SUPREME COURT OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Appellants,

v.

Case No. 85,880
1st DCA Case No. 95-1757

BRUCE MILLENDER, et al.,

Appellees.
_____/

APPEAL OF A CERTIFIED JUDGMENT
FROM THE TRIAL COURT

WAKULLA COUNTY'S ANSWER BRIEF

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PRELIMINARY STATEMENT

This answer brief is submitted by Intervenor/Appellee, Wakulla County, in response to the initial briefs filed by the Attorney General of the State of Florida and the Florida Conservation Association.

Defendants, the State of Florida, Department of Environmental Protection and its division, the Florida Marine Patrol, are referred to collectively as the State. Defendant, the Florida Conservation Association, is referred to as the FCA. The State and the FCA are collectively referred to as Appellants. Plaintiffs Bruce Millender, Ronald Fred Crum, Timmy McClain and the Intervenors of Wakulla County, Franklin County and Walton County, are collectively referred to as Appellees. The trawl net constructed by Charles Buford Golden, Sr. at the request of Ronald Fred Crum is referred to as the Golden-Crum net. Art. X, § 16, Fla. Const. is referred to as the Amendment. The measurement procedure found in subsection (c)2 of the Amendment is referred to as the conical measurement procedure.

The record before the trial court is cited as (R. ____), referring to page numbers. References to the transcript of the trial held March 24, 1995, are cited as (T. ____), referring to page numbers. References to the trial exhibits are cited as (P.Ex. ____), referring to plaintiff's exhibit number, and (D.Ex. ____) referring to defendant's exhibit number.

SUMMARY OF ARGUMENT

Substantial evidence supports the trial court's finding that

the Golden-Crum net measured 476.7 feet under the conical measurement procedure. Accordingly, the trial court's finding was not clearly erroneous, and therefore cannot be disturbed by this Court.

The trial court did not err in admitting evidence relevant to the commercial viability of the Golden-Crum net. The evidence was properly admitted to assist the trial court in construing the constitutional provision in accordance with the intent of the Amendment. Admitting this evidence was not an abuse of discretion. Therefore, the trial court's ruling cannot be disturbed by this Court.

If this Court does find the trial court's finding of fact was clearly erroneous, the Court should strike the conical measurement procedure as applied by Appellants because the provision is repugnant to the 500 square feet limitation of the Amendment. The measurement procedures urged by Appellants exaggerate the actual square footage of the net by 40 to 99 percent. This exaggeration of the actual net size prohibits the use of all nets which are commercially viable in contravention of the Amendment's intent to limit, not eliminate commercial shrimping.

Finally, the trial court did not err in limiting FCA's participation at trial. The FCA waived any objection due to its agreement to the terms of participation of all intervenors prior to trial. Further, the FCA was allowed to present a witness and introduce written evidence over Appellees' objection despite its failure to file a witness or exhibit list.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THE SLANT HEIGHT OF THE GOLDEN-CRUM NET WAS 14.5 FEET.

The trial court found the Golden-Crum net was legal under the Amendment because the slant height, measured in the open mesh position, was 14.5 feet. (R. 575) Plugging this figure into the conical measurement procedure, the Golden-Crum net measures 476.7 square feet and is therefore legal under the Amendment. (R. 575) The court rejected the slant height calculations of 29 feet (asserted by FCA) and 20.49 feet (asserted by the State). (R. 575) Plugging the slant heights asserted by the FCA and the State into the conical measurement procedure, the Golden-Crum net measures 953.4 square feet and 673.6 square feet, respectively, and would be prohibited under the Amendment's 500 square feet limitation on trawl nets. (R. 573)

For the reasons stated below, the trial court's finding of fact was supported by substantial evidence, and cannot be disturbed by this Court. Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982); and Strawgate v. Turner, 339 So. 2d 1112, 1113 (Fla. 1976).

A. The strict language of the Amendment mandates measuring the mesh in the open mesh position.

Subsection (b)2 of the Amendment prohibits the use of trawl nets which exceed 500 square feet of mesh area. Subsection (c)2 of the Amendment defines "mesh area" as "...the total area of netting with the meshes open to comprise the maximum square footage." "Open mesh" means the net material is positioned so each side, or bar, of an individual mesh is at right angles to its adjacent sides so that

the mesh forms a square. (P.Ex. 21). A net is in the stretch, or stretched mesh, position when the mesh is physically pulled taut such that two sides of the mesh, or bars, are collapsed on top of each other until they lie parallel to each other. (P.Ex. 21) The stretch, or stretched, mesh length is twice as long as the open mesh, or bar length. (T. 57) These facts are undisputed. The position of the mesh during measurement is important because the stretch mesh measurement produces a slant height of 29 feet, resulting in a mesh area, or net size, of 953.4 square feet. (R. 573) By contrast, the open mesh measurement accepted by the trial court measures 476.7 square feet. (R. 575); (T. 54, 55, 172)

The FCA contends the net should be measured in the stretch mesh position, a position abandoned by the State after the underlying action was filed. This position ignores the plain meaning of the Amendment's 500 square feet limitation, and cannot be accepted. Florida League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992). Further, as the trial court stated, the phrase "with meshes open" should be construed according to the meaning it has in the fishing industry. (R. 575); (T. 54, 55, 58, 120, 172, 174); see also S.E. Fisheries v. Dept. of Natural Resources, 453 So. 2d 1351, 1354 (Fla. 1984). The diagonal open mesh measurement urged by the State is not recognized in the industry (T. 54, 55, 58, 120, 172, 174) and, therefore, should not be accepted by this Court.

B. **Substantial evidence was presented which supports the trial court's factual finding that the slant height of the Golden-Crum net measured 14.5 feet in the open mesh position.**

The trial transcript is replete with evidence supporting the finder of facts conclusion, contrary to Appellants' representation. (T. 54, 55, 61, 172, 174, 175) For example, when asked about using the conical measurement procedure to measure the net in the open mesh position, Mr. Ronald Fred Crum testified "if you stretch that mesh out...as far as it will go to cover as much of the surface as possible, it will come down to the 14.5 length". (T. 61) When referring to "it", Mr. Crum was describing the slant height of the cone in the open mesh position. Mr. David Harrington, tendered by Appellee as an expert in the area of construction and use of trawl nets, testified that:

> Q. And what is the measurement in the industry that's used for open mesh, what measurement?
>
> A. The bar.
>
> Q. The bar. And the bar equals -- the stretch mesh equals how many times the bar?
>
> A. Stretch mesh? Twice. (R. 174)

Based on this evidence, the trial court properly concluded the open mesh bar measurement is one-half the stretch mesh measurement of 29 feet, which equals 14.5 feet. (R. 575)

This evidence persuaded the trial court the correct measurement of the net was 476.7 square feet. (R. 575) Again, this finding is supported by substantial evidence, entitled to a presumption of correctness, and cannot be revisited by this Court. Marsh, 419 So. 2d at 630 and Strawgate, 339 So. 2d at 1113.

C. The trial court could not have accepted the measurement procedures adopted by Appellants.

The measurement procedures Appellants urge this Court to apply could not have been accepted by the trial court because they exaggerate the actual mesh area, or net size, of the Golden-Crum net by 40 to 99 percent. This effect is undisputed. (R. 573) By contrast, Appellees' open mesh measurement procedure closely approximates the actual mesh area, or size of the net. (R. 575)

The Court must attempt to construe constitutional provisions together to give effect to all where possible. Wilson v. Crews, 34 So. 2d 114, 117 (Fla. 1948). Moreover, the Court cannot adopt an interpretation which produces an absurd result when another construction will accomplish the intent of the provision. Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979); (See Section II.A. infra regarding the intent of the Amendment).

II. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE RELEVANT TO THE COMMERCIAL VIABILITY OF THE GOLDEN-CRUM NET.

Contrary to Appellants' assertion, evidence which is prejudicial is not inadmissible. All evidence prejudices the party against whom it is entered, or it should not be entered. The correct standard under § 90.403, Fla. Stat. (1993) is whether the probative value of the evidence is outweighed by the danger of unfair prejudice. The trial court did not err in admitting evidence as to the commercial viability of the Golden-Crum net because it found the evidence was relevant and not unfairly prejudicial. (R. 576) Extrinsic evidence may be relied upon to construe provisions of the Constitution. Plante , 372 So. 2d at

936. The trial court's admission of this evidence was not an abuse of discretion and therefore cannot be revisited by this Court. § 90.403, Fla. Stat. (1993); and Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991).

A. The commercial viability of legal trawl nets is relevant because the intent of the Amendment was to limit, not eliminate, commercial shrimping.

The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the provision. City of Jacksonville v. Continental Can Co., 151 So. 488, 489 (Fla. 1933). The Amendment's ballot summary provides:

> **TITLE: LIMITING MARINE NET FISHING**
>
> SUMMARY: Limits the use of nets for catching saltwater finfish, shellfish, or other marine animals by prohibiting the use of gill and other entangling nets in all Florida waters, and prohibiting the use of other nets larger than 500 square feet in mesh area in nearshore and inshore Florida waters. Provides definitions, administrative and criminal penalties, and exceptions for scientific and governmental purposes.

As the ballot summary suggests, the Amendment bans all gill nets, nets of entanglement, and limits the size of seine, trawl, and other nets. Trawl nets would have been enumerated with the class of banned nets if the Amendment envisioned their elimination. To suggest shrimping is still possible, although no longer economically feasible, ignores the fact the Amendment was passed to regulate the commercial fishing industry and that shrimping is a commercial activity. Accordingly, the commercial viability of the Golden-Crum net could not be more relevant to the issue squarely before the Court, i.e., the legality of the Golden-Crum net. (R. 2-

10)

B. **The area of the mesh stock used to construct the Golden-Crum net is relevant because it shows the measurement procedures adopted by Appellants exaggerate the actual surface area of trawl nets.**

Appellants assert the actual surface area of the Golden-Crum net is irrelevant. Their position ignores the obvious intent of the conical measurement procedure which the trial court found, and common sense dictates, is to aid in measuring the actual size of the net. (R. 574) To accept Appellants' interpretation, one would have to agree the intent of the Amendment was to impose a more severe limitation on trawl nets, as compared to seine nets. If that was the true intent of the Amendment, it would simply have stated trawl nets shall be limited to 300 or 400 square feet, instead of 500.

Substantial evidence was entered which demonstrates the degree to which the FCA and State measurement procedures exaggerate the actual mesh area, or size, of the Golden-Crum net. For example, Mr. Golden testified that using the cone measurement for shrimp nets "over-estimates the area for the net by 75 to 100 percent". (T. 152) Mr. Crum testified the overestimation would effectively make a 500 square foot net "200 and some square feet" when using the cone formula applied by FCA. (T. 65) Mr. Golden also testified the actual square footage of a 500 square foot net, using the cone formula, would be "approximately half, about 250 square feet" and the fishermen were thus "getting about half of their allowable netting". (T. 152, 153) Appellants' own expert witness admitted to

the exaggeration of the FCA and State measurement methods. (T. 223, 224)

C. The court was not precluded from considering the commercial viability of the Golden-Crum net.

The FCA asks this Court to reverse the trial court because it sua sponte considered the issue of commercial viability of the Golden-Crum net. The FCA correctly states the trial court should not consider issues not before the court. However, the issue was before the court because the plaintiffs requested the court to determine whether the Golden-Crum net was legal under the Amendment (R. 2-10), a request which required the court to examine and construe the intent of the Amendment. Continental Can Co., 151 So. at 489. As stated above, the commercial viability issue arose because the trial court determined the Amendment did not intend to eliminate commercial shrimping in Florida waters. (R. 577) Accordingly, the issue of commercial viability of the Golden-Crum net was properly before the court, and the court did not commit reversible error by allowing evidence relevant to that issue.

III. IF THIS COURT FINDS THE TRIAL COURT'S FINDING OF FACT AS TO THE SIZE OF THE GOLDEN-CRUM NET WAS CLEARLY ERRONEOUS, IT MUST STRIKE THE CONICAL MEASUREMENT PROCEDURE FROM THE AMENDMENT BECAUSE IT IS REPUGNANT TO THE REMAINING PROVISIONS 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 Nat'l Auto. Underwriters Ass'n, 184 So. 2d 901, 902 (Fla. 1st DCA 1966), citing Johnson v. State, 27 So. 2d 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, see also In re Advisory Opinion to the Governor, 374 So. 2d 959, 964 (Fla. 1979) ("[T]he court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters.")

A. The conical measurement procedure as applied by Appellants is repugnant to the Amendment's 500 square feet limitation.

Generally, provisions of the constitution are to be read together and the courts shall give effect to all provisions where possible. Wilson, 34 So. 2d at 117. However, when provisions of the constitution conflict, the court must give effect to one over the other. Id.

The Golden-Crum net is constructed of 478.69 square feet of net stock. (R.572) This evidence is undisputed. Applying the conical measurement procedure urged by the FCA and the State, the net is either 453.4 or 173.6 square feet over the limit. (R. 572, 573) Accordingly, these two separate constitutional provisions are repugnant because they relate to the same subject (net measurement), were adopted for the same purpose (to calculate net

size), and cannot be enforced without material conflict. Wilson, 34 So. 2d at 118.

B. Strict application of the 500 square feet limitation must be applied to trawl nets to further the intent of the Amendment.

Subsection (b)1 of the Amendment bans the use of gill and other entangling nets in Florida waters. Subsection (b)2 limits all other nets to 500 square feet of mesh area, or net size. Under the State's interpretation of the implementing provision of the Amendment (the conical measurement procedure), trawl nets are further restricted in size because they are to be measured as if they were a cone. Accordingly, a trawl net which is constructed out of 500 square feet of net material will measure significantly larger because the mathematical formula assumes the net is a full cone, thereby exaggerating the mesh area, or size of the nets. This effect is candidly admitted by Appellants. (R. 573)

Accordingly, the Court must determine whether the Amendment intended to impose a stricter limitation on trawl nets. As stated above, the trial court found application of the conical measurement procedures asserted by the State and the FCA would eliminate commercial shrimping in Florida waters, not just limit it. (R. 576, 577) This finding was based on substantial evidence (T. 75, 76, 95, 96, 97, 183, 189, 227, 159, 160, 161, 254), and is presumed correct. This was clearly not the intent of the Amendment. (See Section II.A supra regarding intent of the Amendment).

IV. THE TRIAL COURT DID NOT ERR IN LIMITING THE FLORIDA CONSERVATION ASSOCIATION'S PARTICIPATION AT TRIAL.

Prior to the start of the trial, the court conducted a pretrial conference off the record to establish the ground rules for the hearing. (T. 1). Counsel for the FCA participated in that conference and agreed he would examine witnesses or raise any objections or motions through the State's counsel, Mr. Glogau. (T. 192). The same rules applied, and were followed, by counsel for intervenors Wakulla and Franklin County. (T. 192). Notwithstanding the agreement of the parties and the failure of the FCA to file a witness list (T. 269, 270), the court permitted the FCA to call Ted Forsgren as a witness. The FCA voluntarily limited the testimony of Mr. Forsgren to the authentication of documents. (T. 273, 274). Accordingly, any right the FCA may have had to examine, cross-examine, or call witnesses was waived through its counsel's agreement or inaction. United States Mineral Product Co. v. Waters, 610 So. 2d 20, 21 (Fla. 3d DCA 1992).

Moreover, as an intervenor, the FCA's participation is subordinate to the propriety of the main action, and the extent of its participation is within the discretion of the trial court. Coast Cities Coaches, Inc. v. Dade County, 176 So. 2d 703, 706 (Fla. 1965).

CONCLUSION

Wherefore, Appellee, Wakulla County, requests this Court affirm the findings of fact and conclusions of law of the trial

court.

RESPECTFULLY SUBMITTED this 31st day of July, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States mail to J. Patrick Floyd, Esquire, Post Office Drawer 950, Port St. Joe, Florida 32456; Jonathan Glogau, Esquire, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; Terry L. McCollough, 609 East Central Boulevard, Orlando, Florida 32801; and David Cardwell, Esquire, Holland & Knight, Post Office Box 1526, Orlando, Florida 32802; this 31st day of July, 1995.

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