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SUPREME COURT OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al

APPELLANTS,

vs.

CASE NO. 85,880

1st DCA Case No. 95-1757

BRUCE MILLENDER, et al.,

APPELLEES.

_____/

APPEAL OF A CERTIFIED JUDGMENT
FROM THE TRIAL COURT

ANSWER BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES AND CONSTITUTIONS

RULES

STATEMENT OF THE CASE AND FACTS

Appellees review of the Statement of the Case and Facts developed by FCA in its brief revealed that it contained improper argument, insufficient citations to the record and incorrect recitations of alleged fact. The States initial brief also contained some argument (p. 4, 5) in its statement of the Case and Facts.

Nevertheless, because of the extensive references to the record inserted in this brief and the extensive recital by the Court, Appellee will simply rely on these to provide the correction.

The parties will be referred to as follows. Appellees, collectively as Appellees and individually as, Bruce Millender - Millender; Ronald Fred Crum - Crum; Timmy McLain - McLain, Appellants, State of Florida, Department of Environmental Protection and its division, Florida Marine Patrol - DEP; Florida Marine Fisheries Commission - MFC and Florida Conservation Association - FCA. The record in the trial court will be cited as (R.___) referring to page numbers. References to the transcript of the trail on 3/24/95 will be cited as (T.____) referring to page numbers.

SUMMARY OF ARGUMENT

Article X, Section 16 (b)(2) Florida Constitution mandates that no non-entangling net, such as the Golden-Crum trawl, containing an area of mesh or webbing greater than 500 square feet shall be used within three miles of shore on the west coast of Florida and one mile of shore on the east coast. The implementation language of Article X, Section 16 (c)(2) was included with the obvious purpose of assisting one to accurately calculate the maximum actual square feet of mesh physically contained in non-entangling nets such as seines and trawls.

The first sentence of subsection (c)(2) ensures that the maximum square foot area of the mesh actually contained in the net will be determined by calculating the area of the meshes in their fully open position. Logically, this "open mesh" requirement applies to require both the circumference of the mouth of the net (c) and the slant height length (SH)) of the factors to determine area to be measured in or converted to open mesh measurements (in the case of a trawl). The State agrees.

From physically measuring the area of the different shaped pieces of netting in their fully open mesh position before they were sewn together to form the completed Golden-Crum trawl including TED and bag, the undisputed fact that the Golden-Crum trawl actually contains 478.69 square feet of open mesh area was determined (Pl. Ex. 5). The open mesh circumference of the net mouth was then physically measured by measuring along the ropes at

the mouth of the net to which the meshes are tied in an open mesh position. The open mesh circumference of the Golden-Crum trawl is undisputed - 65.75 feet.

Because as a practical matter, the length of the trawl from the center of the headrope to the tail end of the bag can only be physically measured when the meshes of the trawl are in their most closed or stretched mesh position (see Request for Admission No. 1), this closed or stretch mesh length must be converted to an open mesh length to obtain the SH factor required to be utilized in the formula for calculating the maximum "open mesh" area of the net (open mesh circumference x open mesh slant height = open meshes maximum area). The State agrees.

Since the factor for controverting the closed or stretch mesh length into the open mesh slant height is not defined or determined by the Amendment, and the Plaintiffs, State and F.C.A. each have different arguments as to which factor was proper to be used that would accurately calculate the maximum open mesh area of this trawl, the Court began examining various and logical comparisons including properly admitted and utilized extrinsic evidence to determine the correct conversion factor.

The conversion factor (½) used by the shrimpers was based on common sense, usage in the trade and simple mathematical principles. It also successfully passed each test or comparison by the Court, not the least of which is the fact that it produces an open mesh square foot area of the Golden-Crum trawl of 476 (65.75 x 14.5 = 476 square feet). The factors argued by the Appellants

when applied in the formula would physically limit the amount of mesh that could be actually be contained in a trawl such as the Golden-Crum net to a maximum of 251 or 355 square feet of open mesh area, respectively.

These net sizes are obviously greatly reduced, as compared with the will of the people which only felt that reducing the net to 500 square feet of open mesh (a significant reduction from that customarily used) was necessary to protect "saltwater finfish, shellfish and other marine animals from unnecessary killing, overfishing and waste." Article X, Section 16 (a) Florida Constitution.

Based on these comparisons and much other analysis as is reflected in the Brief below and the Final Judgment, any one of which sufficiently supports the decision here on appeal, the Court correctly determined that the ½ conversion factor was the proper conversion factor and held the Golden-Crum net valid under the Amendment. If he had accepted the argument of either Defendant, he would have been required to strike as unconstitutional the fourth sentence of (c)(2) which is the formula to be applied to a trawl to accurately determine the actual square foot area contained in the net, since the Defendants' arguments produce square foot area amounts that are clearly erroneous in that respect.

I. THE EVIDENCE SUPPORTS THE COURTS DETERMINATION THAT THE CONVERSION FACTOR OF 1/2 OR .50 ARGUED BY THE PLAINTIFFS IS CORRECT TO CONVERT THE CLOSED MESH LENGTH OF THE NET (29 FEET) TO OPEN MESH SLANT HEIGHT LENGTH (14.5 FEET) IN ORDER TO DETERMINE THE MAXIMUM SQUARE FEET OF AREA ACTUALLY CONTAINED IN THE TRAWL.

The Final Declaratory Judgment evidences the precise analytical effort by the trial Court in reaching the sound decision. (R. 569-579). This decision is abundantly supported by substantial relevant and logical evidence in the record and therefore should be affirmed. Stawgate v. Turner, 339 So2d 1112, 1113 (FLA. 1976).

The most encompassing issue presented to the trial Court by the Complaint for Declaratory Decree was how one measures a trawl net to determine its square foot mesh area in order to establish compliance with the requirement of the Amendment that such a net contain no greater than 500 square feet of mesh area when fished in "near shore and inshore" waters of this State. (R. 2-10). Included within that question are the determinations of whether the Golden-Crum trawl meets the square foot requirements of the Amendment as well as the interpretation and application of the "with the meshes open" term of subsection (c)(2). (R. 2-10; R. 571 [Top Paragraph]).

A. IT IS UNDISPUTED THAT THE GOLDEN-CRUM TRAWL ACTUALLY AND PHYSICALLY CONTAINS 478.69 SQUARE FEET OF OPEN MESH NETTING.

Article X, Section 16(b)(2), clearly mandates that no trawl "containing more than 500 square feet of mesh area shall be

used in near shore and inshore Florida waters." (emphasis added) It is an uncontroverted fact that the actual total area of mesh in its fully open position which is physically contained in the Golden-Crum trawl is 478.69 square feet. [T 136: 2-24]. Therefore, it is accepted that the Golden-Crum trawl complies with this mandate.

The concept utilized by the shrimpers in attempting to make a net that complies with the Constitutional Amendment was actually very sound. They knew that by adding together the open mesh square foot area of each piece of net that would be sewn together to make the trawl, this sum would equal the total amount of the area of mesh in its open position actually contained in the entire trawl. [T. 135:7-25; 136:2-18]. The reasoning follows that if the actual square feet of open mesh area contained in the trawl is less than 500 square feet, then the amount of square foot open mesh area produced by any properly construed formula to calculate the open mesh area would also be less than 500 square feet. [T. 151:17-25].

B. THE ARTICLE X, SECTION 16 (c)(2) "OPEN MESH", AND FORMULA TERMS HAVE AS THEIR OBVIOUS PURPOSE THE ASSISTING OF ONE TO ACCURATELY CALCULATE THE ACTUAL SQUARE FEET OF OPEN MESH PHYSICALLY CONTAINED IN THE TRAWL.

The implementation language contained in subsection (c)(2) of the Amendment was included with the obvious purpose of assisting one to accurately calculate the actual square footage of mesh physically contained in a net such as a trawl. The "open mesh" requirement and formulas set out in (c)(2) lose their

relevance if their object is only to produce a square foot figure without concern as to their ability to determine accurately the actual square foot mesh area of the net being measured.

The terms of a Constitution must be given their plain and common sense meaning. Florida League of Cities v. Smith, 607 So2d 397 at 400 (Fla. 1992). Since the interpretation of a Constitution is "actuated by the rule of reason . . unreasonable or absurd consequences should, if possible, be a voided." City of St. Petersburg v. Briley, Wild & Assoc., Inc., 239 So2d 817 at 822 FLA. 1970).

In some areas of the Record, the State evidences its tacit agreement that the essential purpose of the requirements and formulas of (c)(2) is to accurately determine the actual square footage of mesh contained in a net. (R. 181:18-25; 191:7-12, 21-24; 192:22-25; 193:1-18; FAC 46-4.002(8). For example, when it was brought to the attention of the Marine Fisheries Commission representative that the application of the mandated formula for a seine (third sentence of subsection (c)(2)) would underestimate the actual mesh area contained in one type of seine because it had a bag, both he and counsel for the Marine Fisheries Commission suggested that the mandated "seine" formula should not be utilized. (Id.)

C. THE "OPEN MESH" REQUIREMENT OF (c)(2) APPLIES TO BOTH THE CIRCUMFERENCE AND SLANT HEIGHT LENGTH FACTORS WHICH MUST BE USED IN THE FORMULAS.

The sentence of Article X, Section 16 (c)(2) regarding "meshes open" confirms the common sense and simple geometric

principle that measurements must be made in or converted to open mesh position of the webbing in order to accurately determine the maximum square foot area of mesh contained in a net. (T 58:24-25; 59:1-3; 145:25; 146:1-3). If some or all of the meshes are closed or stretched as shown in Figure 2 or 3 of the Plaintiff's Second Request for Admissions No. 1 (R.43, R. 123 [Pl. Ex. 21]), then the maximum area of the mesh will not be determined (T. 58:24-25; 59:1-3). This "meshes open" requirement is not restricted by any language of the Amendment and therefore applies to and must be harmonized with these formulas for calculating square foot mesh area specified in the subsequent sentences of the paragraph. (Florida League of Cities v. Smith, supra at 400; and Ozark Corp. v. Pattishall, 185 So. 333, 135 Fla. 610 (FLA. 1939).

The State now agrees that this "open mesh" requirement applies to both the circumference and slant height length factors which must be utilized in the formula provided by the amendment for calculating the square foot open mesh area of a trawl (Brief of Appellants, p. 3, 6). The F.C.A. has assumed the argument abandoned by the State that one must utilize the closed mesh measurement of the slant height length in determining the square foot open mesh area of a trawl. (Pl. Ex. 1; FCA Brief, p. 5, 7) However, the Appellants would continue to utilize the open mesh measurement of the circumference of the net mouth (65.75 feet) in its calculations and to measure seines and other rectangular nets while the meshes are in their fully open position to determine at the maximum mesh area. (Brief of Appellants, p. 3, R. 189: 5-25,

T. 146:8-15; Initial Brief of FCA, p.12).

D. THE CLOSED OR STRETCHED FLAT MESH LENGTH OF THE TRAWL MUST BE CONVERTED TO AN OPEN MESH SLANT HEIGHT LENGTH (SH).

The meshes of the piece of net measured by Plaintiffs from which the different shape sections of mesh were cut to be later sewn together to form the Golden-Crum trawl, (Pl. Ex. 4), as is the case with any rectangular net, will be fully open when all sides of the rectangle are pulled to their maximum length at the same time. (Pl. Ex. 4). While the mesh of the net is in that position the open mesh length and the width can be measured at the same time to be utilized in the formula. However, as argued by F.C.A. at page 12 of their brief, when one takes the center of the headrope (cork line) of a trawl and pulls the trawl taunt from the tail end of the bag, then places a tape measure on that distance, he is measuring only one dimension at a time and is measuring it in a position when the meshes are closed or stretched to their most closed position as the mesh is shown in Figure 3 of the Plaintiffs' Second Request for Admission No. 1. (R. 43, R. 123 [Pl. Ex. 21])

The position of F.C.A. that the closed mesh length of a trawl should be directly used in the formula, also fails to take into account that the overall objective is not to determine the maximum length alone but to determine the true maximum square foot mesh area actually contained in the trawl. In re: Advisory Opinion to The Governor, 374 So2d 959, 965 (FLA. 1979) ("the court must give provisions a reasonable meaning, tending to fulfill not frustrate the intent of the framers and adopters.") It is

mathematically necessary and the Amendment so requires that the true maximum square foot mesh area be determined from open mesh measurements. (Article X, Section 16, First sentence (c)(2)).

The constructed/completed shape of a trawl prevents one from pulling all of the meshes into their fully open position along the length of the net in order to determine their maximum mesh area. Therefore, this maximum length of a trawl in the open mesh position from the mouth of the net to the tail end of the bag cannot be physically measured but it can be accurately determined. (R. 56:23-25; 57:1-18; 121:1-6; 174:16-18; 210:1-5). It must be derived from the closed mesh measurement of the length which is accurately measured with a tape. (Brief of Appellants, p. 3, 6; T. 54:16-25; T. 55:1-8).

The State agrees that this closed or stretched mesh length measurement from the cork line to the tail end of the trawl must be converted to an open mesh slant height maximum length (SH) and used in the cone formula pursuant to the Constitutional "meshes open to compromise the maximum square footage" requirement. [Brief of Appellants p. 3,6].

E. THE COURT PROPERLY INVOKED AND CONSIDERED THE LANGUAGE AND INTENT OF THE AMENDMENT AS WELL AS PROPER EXTRINSIC EVIDENCE TO CONCLUDE THAT THE CONVERSION FACTOR OF 1/2 OR .50 IS CORRECT.

At this point, the court properly invoked and exercised the rules of construction to determine the proper conversion factor to be utilized to convert the known closed or stretch mesh length to the open mesh slant height length (SH) so that it would be used

in the formula applied by the Amendment to a trawl. (R. 574). City of Jacksonville v. Continental Can Co., 151 So. 488, 490 (FLA. 1933), (only a construction of a Constitutional provision which will carry out the real intention of the people should be employed). Extrinsic guides to construction are allowed herein. (Plante v. Smathers, 372 So2d 933,936 (Fla. 1979).

The trial Court held that the conversion factor of ½ (.75 "(bar length) ÷ 1.5" stretch mesh length = ½) or .50 as argued by the Plaintiffs was the proper factor and rejected those proposed by the State and the F.C.A. (R. 569-579). The conversion factor of ½ was not arbitrary or capricious and is well supported by the record evidence.

In the shrimping and net making trades, the measurement of the length of open mesh netting is made by the bar or one side of the square mesh. (T. 54:16-25; 55:1-18; 58:18-22; 120;4-24; 172:11-14; 174:6-15 and 174:19-24). It has never been measured by the diagonal (or by the Pythagorean Theorem) from one knot across the center of the mesh to the knot on the opposite side at the base of the mesh as argued by the State [Id.]. No Marine Fisheries Rule has ever measured open mesh by any thing other than by the "bar". (R. 187:11-22 [Pl. Ex. 2]; T. 265:13-15).

Mr. Golden, the net maker in this case was not aware of any accepted or proper measurement (such as diagonal by the State) that would result in the Golden-Crum net exceeding 500 square feet of open mesh. (T. 151:17-25) at pages 8-24 of T. 120, Mr. Golden references clearly that open mesh measurement is made by the bar in

the industry, not the diagonal.

Mesh in net is constructed so that some is hung by the bar, some by the slant and some by the diagonal (T.122:8-11). This is the way it is in most nets (T. 122:23-25; 123:1-9). Some of the meshes in the Golden-Crum net slant one way and others slant the other even as it goes down to the bag. (T. 125:14-22).

It is also admitted by the Appellants that the bar measurement with the mesh in its open position is always one half as long as the closed, collapsed or stretched mesh length. (R. 44 [#5], R. 123 [Pl. Ex. 21]); (T. 57:1-2). Since the length of the net measured by the tape (29 feet) was in closed or stretch mesh position and the bar length of an open mesh is one-half (½) the length of the closed or stretched mesh length, the one-half (½) conversion factor was applied by the shrimpers to the 29 foot stretched mesh length of the trawl to produce an open mesh slant height length of 14.5 feet. [See Complaint, attachment, R. 10; T. 54:16-25; 55:1-8).

This was the conversion factor used by the shrimpers (29 ft. x ½ = 14.5 feet open mesh) when the Golden-Crum trawl was first presented to the State for approval as evidenced by the diagram submitted to the M.F.C. and which was subsequently attached to the Complaint. [R.10]. This was well before the State came up with its argument of an alternate conversion factor based on the Pythagorean Theory, the effect of which would be to increase the formula calculated mesh area and consequently reduce the actual square feet of open mesh allowed to be contained in a trawl to well below 500

square feet.[1]

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[1]In early December of 1994 upon receiving and reviewing the Golden-Crum trawl and being presented with the fact that the net physically contained less than 500 square feet of open mesh area and that the measurement of the closed mesh length had to be converted to an open mesh length by the conversion factor of ½ because the Amendment logically required mesh area to be determined in the open mesh position, the Marine Fisheries Commission made it clear that its problem with the Constitution language and application brought to light by the Plaintiffs was that it did not reduce the size of a trawl as much as the Marine Fisheries Commission desired or thought it should. (Pl. Ex. 1, p. 2, 3).

Although underestimating the amount of the reduction, the Marine Fisheries Commission pointed out on December 9, 1994 that if the 500 square feet "with the meshes open" requirement is enforced only minor modifications would be required and shrimpers would only have to "reduce their circumference to about 60 feet." (Pl. Ex. 1 p. 2 [last paragraph]). The Marine Fisheries Commission went on to argue at that time that if the "open mesh" requirement could be held not to apply then the closed or stretched mesh length of the net (29 feet) could be used and thereby reduce the circumference of the mouth to "about 45" which apparently was an acceptable reduction to the Marine Fisheries Commission. (Pl. Ex. 1, p. 3 [Top paragraph]).

The actual language used by the Marine Fisheries Commission at that time to convey and make clear their overriding problem with the plain, accurate and common sense language of the Amendment and its application offered by Plaintiffs is set forth below:

> If the 500 square foot requirement is enforced "with the meshes open", only minor modifications will be required in trawls being used under current rules in most inshore Florida waters. Current rules require a 25 foot headrope (width of the mouth at the top of the trawl) and a 75 foot circumference. Shrimpers could still configure their trawls with a 25 foot headrope, but would have to reduce their circumference to about 60 feet . . . If the "actual" maximum length of the net is used, the perimeter would have to reduced to about 45 feet, with a headrope of 15 feet. The later reduction constitutes a much more dramatic change in current gear and the amount of shrimp a trawl catches.

It is apparent from the language used by Marine Fisheries Commission (see also second paragraph of 12/9/94 letter) that it did not dispute the conversion factor of ½ or .50 used by Plaintiff to convert the closed mesh measurement to open mesh slant height length (SH). However, when it later came up with the alternate conversion factor (1.06 "÷ 1.5" = .71) it argues now and which would increase the formula calculated square foot area by about 200 square feet and thereby significantly decrease the actual amount of mesh area physically allowed to be contained in a net to about 350 square feet, the State admitted that the closed or stretch mesh length of a trawl "must then be converted to an open mesh length for use in the cone formula pursuant to the Constitution". (Brief of Appellant, p. 3, 6).

Another basis for using the bar length measurement of the open mesh and its conversion factor of ½ or .50 deals with calculating the area of one square of "open" mesh. Since the object of subsection (c)(2) is to accurately determine the square foot area actually contained in the net being measured, the following mathematical principle applies: the sum of the area of each of the meshes in their open positions would equal the total open mesh area contained in the net. (T. 128:4-13; 57:16-19). To measure the area of one square mesh (see Pl. Ex. 7) one would multiply the bar length (.75") by the length of the base of the same mesh (.75") and for our mesh the correct area would be (.75 x .75 = .5625 square inches) .5625 square inches. (T. 57:16-19).

If one would utilize the Pythagorean Theorem or diagonal

measurement as argued by the State of measuring across the middle of the square from one cover down to the opposite cover on the base, 1.06 inches) and multiply that length by the base (.75 inches) to determine the area of this one square mesh for purposes of later adding the area of each mesh together to figure the open mesh area of the entire trawl, the result is clearly erroneous (1.06 "x .75" = .7950 square inches) and over calculates the area of this square mesh by 41.5% (last digit rounded). [.7950 - .5625 = .2335 .2335 ÷ .5625 = .415 (last digit rounded) or 41.5% over calculation area of one mesh]. (T. 58:5-17).

If one mesh is over calculated in terms of area through the use of the States diagonal "length" by 41.5% then logically the open mesh area of the entire trawl net would be over calculated using the Pythagorean measurement of 1.06. It is not a coincidence or "arbitrary" that the total mesh area determined by the State using its construction (1.06 diagonal measurement) is almost exactly 41.5% greater than the known open mesh area actually contained in the trawl. [673 square feet - 478 square feet = 195 square feet and 195 ÷ 478 = .41 or, stated in words, the formula calculated area by the State (673) is 41% greater than the known square feet open mesh area of 478].

Neither would it be a coincidence that when the Marine Fisheries Commission representative, Mr. Teehan, was asked to determine the square feet area of a piece of mesh known to be one foot square utilizing the States Pythagorean measurement of the mesh across the diagonal, an area of 1.4 square feet (last digit

rounded) was produced. (R. 257:24-25; 258:1-2; 259:8-19, T. 244:2-7). (Exhibit 2 to deposition of Teehan [Pl. Ex. 2] - 1 foot square of mesh).

One of the most well known tests in science and math when determining the propriety or correctness of a factor is to compare its results against the known. The object of this formula ((c)(2)) and consequently the measurements to be utilized is to accurately determine the maximum open mesh square foot area actually contained in the trawl. The calculated area using the conversion factor argued by the State is 673 square feet. (T. 66:1-25, 67:1; 82:21-25). However, the known and uncontroverted open mesh square feet of mesh actually contained in the trawl is 478.69 square feet. (T. 136:1-24). The result of the F.C.A.'s construction produces a calculated open mesh area of 953 square feet. (T. 64:1-25; 83:3-10; 203:14-17). The differences simply require the rejection of the arguments of the Appellants as the trial Court correctly concluded. (R. 575). The result of the formula using the bar conversion factor argued by Plaintiff produces a calculated open mesh area of 476 square feet, virtually the identical amount of open mesh known to be contained in the trawl. (T. 54:20-25; 55:1-14; 172:5-14).

F. IT IS UNDISPUTED THAT THE EFFECT OF THE F.C.A. ARGUMENT AND THE STATE ARGUMENT RESULT IN THE MAXIMUM ACTUAL OPEN MESH AREA WHICH WOULD BE CONTAINED IN THE TRAWL OF 251 AND 355 SQUARE FEET RESPECTIVELY AND THEREFOR MANDATE REJECTION.

Examining the effect that the figures produced by the Defendants/Appellants' arguments would have in reducing the actual

mesh area contained in the net in order to meet Defendants' formula calculation of 500 square feet area produces even more compelling evidence which mandates rejection of the Defendants' proposals and acceptance of the Plaintiffs'. It is uncontroverted that by applying the F.C.A.'s construction of the formula, it reduces the actual mesh area which could be physically contained in the trawl to 251 square feet in order to meet the F.C.A. formula calculated area of 500 square feet.[2] (T. 65:1-7; 153:1-2; 223:21-25; 224:1-2; 224:16-17). Applying the State's construction of the

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[2]If the square foot mesh area produced by the cone formula for lateral surface area is held constant at 500 square feet for the Crum Trawl (Exhibit 3) and the stretch mesh length is utilized, then the actual mesh area contained in the trawl (at 478.69 square feet) would be reduced by approximately 50% or to 251.15 square feet of actual mesh area contained in a trawl by the following calculation:

$$\frac{478.69 \text{ - (square feet of mesh area actually contained in the trawl at open position)}}{953.4 \text{ - (square feet produced by the formula for the lateral surface area of the cone as suggested by Defendants)}} = \text{x (area actually contained in net in open mesh position when the formulated mesh area is reduced to 500 square feet)} \Big/ \frac{500}{\text{(the 500 square feet) that the net is reduced to in order to meet the formula limitation of 500 square feet)}}$$

X = 251.15 square feet
[R. 65:1-7; 153:1-2; 223:21-25; 224:1-2; 224:16-17]

formula reduces the actual open mesh area which could be physically contained in the trawl to 355 square feet in order to meet the State's formula calculated area of 500 square feet. (T.66:1-25; 67:1).

It is also interesting to note (as was brought out in the testimony) that acceptance of the argument by the Appellants would limit the actual mesh area physically contained in a shrimpers trawl to between approximately 250 square feet and 350 square feet while a seine fisherman fishing in the same waters would be allowed by each of their arguments 500 square feet of actual open mesh area to be contained in his net. (T. 152:18-25; 153:1-4). Certainly, that was not the intent of the Amendment. In re: Advisory Opinion to the Governor, infra. at 965.

To allow such would constitute a misrepresentation to the people of this State when compared with the material and information provided to them to secure the signatures on the petition for this initiative and to vote for the Amendment once on the ballot. (Def. F.C.A. Ex. 4, T. 273:8-25; 274:1-21). Since the F.C.A. introduced the documentation as evidence of the frame of mind or intent of the voters in passing the amendment, the result of Defendants' arguments would therefore also be contrary to that intent or frame of mind of the voters. (F.C.A. Ex. 4; T. 273:8-25; 274:1-21; 284:7-12).

The Florida Supreme Court has consistently held that, "the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and

the people who adopted it." City of Jacksonville v. Continental Can Company, 151 So. 488, 489 (Fla. 1933). See also, in re: Advisory Opinion to Governor, 374 So.2d 959, 965 (Fla. 1979) ("the Court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters."). The intent of the framers and adopters must be given primary consideration, and strict interpretations are forbidden if such interpretations would impose an effect never intended by the adoption of the Constitutional provision. Continental Can, supra.

First, the F.C.A. Exhibit "The Constitutional Amendment" dated June 4, 1993 is replete with terminology that clearly and specifically represents that the effect, meaning and intent of the Amendment is to limit the size of the shrimp trawls to be used within three miles of shore to an actual 500 square feet , not 500 square feet of mesh area as calculated by a formula which through a different construction by the Appellants would reduce the mesh size actually allowed to be contained in the trawl to 251 or 355 square feet. (Def. F.C.A. Ex. 4). The Marine Fisheries Commission even states Plaintiffs' position on this in its Brief, to-wit: "The Constitutional Amendment, in clear language, limits the size of nets in the near shore and inshore waters of Florida to 500 square feet or less." (Brief of Appellant (State) p. 16).

Second, the exhibit demonstrates by itself the "will of the voters" as represented by F.C.A. not to prohibit or eliminate directly or indirectly, economically or functional the commercial harvesting of shrimp by the smaller trawlers in near shore and

inshore Florida waters with trawls which as set out above contain no greater than 500 feet of open mesh square foot area. (Def. F.C.A. Ex. 4, T. 284:5-12). Some of this language is set forth below:

> KEY ELEMENTS OF CONSTITUTIONAL AMENDMENT
>
> .Prohibits the use of other nets with greater than 500 square feet of mesh area in near shore and inshore waters. This forces LARGE shrimp trawlers and purse seines out of inshore bays and estuaries . . . (Def, Ex. 4, p.1).

(Thus the smaller shrimp trawlers would not be forced out - just the large ones which have frequently shrimped in that area.

> WHAT IT DOES NOT DO
>
> .Does not prohibit commercial harvest with alternative gear. (Def. Ex. 4, p.2).

(Since alternative gear, ie. smaller trawl nets[3] would only be required by the Amendment in near shore and inshore waters, this statement would logically apply to not prohibit commercial harvest by shrimpers in inshore and near shore waters.)

> .It would allow the use of up to two of the smaller nets if fishing from a vessel. (Def. Ex. 4, p. 5).

(Shrimping can hardly be characterized as a recreation activity. The reference in the language must be construed to mean commercial harvesting operations.)

> .The prohibition on the use of nets greater than 500 square feet of mesh area in near

[3]See page 6. of Def. Ex. 4: "In addition to simply using smaller trawls .. . there are other alternative nets . . ."

> shore and inshore waters will force large shrimp trawls . . . out of Florida's inshore bays . . . (Def. Ex 4, p. 4).

There is no language in the document dictating that the present method of commercial harvesting of shrimp must be changed, or eliminated; only that net sizes to be used within three miles of shore would be reduced to 500 square feet. This would allow the smaller inshore boats to continue to commercially harvest shrimp with smaller nets where they traditionally have harvested while forcing the larger trawlers with their commensurately larger trawls and extended range to stay in the outside waters beyond three miles.

The language in the Constitutional Amendment and the ballot summary also reflect the intent of the voters to limit rather than prohibit shrimp trawlers in inshore waters. (Article 16, Section (1)(b)(2) and Ballot Summary). One would reasonably expect that on a subject of this importance, if the commercial harvest by shrimp trawls was intended to be prohibited within three miles - it would have been specifically stated as was done with respect to the prohibition on gill nets.

The legal construction principle of "Expressio unius est exclulsio alterius" produces the positive will of the people with regard to commercial harvest by shrimp trawlers when the language of the Amendment and the position paper of F.C.A. (Def. Ex. 4) are examined together, to wit: That non-entangling nets such as a trawl containing webbing or mesh in sizes now limited to 500 square feet can still be fished by the same methods within three miles and

that prohibiting commercial harvesting by the smaller trawlers with these smaller trawls is not necessary to "protect saltwater finfish, shellfish and other marine animals from unnecessary killing, overfishing and waste." (Article X, Section 16 (a); Def. Ex. 4).

The greatly reduced amount of mesh sizes that shrimpers would be limited to place in their nets under Defendant's arguments would render them commercially unfeasible and functionally inoperative. (T. 75:17-24; 76:9-14; 97:18-21; 183:5-12; 189:9-17). In the tests made, nets of the maximum size that would be allowed under the Defendants' arguments were constructed and pulled along the side of and at the same time as the Golden-Crum net. (T. 73:25; 74:1-13; 74:21-25; 74:14-20; 75:17-24; 76:9-14). The results proved, as had been testified to by many witnesses, that the nets were not commercially feasible and that the bag of the larger of the two (State's argument) could barely be brought to the rail of the boat from the outrigger in calm waters to dump the catch. (T. 75:17-24; 76:9-14; 97:18-21; 162:12-13, 21-22; 169:13-19; 183:5-12; 189:9-17).

By contrast, actual use of the Golden-Crum net before the Amendment and by many after the Amendment has demonstrated that although it represents a significant reduction in the customary size of trawls [Pl. Ex. 12, T. 46:5-6; 54:2-4; 54:10-11; 93:1-14] (especially of the larger trawls) previously fished inside of the three miles, it is just big enough to be both commercially feasible and functional to the smaller trawlers. (T. 36:25, 37:1-9; 73:1-

25). The only testimony of expert witnesses in the industry with the proper experience and background to make conclusions as to commercial and functional viability was consistent with the tests made on the nets. (T. 36:25; 37:1-9; 73:1-25; 162:12-13, 21-22; 169:1-12; 183:5-12).

This evidence was relevant and properly considered as extrinsic evidence of one of a number of factors used by the Court to examine the effect of the Plaintiffs' and Defendants' proposals as compared with the intent or lack thereof of the Amendment. City of Jacksonville v. Continental Can Co., supra and Plante v. Smathers, 372 So2d 933 (Fla. 1979).

Finally, the Appellants have started almost every argument in this case with the reference to the will of the people as expressed by the Amendment in a majority of 72% of those voting. (Brief of Appellants, p.1). However, it is the Plaintiffs in this case and their net which are squarely within the will of those 72% of the voters under the language and intent of the Amendment. The Golden-Crum trawl logically produces less than 500 feet of formula calculated square foot open mesh area because it has less than 500 square feet of mesh physically contained in it and it significantly limits rather than eliminates commercial trawling in near shore and inshore waters. (Def. Ex. 12 & 16; T. 46:5-6; 54:2-4; 54:10-11; 93:1-14).

The Defendants' arguments admittedly produce a trawl that would be limited to actually containing between approximately 250 to 350 square feet of open mesh and which would eliminate inshore

and near shore commercial trawling. As evidenced in the Brief of Appellees/Plaintiffs above, this was not the will of the people. The State Marine Fisheries Commission and the F.C.A. are own their own mission herein which may or may not be righteous, but nevertheless cannot be said to be advanced under the cloak of authority of Article X, Section 16.

II. **IF THE COURT REJECTS THE CONVERSION FACTOR ARGUED BY THE PLAINTIFF AND ACCEPTED BY THE TRIAL COURT OF 1/2 OR .50 TO ARRIVE AT THE OPEN MESH SLANT HEIGHT LENGTH OF THE TRAWL AND ACCEPTS EITHER OF APPELLANTS ARGUMENTS, THEN THE FOURTH SENTENCE OF (C)(2) MUST BE STRICKEN AS UNCONSTITUTIONAL IN ORDER TO PRESERVE THE INTENT OF THE LANGUAGE AND VOTERS OF THE AMENDMENT.**

General principles of statutory construction are applicable to the construction of constitutional provisions. Continental Can Co., 151 So. at 489. If two provisions are internally inconsistent

> .where the last clause of a statutory section is plainly inconsistent with the first part of the same section, and the first part is consistent with the clear policy and intent of the legislature, the last clause, if operative at all, will be so construed as to give it an effect consistent with the first part of the section and the policy it indicates.

In re National Auto Underwriters Ass'n, 184 So2d 901,902, (Fla. 1st DCA 1966), citing Johnson v. State, 157 Fla. 685, 27 So2d 276, 282 (Fla. 1946, cert denied, 329 U.S. 799, 1946. Moreover, the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers who adopted it. Continental Can Co., 151 So. at 489; In re Advisory Opinion

to the Governor, 374 So. 2d 959, 964 (Fla. 1979) ("the court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters.")

Acceptance of the State's argument would limit the square foot area of the trawl to 355 square feet of open mesh actually contained in the net. Acceptance of the F.C.A.'s argument would limit the square foot area of the trawl to 251 square feet, actually contained int eh net. However, the intent of the voters and the express language of (b)(2) makes it clear that 500 square feet of open mesh area was to be the limitation necessary to protect the interest sought.

Furthermore, as referenced previously, fishermen using other non-entangling nets such as seines would be able to use 500 square feet of open mesh according to Appellants' construction while shrimp trawlers would be limited as above. The effect of their argument also prohibits rather than limits commercial harvesting by trawlers in inshore waters. As shrimping is not a recreational activity, the elimination of profits and commercially practical shrimp nets by reducing the size of the nets so far below that intended, effectively eliminates shrimp trawling by the smaller boats (25 - 50 feet in length).

III. ANY RIGHTS OF THE F.C.A. TO EXAMINE, CROSS-EXAMINE OR CALL WITNESSES WAS EXERCISED, VOLUNTARILY WAIVED THROUGH AGREEMENT OR WAIVED THROUGH INACTION.

Mr. McCollough's argument concerning being refused by the court to examine or present witnesses is incorrect and must be

rejected.

Mr. McCollough, like all intervenors, agreed to present questions, evidence and witnesses through counsel for the parties to the case. This agreement was reiterated at the pretrial conference among all intervenors, the parties and the Court just before the trial. It is referenced by the Court at T.5 and T. 6.

At page T. 270 undersigned counsel references the agreement made by Mr. McCollough was that "they (intervenors) would only participate in the legal arguments, period." Mr. Mowrey, counsel for other intervenors, references the agreement at the trial to the effect that intervention was granted but would be limited to legal argument. (T. 270).

The Court further specifically restated the agreement on the record at T. 92:13-25:

> . . . when we made this and there was not the record, let me just indicate that the ground rules that we set forth, and I thought we all agreed to this morning of the record, was that if there were any questions or objections, or what have you, they would be asked through Mr. Floyd or Mr. Glogau. That went for also Mr. McCollough and also for Mr. Shuler and Mr. Mowrey, too.
>
> Because I feel like - - I'm not trying to limit Intervenors participation in this case at all, but there are intervenors and given the matter of the case, and there seems to be the - - no problem following that procedure.

Following this, neither Mr. McCollough nor the attorney for the State ever suggested that the agreement was otherwise than as referenced above nor did Mr. McCollough argue in his trial brief or post trial document submitted to the Court that he was denied

any participation or right. (R. 448-457). The fact is that Mr. McCollough only requested to introduce one witness and this request was granted. (T. 8:13-20; 269:17-22). Subsequently, he was allowed to submit documentary evidence also. (T. 273:24-25; 274:1-4; 285:4-7). (Def. F.C.A. Ex.4).

Furthermore, Mr. McCollough exercised objections, making of motions and comments on evidence frequently. (T. 63:18-22; 102:3-10, 20-22; 130:16-18; 190:23-25; 191:1-4).

All of this was done before Mr. McCollough filed an answer or affirmative defenses for F.C.A. (R. 350-352) (filed on 3/27/95) and on the same day as F.C.A.'s filed a witness list. (R. 299-300), (3/24/95).

Just as the other intervenors who voluntarily limited the involvement in the trial in order to be allowed to intervene, F.C.A. voluntarily limited its involvement in the case. However, F.C.A. asked for and was granted its request to call Mr. Forgren. Then Mr. McCollough voluntarily decided to tender a memo from the F.C.A. (Def. F.C.A. Ex. 4) rather than submit other evidence. (T. 273:24-25; 174:1-4). Apparently, he decided he did not wish to call any other witnesses or present any further evidence. (T. 285). Pursuant to the agreement, he, like counsel for the other intervenors, actively participated in questioning through counsel for the parties. (T. 85:25; 86:1-25).

Accordingly, any right the F.C.A. may have had to examine, cross-examine or call witnesses or put on evidence was exercised voluntarily, waived through counsels' agreement on

intervenors' participation or, was waived through inaction. United States Mineral Product Co. v. Waters, 610 So2d 20, 21 (FLA 3 DCA 1992). See also Coast Cities Coaches, Inc. v. Dade County, 176 So2d 703, 706 (FLA. 1965).

CONCLUSION

It is respectfully submitted that because the record supports the ruling of the trial Court with substantial relevant and logical evidence, it should be affirmed.

Respectfully submitted this 31st day of July, 1995.

J. PATRICK FLOYD, P.A.

By: J. Patrick Floyd
J. PATRICK FLOYD

ATTORNEY FOR APPELLEES/
PLAINTIFFS, BRUCE MILLENDER,
RONALD FRED CRUM AND
TIMOTHY MCCLAIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to U.S. Mail this 31st day of July, 1995 to Jonathan A. Glogau, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; Terry L. McCollough, 538 Washington Street, Orlando, FL 32801; Alfred O. Shuler, Esquire, P. O. Box 850, Apalachicola, FL 32320; and Ronald A. Mowrey, P.A., 515 North Adams Street, Tallahassee, FL 32301-1111.

J. Patrick Floyd