, as:

> ...each agency statement of general applicability that implements, interprets...or describes the organization, <u>procedure</u>, or <u>practice requirements</u> of an agency...(emphasis added).

II. SADDLEBROOK IS UNSUCCESSFUL IN FINDING EITHER A LEGAL OR POLICY BASIS TO AVOID THE CONSEQUENCES OF THE ERROR OF THE MAJORITY OF THE DISTRICT COURT IN FAILING TO DISTINGUISH BETWEEN THE AGENCY PERMITTING JURISDICTION AND THE REVIEW JURISDICTION OF AN AGENCY UNDER CHAPTER 120, *FLA. STAT.*

Saddlebrook continues to confuse formal and informal hearings pursuant to §120.57, *Fla. Stat.*, with the "free-form" decision making process which characterizes most agency action. A formal or informal hearing pursuant to §120.57 can occur only if a petition for such a hearing is filed. Most permits are issued without any recourse to Chapter 120 whatsoever.

There are three types of agency proceedings: (1)Free-form proceedings which are nothing more than the necessary or convenient procedure by which an agency transacts its day-to-day business; (2)Section 120.57(1) "formal" proceedings, which are initiated by the filing of a petition; and (3) Section 120.57(2) "informal" proceedings, also initiated by the filing of a petition.[6] *Capeletti Brothers, Inc. v. State, Department of Transportation,*

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[6]Saddlebrook was on notice that the permitting process occurred in a "free-form" proceeding which was not subject to Chapter 120, Fla. Stat. The Notice of Proposed Agency Action, sent to Saddlebrook on May 3, 1991 stated the following:

> If you do not wish to request an administrative hearing but wish to address the Governing Board informally concerning the proposed decision, you may appear before the Governing Board at the time and place stated above. Such an appearance shall not provide a basis for appealing the decision of the Governing Board pursuant to Chapter 120, F.S. (R:Vol.I, p. 15).

362 So. 2d 346 (Fla. 1st DCA 1978). The filing of a permit application invokes the agency "free-form" proceedings. As Professor Levinson observed in H. Levinson, *Elements of the Administrative Process*, 26 American Law Review 872, 880 (1977):

> "Free-form" proceedings are not subject to legal requirements with regard to any of the procedural elements, although legal requirements may exist with regard to non-procedural elements. In "free-form" proceedings, the agency is therefore at liberty to adopt any procedure it wishes, or no procedure at all.[7]

The vast majority of an agency's "free-form" decisions become conclusive because they are not challenged by a §120.57(1) or (2) proceeding. *Capeletti Brothers, Inc. v. State, Department of Transportation* at 346.

In this case, SWFWMD sent to affected persons a "Notice of Proposed Agency Action and Staff Report" which recommended that the requested permit be issued to Saddlebrook (R:Vol. IV, p. 524). Wiregrass objected to the issuance of the permit and timely filed its Petition for Formal Administrative Hearing pursuant to §120.57, *Fla. Stat.* (1989). (R:Vol. I, pp. 1-6) If no petition for an administrative hearing had been filed, the requested permit would have been issued to Saddlebrook pursuant to SWFWMD's "free-form" decision making authority. *Capeletti Brothers, Inc. v. State,*

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[7]The "broad jurisdiction and discretion to regulate the administrative process" (Saddlebrook Brief p. 13), to which Saddlebrook refers, is available only in the agency "free-form" proceeding. (See Wiregrass Brief on the Merits p. 22). If a petition for a §120.57 hearing is filed, the agency must proceed under Chapter 120, which grants no discretion to the agency. (Wiregrass Brief on the Merits p. 22).

Department of Transportation at 348. If the petition requesting a §120.57 hearing is withdrawn or voluntarily dismissed by the petitioner, the earlier "free-form" action by the agency takes force and becomes final agency action. *RHPC, Inc. v. Department of Health* at 1268. In *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.*, when Wiregrass withdrew its Petition for an Administrative Hearing, the earlier "free-form" decision of the Agency, i.e. the recommendation to issue the requested permit to Saddlebrook, was approved by the Governing Board. (R:Vol. X, pp. 1532-1533).

Invoking agency jurisdiction in a permitting process does not also initiate a Chapter 120 proceeding. An applicant or an affected party can initiate a Chapter 120 proceeding by filing a petition; however, if a Chapter 120 proceeding is not initiated, the permitting takes place in the agency "free-form" proceeding. *Capeletti Brothers, Inc. v. State, Department of Transportation* at 349. The withdrawal or voluntary dismissal of a petition for a Chapter 120 hearing does not initiate a §120.57(2) informal hearing; instead the agency proceeds under its "free-form" authority. *RHPC, Inc. v. Department of Health* at 1268.

Saddlebrook repeats the error of the majority of the Second District when it states (Saddlebrook Brief pp 15, 24):

> Agency permitting jurisdiction is invoked when a party seeks a permit; the process of exercising the jurisdiction is governed by either the formal or informal method provided by §120.57. *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.* at 1591.

The process by which an agency exercises its permitting jurisdiction is the "free-form" decision making process envisioned

by Professor Levinson. *Capeletti Brothers, Inc. v. State, Department of Transportation* at 348. The procedure established by §120.57 does not enter into the agency's permitting jurisdiction unless a petition is filed.

The majority of the Second District Court of Appeal compounds its error when it equates a waiver of the right to a formal §120.57(1) proceeding in favor of an informal proceeding pursuant to §120.57(2) and SWFWMD Rule 40D-1.521(5) with a voluntary dismissal or withdrawal of a petition requesting an administrative hearing. *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.* at 1592; Saddlebrook Brief pp. 16 and 23. The voluntary dismissal of a petition in an administrative proceeding results in the "free-form" agency decision becoming final agency action. *RHPC, Inc. v. Department of Health* at 1268; *John A. McCoy SNF Trust v. DHRS* at 352.

By asserting that all permitting occurs pursuant to the process of Chapter 120, *Fla. Stat.*, the Second District Court of Appeal decision, if upheld, would have a significant, and probably unintended, effect on administrative law. The elimination of the "free-form" proceedings by which an agency conducts the majority of its day-to-day business would bring agency action and efficiency to a standstill.

This opinion is not and cannot be the law of Florida, and must not be permitted to stand.

CONCLUSION

The Decision of the Second District Court of Appeal is wrong, and this Court should reverse it on the grounds stated by the dissenting opinion, that *Middlebrooks* and *McCoy* compel a contrary result.

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CERTIFICATE OF SERVICE

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