SUPREME COURT OF FLORIDA

CASE NO.: 85,880

L.T. CASE NO.: 95-1757

DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,

Appellants,

vs.

BRUCE MILLENDER, ET AL.,

Appellees.

REPLY BRIEF OF FLORIDA CONSERVATION ASSOCIATION

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SUMMARY OF THE ARGUMENT

In their Answer Briefs, Appellees respond to the arguments raised in this appeal with essentially a single two step argument. They contend that the trial court's determination as to the proper interpretation of the language of Article X, Section 16 is correct because it results in a determination which closely approximates their calculation of the amount of raw mesh used to construct the net in question. They argue that this must be the correct interpretation because the alternatives proposed would reduce the size of allowable nets below that proposed by Appellees--a result which, they contend, would eliminate commercially viable shrimping in the State inshore and nearshore waters of the State of Florida. This argument is further extrapolated by claiming that its basis is on an intent by the voters when Article X, Section 16 was approved and added to the Florida Constitution, to place netting restrictions in effect while still allowing commercially viable shrimping operations in the inshore and nearshore waters.

The second prong of Appellees argument is that if they and the trial court are wrong and the measurement scheme proposed by either the State of Florida or the Florida Conservation Association is utilized, then portions of Article X, Section 16 should be stricken because they do not reflect the intent claimed to be in existence by Appellees at the time of the adoption of this amendment. The "intent" offered to support an argument for the striking of language from Article X, Section 16, being the same intent claimed to support the first prong of their overall argument. This argument must necessarily fail together with the first prong. IF the intent doesn't exist as to the first prong, then it doesn't in the second instance either.

Finally, Appellees respond to FCA's argument of error with respect to the restriction of examination, cross-examination of witnesses and other participation in the trial by arguing matters outside the record in this case and contradicted by matters of record of this case. The following detailed argument in comparison will illustrate the ineffectiveness of Appellees response.

I. The Formula Adopted by the Trial Court for Measurement of Trawl Nets Is Contradictory to the Plain Language of Article X, Section 16.

The essence of the trial court's Final Declaratory Judgment and indeed the entire argument advanced by Appellees in their Answer Briefs is that the language of Article X, Section 16 in and of itself, is insufficient to provide direction to those charged with its enforcement. Further, they contend that having followed the directory portions of Article X, Section (c)(2), it is necessary to add to those provisions by performing derivations of the measurements which result in order to arrive at the actual measurement permissible under Article X, Section 16.

The lynchpin of Appellees' arguments, and the Final Declaratory Judgment of the trial court is that there is a specific intent within Article X, Section 16(c)(2), to create a measurement scheme which exactly compares with or closely approximates the amount of raw mesh netting used in the construction of a trawl net. No authority is offered for this proposition. The cone formula contained within Section (c)(2) is only applicable to trawls and other bag type nets. Thus, the logic offered by Appellees argues that because other portions of (c)(2) and the measurement directions contained therein create a resulting square footage which closely approximates the raw mesh area of those nets, the same result is required with respect to trawls and other bag type nets.

The significant difference ignored and omitted by Appellees is the manner in which trawl and bag type nets are "fished" as compared and contrasted with other types of nets. The testimony at

trial was clear and undisputed. A trawl net is essentially an elongated sock which is towed through the water such that it is inflated and the prey sought to be captured by the use of such net is swept through the mouth of the net and captured in the bag end. (T.36-38) Accordingly, it is the cross section of this mouth area of the net which determines its effective fishing area and which is controlled in order to effect the effective size of the trawl net. (T. 36-38) The testimony at trial further confirms that, in order for a trawl net to fish efficiently and properly, there must be a proportion, within ranges, between the overall length of the net and the size of the net mouth. (T. 37-38) Viewed against this background, the trawl measurement language and formula contained within Section (c)(2) of Article X, Section 16 is not only sufficient, without addition, modification or reduction in its language, so as to allow accurate predictable measurements of such nets, but shows even more clearly why the measurement scheme employed for trawl and bag type nets is so different from those of other, static nets.

The arguments advanced by Appellees are irreparably flawed. First, as noted in FCA's Initial Brief, no language of the amendment suggests that consideration of commercial viability is appropriate, proper or required. Indeed, as previously noted, no discussion of or distinction between recreational and commercial purposes is provided for in Article X, Section 16. That argument will not be repeated here.

Even if commercial viability were appropriately considered, the only evidence introduced at trial was with respect to commercial viability for the three Plaintiffs and was disputed as to other fishermen habitually fishing within a very narrow stretch of the Florida coastline. To suggest as is absolutely necessary in order to sustain Appellees and the trial court's arguments, that commercial viability in the shrimping industry throughout the State of Florida in its nearshore and inshore waters

is exactly the same for all fisherman in all areas of the State, is not only unsupported by evidence in the record, but implicitly ridiculous. This reliance upon the commercial viability argument is a lynchpin of Appellees' position in this case.

The second important and unfounded support offered by Appellees for the correctness of their position and the determination by the trial court, is the conclusion that there is an intent contained within Article X, Section 16, that the result of the calculation of net size with respect to trawls and other bag type nets must closely approximate the actual square footage of mesh physically contained in such a net. Appellees' statement on this point is that "the "open mesh" requirement and formula 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." (Appellees' Answer Brief at 6,7) Significantly, no legal authority is offered for this proposition. The only support offered in this entire point of Appellees' Answer Brief is that which requires that provisions of the Florida Constitution being given their plain and common sense meaning. The very authorities cited by Appellees, contradict their argument. The language of the operative sentence contained in Section (c)(2) is plain and its meaning obvious to persons of ordinary sensibilities. It states "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." The principal of the statutory and constitutional construction ignored by Appellees is that the specific controls over the general. Pioneer Oil Co. Inc. v. State, Department of Revenue, 381 So. 2d 263 (Fla. 1st DCA 1980).

Section (c)(2) contains general language which defines mesh area as the total area of netting with the meshes open to comprise the maximum square footage. The meaning of this general

sentence is obvious and clear. Nets are to be measured such that the result is the maximum square footage calculated for any given net. The argument advanced by Appellees, and the result handed down by the trial court are contradictory to this statement of intent and definition. The measurement formula adopted by the trial court and argued as being proper by Appellees is inconsistent with this result. They suggest that this sentence requires that the measurement formula result in a number which exactly equals or nearly approximates the actual raw mesh area of the net in question or in the case of trawls, used to construct the net in question. This entire case illustrates the difficultly in measuring trawl nets. Because they are not utilized in a static position, but rather while in motion in the water, their use and character during use is different from static nets. The logic behind the specific formula and the nature of the formula dictated in Article X, Section 16 for the measurement of such nets is not only obvious but consistent with the plain meaning of the other provisions of Section (c)(2). It requires that two measurements be taken. First, the maximum circumference of the net mouth. No dispute exists in this case with respect to the efficacy of that measurement. The second measurement required with respect to trawls is the maximum length from the net mouth to the tail end of the net. It is also clear and undisputed that the maximum length of any trawl net from the mouth to the tail end of the net is the result of measurement by the stretch mesh method. It is inescapable, and Appellees do not dispute that, the use of the stretch mesh measurement also has the result of calculating the mesh area of the trawl net so as to comprise the maximum square footage for that net. Indeed, it is this very result about which Appellees complain of. They suggest a result and the trial court has dictated a result which is inconsistent with and contradictory to the directory provisions of Article (c)(2), both in general and specifically.

Article (c)(2) requires and allows no further derivation beyond the specific measurements

dictated for nets. Indeed, with respect to trawls, it prescribes the exact mathematical formula and the exact method of measurement and no derivation or interpretation is either required or properly allowed.

An examination of the entire language of Section (c)(2) shows the validity of this logic. At trial, Mr. Golden, the maker of the net in question, testified that trawls were of irregular construction with the pattern or "grain" of the netting material being different at different points on the net surface. This, the trial court concluded and correctly so, makes it very difficult, if not impossible to determine the actual length of a grain trawl which in use, i.e. with the meshes open. The problem has not in the language of the Amendment but with the manner in which trawls are constructed. No matter what position a trawl is used in, there is never a time when all meshes are either fully open or when they are all open to the same degree. That problem is exactly why the specific formula for trawl nets makes sense.

When the net is positioned so that its maximum length is measurable, some of the meshes are in the stretched mesh portion, some are open and some are in between. The trial court's Final Declaratory Judgment is in harmony with this and indeed, relies upon the correctness of this conclusion. The fatal flaw in the Final Declaratory Judgment is the trial court's determination to take a further derivative step. Apparently, the trial court concluded that its result would equal or approximate a theoretical "open mesh" condition. Such a condition doesn't exist.

This is the obvious reason for, not only a different measurement method for trawls, but for the very method prescribed. It may be that it does not equal the raw mesh material used to build the net. The functional "feasibility" of a trawl, however, is not directly a function of that area. Thus, the premise of Appellees' position is untenable and should be rejected by this Court.

Because the derivative method proposed by Appellees is contradictory to the other portions of Article X, Section 16(c)(2) it is improper. The arguments advanced by Appellees both at trial and in this Court must be rejected and the Final Declaratory Judgment rendered by the trial court reversed on that basis.

II. The Record Demonstrates FCA did not Waive its Right to Cross Examine, Examine or Call Witnesses.

The colloquy that took place between the trial court and counsel at pages 269-275 makes its clear that the trial court in an off the record pretrial conference restricted all intervenors from cross examination of witnesses, examination of witnesses to call witnesses in this case. Neither FCA nor other intervenors in the case voluntarily waived examination of witnesses. This is also demonstrated in the colloquy with the respect to the comments to the court by Mr. Mowrey, attorney for Wakulla County.

Finally, the direction and order by the trial court at page 86 of the trial transcript demonstrates that there was no waiver or voluntary agreement by FCA. Indeed, upon attempted cross-examination of the very first witness in this case, Mr. Crum, the trial court directed that no such cross-examination could take place except by questions relayed through counsel for the Department of Environmental Protection and other state agencies. As noted in FCA's initial brief, such a restriction and requirement is improper, is not based upon any waiver or voluntary agreement and any argument that suggests that efforts to cause the trial court to relax its ruling while at the same time complying with it constitutes such a waiver are contrary to the record and constitute a misrepresentation of the contents of the record. Exception to the trial court's order was properly raised and is documented in the record and no argument advanced by Appellees supports an

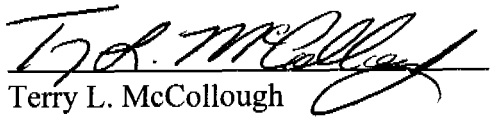
alternative conclusion.

CONCLUSION

On the record and arguments submitted in this case, the error committed by the trial court is clear. The Florida Conservation Association respectfully suggests that the only correct result is a reversal of this case with directions for entry of a final judgment in conformity with Article X, Section 16(c)(2) of the Florida Constitution.

DATED this 14th day of August, 1995.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 14th day of August, 1995 to Jonathan A. Glogau, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida, 32399-1050, J. Patrick Floyd, Esquire, 408 Long Avenue, Post Office Drawer 950, Port Saint Joe, Florida, 32456 and Ronald A. Mowrey, P.A., 515 North Adams Street, Tallahassee, FL 32301-1111.

Terry L. McCollough

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