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.

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APPEAL OF A CERTIFIED JUDGMENT
FROM THE TRIAL COURT

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# REPLY BRIEF OF APPELLANTS

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## SUMMARY OF ARGUMENT

There is no evidence in the record which would lead to the conclusion that the open mesh length of a trawl is one-half the stretched measured length. Plaintiffs provided evidence that there is a "bar" measure which is one half the "stretch" measure, but there is no connection made to the length of a shrimp trawl. To the contrary, the bar measures the size of the openings in the mesh and is unrelated to the length of a trawl. The State's method of relating the stretched length of a mesh (which is measured diagonally) to the diagonal distance across an opened mesh is the only valid conversion evidenced on this record.

The cone formula is mandated by the constitution for the measurement of a trawl. There is no evidence or legal citation to support the assertion that the measurement method set forth specifically in the constitution must "accurately" calculate the amount of mesh used to construct a net. The court chose the one half conversion because it best approximates the amount of net used to construct Plaintiffs' net. This choice was arbitrary because it was wholly unrelated to the relationship between the net in its stretched condition and in its "open mesh" condition. The court's reliance on that evidence was reversible error.

In addition, the court below erred by considering the economic viability of nets advocated by the State. The constitutional amendment's purpose is to limit marine net fishing. If this radical change in fishing practices is uneconomical for some in the industry, then reducing the fleet is consistent with the intent of the amendment. Such reduction will protect the state's fish stocks from overfishing and waste.

The decision below must be reversed and the Plaintiffs' net must be declared in violation of the 500 square foot limitation of Article X, § 16, Fla. Const.

## ARGUMENT

### I.
### THERE IS NO EVIDENCE TO SUPPORT THE COURT'S FORMULA FOR THE SLANT HEIGHT OF PLAINTIFFS' NET

Appellees argue at length that the record contains evidence to support the trial court's choice of one-half as a conversion factor from the "stretched" to the "open" mesh measurement of shrimp trawls. A close examination of the record citations, in the context of the question presented to the court, will show that, in fact, the record is devoid of any such evidence.

The crucial question presented to the court below, and to this court, is how to measure the length of a shrimp trawl. This measurement comprises the slant height for use in the constitutionally mandated cone formula for determining the size of trawls. Art. X, § 16(c)(2), Fla. Const. The formula was chosen because trawls are generally conical in shape. [T. 205; Def. Ex. 2] Appellees' assertion that it is an attempt to "accurately calculate the actual square footage" is supported by no citation to the law or the record. [Appellee's Br. at 6] (See section II, *infra*).

When the meshes in Plaintiffs' net are stretched, each mesh is 1.5 inches long [T. 83-84] and the entire net is 29 feet long [T. 145]. Contrary to Plaintiffs' assertion that the nets are never measured across the diagonal, [App. Br. at 11], the 1.5 inch measurement *is* across the diagonal and the 29 foot measurement is along the axis of the length of the net which crosses each mesh diagonally. (See appendix B to Appellant's initial brief and Pl. Ex. 9)

Appellees admit in their brief that "open mesh" means that the meshes are opened to their maximum size, that is square. [Appellee's Br. at. 9; Wakulla Co. Br. at 3-4] When the meshes of Plaintiffs' net are in the fully open position, the distance along the same axis of measurement, the diagonal, is 1.06 for each mesh and 20.49 feet for the entire net. [T. 81-82 (Plaintiff Crum); Pl.

Ex. 10][See Appendix A, Appellant's initial brief] You must measure along the same axis because the mesh does not magically reorient itself when the meshes are construed to be open.

The only evidence in this record shows that the "bar" measurement is the length of one side of the square of each mesh and that the stretched length of a mesh is twice the "bar" length. ***Nowhere*** is there any connection made between the "bar" length and the length of the trawl when measured for the cone formula. The only evidence in the record is directly to the contrary. [T. 81-82; 241-42] Both the court below and the Appellees rely on the use of the terms in the "shrimping trades." [R. 575; Appellees' Br. at 11-12; Wakulla Co. Br. at 4][1] This is error. When construing the terms of the constitution, the plain meaning is to be used, not terms of art. State v. Florida State Improvement Commission, 47 So. 2d 627, 630 (Fla. 1950); Florida Boater's Ass'n v. DOR, 400 So. 2d 1006, 1007 (Fla. 1st DCA 1981). This is consistent with the purpose of such construction which is to determine the intent of the framers and the people who voted. Gallant v. Stevens, 358 So. 2d 536, 539 (Fla. 1978).

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[1] The evidence shows that even in the industry, the use of the "bar" measurement is to describe the size of the openings of the net. When measuring the size of a large piece of net, Mr. Golden, the netmaker, measured the length and width with a tape measure. [T. 68-69] Regulations of the Marine Fisheries Commission refer to the length of nets in yards or feet, not number of meshes. *See, e.g.*, 46-4.0081(1)(a), Fla. Admin. Code (600 yards ); 46-4.0085(2)(a), Fla. Admin. Code (recreational seine limited to 100 feet).

Open mesh, therefore, has no relationship to the length of the "bar," but merely reflects the intent to measure the length of the net with the meshes fully extended to their open, square shape rather than stretched to their maximum length. The use of the "bar" measurement in the industry is irrelevant to this inquiry. The only way to convert the actually measured stretched length of a trawl to the open mesh length for use in the cone formula, and the only way supported by the evidence in this record, is to use the conversion factor outlined in Appellant's initial brief resulting in a length of 20.49 feet. [Appellant's Initial Br. at 4-5] Using this length in the cone formula results in a measurement of 673 square feet making Plaintiffs' net illegal under the 500 square foot limitation in Article X, § 16, Fla. Const.

## II.
## THE AMOUNT OF RAW MESH STOCK USED TO CONSTRUCT PLAINTIFFS' NET IS IRRELEVANT AND THE COURT ERRED IN LARGELY BASING ITS OPINION ON THAT EVIDENCE

Appellees assert that the cone formula was placed in the constitution in an attempt to accurately calculate the actual amount of mesh used to build the net. There is no citation for this proposition and it is without merit. Subsection (c) of Art. X, § 16, Fla. Const., provides the methods for calculating the square

footage of all nets, rectangular, trawl, and combination. Trawls are generally conical in shape [T. 205; Def. Ex. 2] and the constitution therefore mandates that the formula for the surface area of a cone be used. If the constitution merely restricted the nets to 500 square feet and the Marine Fisheries Commission, pursuant to Chapter 370, Fla. Stat., adopted a measurement method, an argument could be made that the method must accurately approximate the actual amount of mesh stock in the net. That is simply not the case here and no such requirement is found in the constitution itself.

Appellees assert at page 7 of their brief that:

> [W]hen 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.

This is a *gross* misrepresentation of the exchange regarding this type of net.[2] There is no evidence that such a net exists. More importantly, this mythical net would be considered a "combination net" under the last sentence of that

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[2] In addition, Appellees' assertion that there was some "tacit agreement" between the State and the Plaintiffs on this point is nothing short of fantasy. The State continuously objected to the admission of evidence on the amount of raw mesh used to construct the Plaintiffs' trawl. The basis for these objections was that the evidence was irrelevant.

subsection and clearly would be measured under that language, not the initial language pertaining to seines.[3] [R. 192-93 (Teehan Deposition)] There is no dispute that the nets at issue in this case are trawls subject to the specific language requiring that they be measured as a cone.

In several places, Appellees assert that the State's formula limits shrimp nets to 350 square feet. It does no such thing. It merely results in a calculated size of 673 square feet for Plaintiffs' net. It is possible for other nets to be constructed within the constitutional limitation under the state's formula that contain 500 square feet of raw mesh stock. In fact, it is conceivable that nets containing *more* than 500 square feet of raw mesh stock could be constructed

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[3] Art. X, § 16(c)(2) provides:

> [T]he total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of the netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height. **Calculations for any other nets or combination type nets shall be based on the shapes of the individual components.**

(emphasis added)

which also comply with the 500 square feet limitation as calculated under the State's formula.

The amount of raw mesh stock used to construct Plaintiffs' net is irrelevant. The court below chose the conversion factor of one-half in order to force the cone formula to approximate the amount of mesh used to construct the trawl. Because the court erred by allowing this evidence in and then further erred by relying on it, the court chose a conversion factor which was arbitrary and capricious and not supported by relevant evidence. As set forth above in section I, the "bar" measure upon which the court based its calculation is not related to the length of the net measured from the center of the headrope to the end of the net. The only conversion factor supported by evidence related to the length of the trawl in the open mesh condition is that presented by the State. Therefore, the only length supported by the evidence for Plaintiffs' trawl is 20.49 feet, resulting in a calculated area of 673 square feet, making the Plaintiffs' trawl illegal under Art. X, § 16, Fla. Const.

## III.
## THE ECONOMIC VIABILITY OF NETS OF A CERTAIN SIZE IS IRRELEVANT AND THE COURT ERRED IN PARTIALLY BASING ITS OPINION ON THAT EVIDENCE

The court below also erred by admitting evidence of the commercial viability of shrimp trawls as limited by the state's formula for calculating the area for constitutional purposes. The question of commercial harvest is not raised by the language of the constitution; it limits all use of nets.

In addition, Appellees assume that the amendment's use of the word limit exclusively related to the size of nets. The purpose of the amendment as set forth in its introductory language is to "limit marine net ***fishing***." Art. X, § 16(a), Fla. Const. (emphasis added). This clearly can be interpreted to include reducing the size of the fleet by weeding out those who cannot remain in the industry under the new restrictions. This is common in any industry faced with new restrictions; the marginal producers will be weeded out. This is consistent with the overall purpose of the amendment which is to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste. *Id.*

Finally, the evidence does not show that the shrimping industry will be destroyed if the State's formula is used. There is ample evidence in the record

that commercial fishermen in the inshore waters are currently using nets which would be legal under the State's formula. [T. 77, 80 (Plaintiff Crum); 199-200, 231 (Teehan); 250, 252-53 (Coleman); 258, 261 (Lt. Whaley)] The Marine Fisheries Commission even enacted an emergency rule in 1992 to allow this fishery to continue when a new rule would have inadvertently wiped it out. [T. 201-03; 46ER92-1] Furthermore, shrimp fishermen have other alternatives, to wit: some can go out three miles and fish with the gear they traditionally used and others can use smaller boats with smaller nets or other alternative gear. [T. 204; Def. Ex. 4 at 2 and 6]

Admitting this irrelevant evidence and relying on it forced the court below to search for a decision which would allow the shrimp fishermen to continue in their trade as close to how they traditionally did as possible. This is clearly not the intent of the amendment. This amendment produces radical changes in how the fishing industry operates and the shrimp fleet is not excepted. A reduction in the size of the fleet as well as a reduction in the size of the trawls used clearly further the salutory purposes of protecting the State's fish stocks - the primary goal of the amendment.

## CONCLUSION

For the reasons set forth above, this court must find that the Plaintiffs' trawl does not comply with the 500 square foot limitation found in Art. X, § 16, Fla. Const., and that the State's interpretation of the proper formula be accepted. The decision of the court below must be REVERSED

Respectfully submitted this 15 day of August, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been served by United States mail this 15 day of August, 1995, on:

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