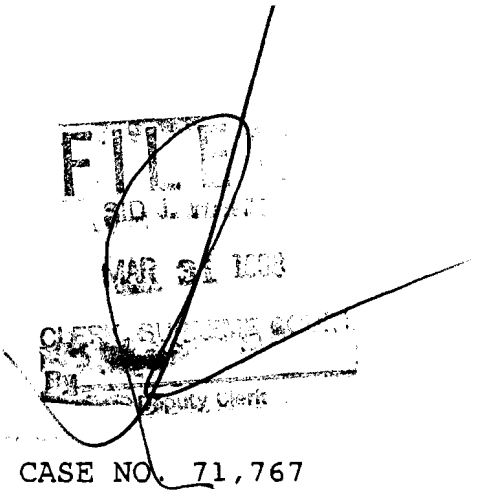
IN THE SUPREME COURT OF FLORIDA



LANCA HOMEOWNERS INC., a/k/a
LANCA HOMEOWNERS ASSOCIATION,
INC. and the L. C. GRIEVANCE
COMMITTEE and PATRICK MCKERNAN,

Appellants/Cross Appellees

v.

CASE NO. 71,767

LANTANA CASCADE OF PALM BEACH,
LTD.and JAMES A. SMITH,

Appellees/Cross Appellants

_____/

ON APPEAL FROM A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

ANSWER BRIEF OF APPELLEES/CROSS APPELLANTS LANTANA CASCADE OF PALM BEACH, LTD. and JAMES A. SMITH

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STATEMENT OF THE CASE AND OF THE FACTS

Lantana Cascade of Palm Beach, Ltd., (hereinafter "the Park Owner") owns the Lantana Cascade Mobile Home Park (hereinafter "the Park") in Palm Beach County. Appendix (hereinafter "App.") 72-73. The park offers for rent approximately 461 mobile home lots. App. 3, 33-34.

L. C. Grievance Committee, Inc., (hereinafter "L.C.") is a Florida not for profit corporation which, since at least 1975, has purported to act on behalf of certain tenants of the park and their successors. App. 3, 83-90, 114-19. Lanca Homeowners, Inc. (hereinafter "Lanca") is a Florida not for profit corporation which, since approximately 1985 has purported to be "the homeowners association" of the mobile home owners at the Park, pursuant to Section 723.075, Fla. Stat. (1985). App. 3, 121-25. Neither Lanca nor L. C. is a tenant or mobile home owner at the Park. App. 5. Moreover, neither Lanca nor L.C. has the power to levy monetary assessments against the tenants of the Park. App. 114-125.

At the time of the hearing in the trial court which precipitated this appeal, approximately sixty (60%) percent of the tenants of the park were seasonal tenants. App. 287. Some of the tenants had become tenants as early as 1971. App. 193. Others had become tenants in other years, through 1983. App. 220. Some of the tenants had signed leases, some had not.

See, e.g., App. 159, 200. Some of the tenants had relocated within the Park, others had not. See, e.g., App. 342. Some had experienced excessive water retention or "flooding" in their driveways, others had not. See, e.g., App. 248-50. Some lived near tall, allegedly dangerous Australian pine trees, others did not. See, e.g., App. 274-75. Generally, several of the various tenants in the Park had experienced problems or inconveniences which affected themselves and a few others but which did not affect all of the tenants. App. 58-62.

In 1984, the Florida legislature enacted Chapter 84-80, Laws of Florida known as the "Florida Mobile Home Act" (hereinafter "the Act"). The Act contained a provision authorizing tenants of mobile home parks to form "homeowners associations", [Ch.84-80 Sections 720.111 et seq.] and authorized the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business Regulation to promulgate and enforce rules relating to the act [Ch. 84-80, Section 720.301 et seq]. Pursuant to the authority granted in the act, the Division shortly thereafter promulgated Chapters 7D-30 through 7D-32, Fla. Admin. Code (hereinafter "the Rules").

In 1986, Lanca and L. C., purportedly as representatives of all of the tenants of the Park, wrote a letter to the Park Owner which accused the Park Owner of violations of the Act, the Rules, and a Consent Judgment which had been entered in 1975 against the former owners of the Park (hereinafter "the Judgment"). App. 99-104. In the letter, Lanca and L. C.

demanded immediate compliance with their interpretation of the Act, the Rules and the Judgment, and threatened a class action damages suit and rent strike by the tenants if the demands were not met. Id.

Unsure of its rights and the rights of L. C. and Lanca under the Act, the Rules and the Judgment, the Park Owner filed a Complaint for Declaratory Judgment and Other Relief against Lanca and L. C. requesting the court to determine, inter alia, whether Lanca or L. C. or both were authorized to act on behalf of all of the tenants of the Park. App. 389.

Lanca and L. C. moved to dismiss the Complaint and, purportedly as class representatives of all or some of the tenants of the Park, filed a class action "Counter Complaint". App. 389, 70-113.

The Counter Complaint carried out the threat set forth in the letter referred to above. It sought declaratory judgment, injunctive relief and damages claiming

(1) The Park Owner had violated the Judgment,

(2) The Park Owner had violated the Act and the Rules promulgated thereunder and

(3) The Park Owner had imposed unconscionable and improper rent increases from September 1, 1980 through September 1, 1985.

Id. In addition, a number of the tenants used the Counter Complaint as a vehicle for conducting a rent strike by depositing their rents in the registry of the court with reference to the Counter Complaint. App. 389.

A hearing was held on December 23, 1986, to determine whether Lanca or L. C. was authorized to represent the tenants of the Park as class representatives. App. 6-69. After the hearing, the trial court ordered that Lanca was authorized to act as class representative of the tenants notwithstanding that it was not a member of the class which it purported to represent. App. 3-5. In making this order the trial court relied upon a portion of the Act, specifically the portion of Section 720.111 of Ch. 84-80 codified at Section 723.079(1) Fla. Stat. (1985) which provides that a "homeowners association" may be joined in a suit as a class representative. App. 5.

The order also held that the Counter Complaint, except for certain specifically identified issues, was maintainable as a class action. App. 4.

The Park Owner timely filed a petition for writ of certiorari and a notice of appeal with respect to the order. App. 385, 387. Lanca and L. C. moved to dismiss both the petition and the appeal solely on the ground that the petition and notice were not timely filed. App. 380-82, 383-84. Both such motions were properly denied. App. 385, 387.

Thereafter, the court of appeal denied the petition "because the issues it raises are being fully treated in the companion non-final appeal". App. 370. The decision in the companion non-final appeal held that the trial court's reliance on Section 723.079(1), Fla. Stat. was erroneous, as that statute except for its first two sentences is

unconstitutional. App. 2. Notwithstanding that the ruling on Lanca's standing was totally dispositive of the Counter Complaint, the court of appeal hypothetically affirmed the trial court's finding that the Counter Complaint, except for specified portions, could be maintained as a class action. Id.

Lanca and L. C. timely perfected this appeal pursuant to this Court's jurisdiction under Fla.R. App. P.9.030(a)(1)(A)(ii), and the Park Owner timely perfected a cross-appeal. Thereafter, Lanca, L C. and the Park Owner stipulated to the appearance of amici curiae Federation Mobile Home Owners of Florida, Inc., (hereinafter "FMO"), and Florida Manufactured Housing Association, Inc. (hereinafter "FMHA") and to a briefing schedule substantially accelerated from the standards set by Fla. R. App. P. 9.110 for appeals pursuant to Rule 9.030(a)(1).

SUMMARY OF ARGUMENT

Appeal

The district court of appeal correctly reversed the trial court's order authorizing Lanca to represent the tenants of the Park as counterclaimant under the Counter Complaint. A class representative must be a member of the class which it purports to represent, except as authorized by Rules properly promulgated by this Court. Lanca admittedly is not a tenant of the Park, and, therefore, is not a member of the class which it purports to represent. No properly promulgated Rule of this

Court authorizes an entity like Lanca to represent mobile home park tenants until and unless it has purchased a mobile home park and converted it to a condominium or a cooperative form of ownership. Lanca admittedly has not acquired the Park, and, hence, could not have converted its form of ownership. The statute relied upon by the trial court could not constitutionally provide any other rule. Thus, the trial court's order was a clear departure from the essential requirements of law. Since denial of class representative status to Lanca was totally dispositive of the case at the trial court level, the District Court properly decided the matter.

Lanca and L. C. improperly petition this Court for a new rule of civil procedure. This Court has established procedures for considering and promulgating new and revised rules which permit fact finding and comment by the Florida Bar, its committees and all other parties in interest. It is unwise to act precipitously in such matters because of the far-reaching effects of new and revised rules. Here it would be especially unwise in the face of the factual changes which have come about in the mobile home industry since the decisions in the cases cited by Lanca, L. C., and FMO. In particular, the Park Owner would show that mobile home park tenants in general and tenants of the Park in particular are as free to move as any condominium owner. This is so because such tenants are universally able to sell their "mobile homes" in place as

easily as a condominium dweller can sell a condominium and universally able to buy a new or different unit in a different park as well as a condominium purchaser can. Thus, the Park Owner submits that full fact finding would show that the asserted "grossly unequal bargaining position" relied upon by Lanca, L. C. and FMO as justification for a new rule does not now exist and certainly is not supported by the record in this case. For instance, such an inquiry would show that, at the Park, even though it has been "full" since before 1980, over 13% of the tenants have moved in since this suit was filed.

Cross Appeal

Having decided that Lanca could not be the class representative of the tenants of the Park, the district court improperly "affirmed" the trial court's ruling that the Counter Complaint was otherwise amenable to class prosecution. The decision that the only counterclaimant cannot be a counterclaimant renders all issues relevant to the Counter Complaint moot, because, without a counterclaimant, the Counter Complaint must be dismissed.

Moreover, both the trial court and the district court erred in holding that, under the facts of this case, the Counter Complaint is maintainable as a class action. Those facts clearly show the tenants of the Park are not similarly situated with respect to the claims made and that the claims of the tenants are too individualized to permit a class action.

ARGUMENT

Lanca and L. C. (hereinafter, occasionally "Appellants") formally raise three issues:

I. Constitutionality of §723.079(1) Fla. Stat (1985)

II. The Advisability of a New Class Action Rule, and

III. Lanca Can Be a Class Representative

Herein, Park Owner treats Appellants' Issues I and III as a single issue infra at I and treats Appellants Issue II infra at II. Appellant addresses the issues on cross-appeal infra at III.

I. THE DISTRICT COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT"S ORDER AUTHORIZING LANCA TO ACT AS THE REPRESENTATIVE OF THE TENANTS OF LANTANA CASCADE MOBILE HOME PARK BECAUSE SECTION 723.079(1) FLA. STAT. (1985) IS UNCONSTITUTIONAL AS APPLIED BY THE TRIAL COURT.

The District Court of Appeal correctly ruled that Section 723.079(1) Fla. Stat. (1985), as applied by the trial court, was an unconstitutional incursion into this Court's exclusive rule-making power. Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976). As this Court clearly held in Avila, the Florida legislature has no power to adopt rules for practice and procedure in Florida courts. Article V, Section 2(a), Florida Constitution; 347 So.2d at 608. In Avila this Court struck down as unconstitutional a statute designating who can be a class representative in a class action lawsuit. Therefore, any statute which purports to do so is unconstitutional. Id.

In this case, the trial court applied Section 723.079(1) Fla. Stat. (1985) to be a "substantive grant of authority" permitting a mobile home park tenants "homeowners association" to act as class representative of those tenants even though (1) no rule of this court so provided and (2) under the rules of this court such representation would not be permitted. App. 5; Lantana Cascade of Palm Beach, Ltd. v. Lanca Homeowners, Inc., 516 So.2d 1074 (Fla. 4th DCA 1987) at 1075. Rule 1.220 requires a class representative to be a class member, Stabinski v. Pirelli Tire Co., 371 So.2d 679 (Fla. 3d DCA 1979). Rule 1.221 permits an entity to represent a class of which it is not a member, but only if the entity is a condominium association or a cooperative housing association and the class consists of the association members. Lanca is neither a class member nor a condominium association nor a cooperative association. Thus, so applied, the statute clearly provides a rule of practice or procedure and, hence, is unconstitutional. Avila, supra.

Indeed, Lanca and L. C., practically concede as much by their failure to meaningfully contest this holding. Their only arguments on the issue appear to be (1) Avila was wrongly decided and (2) the statute at issue here is distinguishable from the statute at issue in Avila. The first such argument is impertinent and the latter is without merit.

Lanca and L. C. cite no decision in conflict with Avila. Markert v Johnston, 367 So.2d 1003 (Fla. 1978), Florida Wildlife Federation v. State, 390 So.2d 64 (Fla. 1980), and Van

Bibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983) agree with Avila that the legislature has no power to promulgate rules of procedure in derogation of this Court's exclusive authority under the Florida Constitution. In Markert a procedural statute was struck down; in Van Bibber and Florida Wildlife substantive statutes were upheld. Likewise, in Caloosa Property Owners Association Inc. v. Palm Beach County, 429 So.2d 1260 (Fla. 1st DCA 1983) the court recognized the authority of Avila on the issue of the legislature's lack of power in the area of procedure, but upheld a statute as substantive because it created a new cause of action. The statute in issue here does no such thing.

Rather, the statute here is almost identical to the statute which this Court held unconstitutional in Avila. The portion of the statute relied upon by the trial court here provides, inter alia:

> "If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action."

The statute struck down in Avila provided inter alia.

> "In any case in which the association has the authority and the power to maintain a class action, the association may be joined in an action as representatives of that same class with reference to litigation and disputes involving the matters for which the association could bring a class action.

It is disingenuous for Lanca and L. C. to argue there is any substantial difference between these two statutes.

Thus, the District Court of Appeal properly ruled the trial court's order was a clear departure from the essential requirements of law and that Lanca is not authorized to act as representative of the tenants of the Park in this or any other suit.

II. THE COURT SHOULD NOT ENTERTAIN A PETITION FOR THE PROMULGATION OF A NEW RULE OF CIVIL PROCEDURE IN THIS PROCEEDING.

Since the decision in Avila, this Court has promulgated specific rules of procedure for amending the Florida Rules of Civil Procedure. Fla. R. Jud. Admin., Rule 2.130. Those rules call for rule proposals and amendment proposals to be referred to committees of the Florida Bar for consideration, vote and reporting once every four years, except in "emergencies". Id. The facts presented in the record of this case establish no such "emergency". Unlike the situation in Avila, the legislative history of the challenged statute does not reveal a legislative determination of an emergency. Moreover, the parties to this appeal, even giving all due respect to amici FMO and FMHA do not adequately represent all of the interests affected by rules of civil procedure generally nor this rule in particular. See, e.g., Fla. R. Jud. Admin. 2.130(b)(4).

Appellants and FMO's protestations to the contrary notwithstanding, Park Owner submits full consideration pursuant to Rule 2.130 would show that tenants of mobile home parks are

not situated sufficiently differently from tenants of apartments or owners of residences in planned unit developments to justify a separate rule of civil procedure authorizing mobile home park tenant homeowner associations to be "class representatives", but not permitting apartment house tenant associations or P.U.D. property owners associations to do the same. Yet, as recently as 1986 this court has reaffirmed its longstanding position that such entities have no such authority. Tortoise Island Committee Inc. v. The Moorings Association, Inc., 489 So.2d 22 (Fla. 1986) adopting dissent of Cowart, J., 460 So.2d 961 (Fla. 5th DCA 1984) at 973. See, also, Stabinski v. Pirelli Tire Corp., 371 So.2d 679 (Fla. 3d DCA 1979). There is no good reason to retreat from that longstanding position now.

Indeed this case is an excellent example of the mischief which would result from such a change. As things now stand, a procedure is available for any individual tenant of the Park to obtain redress for grievances. Section 723.063, Fla. Stat. (1987). This procedure permits any aggrieved mobile home park tenant to give the Park Owner written notice of material noncompliance with Chapter 723, and, if the condition is not corrected, to withhold rent, defend against eviction, and collect attorneys fees if he's right. Id; Section. §723.068 F.S. If, however, it is determined later by a court that the tenant was wrong, the tenant is financially responsible for the Park Owner's attorneys fees, costs and damages. Section 723.068, Fla. Stat. (1987); Section 57.041, Fla. Stat. (1987);

Fla. R. Civ. P. 1.420(d). Further, if the tenant fails to pay such damages, attorneys fees and costs, the tenant is subject to eviction. Section 723.062, Fla. Stat. (1987).

This balancing of risks and financial responsibility clearly is designed to, at the same time, protect tenants from material violation of their rights and to deter tenants from frivolous litigation, while forcing park owners to be reasonable in dealing with tenant complaints. This balance would be destroyed if a "homeowner association" like Lanca were permitted to "represent" the tenants.

Lanca is not a tenant, so it can't be evicted. Lanca has no means of raising money other than "passing the hat", so it can't pay damages, attorneys fees or costs if it brings a suit and loses. Lanca has never held an election of officers or directors, so there is no way to judge whether it is truly representative of tenants. In fact, the record below quite clearly shows it is <u>not.</u>

There is no reason to speculate that any other mobile home park tenant "homeowners association" would be any different, until it acquires a park and converts it to condominium or cooperative ownership as permitted by Sections 723.073, and .077, Fla. Stat. (1985). This is so because, until such an acquisition and conversion happens, the tenants have no meaningful financial stake in the entity and the entity has no meaningful way of collecting the "assessments" which it is permitted to make by Section 723.079(3). Before such a

conversion, instead of a fee simple estate in a condominium or lot, the tenant has only a short term rental estate to which the association can look for collection of assessments. Under these circumstances, human nature predicts the tenants purportedly represented will have no substantial commitment to such an entity.

Finally, on this point, Park Owner would note that the very cases cited by Lanca, L. C. and FMO demonstrate that no new rule is needed. It is apparent from the decision in both Lemon v. Aspen Emerald Lake Associates, Ltd., 446 So.2d 177 (Fla. 5th DCA 1984) and Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986) that, where the facts warrant class actions by mobile home park tenants, such action can be brought with individual tenants as class representatives. It is likewise apparent that relief of the sort sought here can be obtained in suits wherein all interested and similarly situated tenants are joined as plaintiffs. See, e.g., Jones v. Thomas, 16 Fla.Supp.2d 30 (Ninth Cir., 1986); Offner v. Keller Park Investor, I, Ltd., 19 Fla.Supp.2d 140 (Sixth Cir., 1986); Fredricks v. Hoffman, 45 Fla.Supp. 44 (Twelfth Cir., 1976). In this case, the tenants of the Park could have followed either of these approaches, but did not. Instead Lanca and L.C., without authority, launched this suit. This Court should not reward such behavior by promulgating an emergency rule to justify it.

III. THE DISTRICT COURT OF APPEAL ERRONEOUSLY AFFIRMED THE TRIAL COURT'S RULING THAT PARTS OF THE COUNTERCOMPLAINT WERE MAINTAINABLE AS A CLASS ACTION.

An appellate court loses jurisdiction of an appeal when the issues become moot, unless the questions raised are of great public importance or are likely to recur. Cf. Holly v. Auld, 450 So.2d 217 (Fla. 1984) at 218, n.1. In this case, therefore, when it decided Lanca could not be the class representative of the tenants of the Park at the trial court level the district court lost jurisdiction to decide that "the counterclaim, except for the specified portion, could be maintained as a class action." Lantana Cascade, supra, at 1075.

To reach this conclusion, reference need only be made to the counterclaim itself and Fla. R. Civ. P. Rule 1.110(b)(2). The counterclaim [App. 70-113] had two plaintiffs -- Lanca and L. C. -- but no allegation as to how either was, itself, injured. As the district court held, Lanca could not be the class representative of the tenants of the Park, because it was not a member of the class and no properly promulgated rule of this Court would permit it to so act. Lantana Cascade, supra, at 1075. The record clearly shows L. C. to be afflicted with the same infirmities as Lanca in this regard. Thus, the counterclaim cannot possibly show that "the pleader is entitled to relief." That being the case, the district court's decision that Lanca could not represent the tenants mandated dismissal

of the counterclaim and rendered moot, abstract, or hypothetical any issues relating solely to its sufficiency otherwise. Therefore, the district court erred by addressing the maintainability of the counterclaim as a class action at all.

Even worse, however, the district court wrongly decided this issue.

This Court has clearly and repeatedly held that where the claims of potential class members necessarily depend on their own particular facts, the claims are not amenable to class suit. See, e.g., Tortoise Island Communities, supra, 460 So. 2d at 973-74; Osceola Groves, Inc. v. Wiley, 78 So.2d 700 (Fla. 1955) at 702-03. This principal has been followed in cases involving, as here, claims of tenants based upon alleged omissions or non-compliances by their landlord, K. D. Lewis Enterprises, Inc. v. Smith, 445 So.2d 1032 (Fla. 5th DCA 1982); and claims of breaches of good faith and unconscionable rent increases by a mobile home park owner, State v. DeAnza, 416 So. 2d 1173 (Fla. 5th DCA 1982). Moreover, several courts have seriously questioned whether suits alleging unconscionability -- requiring the coalescence of both "procedural" and "substantive" unconscionability -- can ever be brought as class actions. Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985); Maner Properties, Inc. v. Siksay, 489 So.2d 842 (Fla. 4th DCA 1986); Kohl v. Bay Colony Condominium Assn., Inc., 398 So.2d 865 (Fla. 4th DCA 1981).

Against this legal background, and the uncontradicted evidence at the trial court of the widely varying circumstances, claims, and interests of the tenants, Park Owner submits the district court and the trial court were simply wrong in saying any part of the counterclaim was amenable to class prosecution. App. 6-69, 156-378.

The "Counter-Complaint" contains three counts, as follows:

1. Count I. A claim that Appellants have violated the terms of a Consent Judgment entered July 25, 1975, in a case styled Mary O-Toole, et al. v. Lantana Cascade Mobile Home Park, et al., Civil Action No. 75-1257 CA (L) 01 D, in the Circuit Court for the Fifteenth Judicial Circuit of Florida. App. 72-75.

2. Count II. A claim that Appellants have violated various portions of the "Florida Mobile Home Act", Chapter 84-80, Laws of Florida 1984, Chapter 723, Fla. Stat. App. 77-82.

3. Count III. A claim that Appellants have imposed unconscionable, illegal, improper and unreasonable rental increases from September 1, 1980 through September 1, 1985. App. 77-82.

Under the Order on appeal here, the trial court has ruled that all of the above claims except those set forth in certain paragraphs of Exhibit C to the Counter-Complaint, may be prosecuted as a class action on behalf of all of the residents of the mobile home park. Appellants submit that the facts presented to the Court below compel the conclusion that, in this case, the three claims purportedly made on behalf of all residents of the mobile home park, cannot properly be maintained as a class action on behalf of all residents of the Park because those facts clearly demonstrate that all residents of the Park do not share the same interest in those claims.

As to Count I, which relates to the alleged breach of the alleged 1975 Consent Judgment (which, by the way, the evidence showed had been satisfied and released in 1977 [App. 147-49]) the proof was uncontradicted that not all tenants of the Park were plaintiffs in the case which resulted in the Consent Judgment and that not all tenants of the Park are beneficiaries of the Consent Judgment, (even assuming, arguendo, that it continues to have vitality despite its satisfaction and release). See, App. 97 ¶ 5, last sentence ["This stipulation and judgment shall be binding upon all the parties herein and shall be filed and recorded in the official records of Palm Beach County, Florida."] and App. 150-54, O'Toole. "List of Plaintiffs". Therefore, all tenants of the Park cannot have a common interest in the claims made in Count I.

As to Count II, the record contains no facts establishing that the tenants are similarly situated with respect to the alleged violations of the Florida Mobile Home Act. However, it is analytically evident that the tenants of the Park cannot be similarly situated with respect to the pleaded "violations", where some have moved in since the alleged violations occurred and some have moved within the Park since the alleged violations occurred. Those facts, of course, would give rise to a defense of waiver or estoppel as to those "class" members, which would not be available against the others. This circumstance argues against class prosecution. Osceola Groves, supra at 702-03. K. D. Lewis Enterprises, supra at 1034. Moreover, close examination of the so-called "statutory claims"

in Court II and the evidence offered to support them shows that the "statutory claims" are nothing more than the claims of individual disgruntlement which underly Counts I and III recast as purported "statutory claims". Compare App. 101 ¶11 with App. 103 ¶15; also, compare App. 74 ¶21 with App. 76 ¶¶32-34 and App. 78 ¶41. Thus, the same problems afflict Count II as afflict both Count I and Count III as to maintainability as a class action.

Finally, as to Count III relating to alleged "unconscionable rent increases", Exhibit C to the Counter Complaint (which is incorporated by reference into the Counter Complaint) shows that the Counter Complaint asserts "illegal, improper and unreasonable rental increases from September 1, 1980 through September 1, 1985". App. 103, ¶ 15. However, the testimony establishes that the tenants were not all residents of the Park from September 1, 1980 through September 1, 1985. See, App. 193, 220. Moreover, some tenants have moved within the park during the period from September 1, 1980 through September 1, 1985. See, App. 342. Likewise, some of the tenants have signed written leases, others have not. See, App. 159, 200. Some tenants live in the Park year round, while others do not. Appellants submit that these factual distinctions between the situations of the various tenants clearly establish that in this case, procedural unconscionability could not be proven for all tenants of the

Park simultaneously. See, e.g., Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1985) at 1327. In Garrett v. Janiewski, supra, another case in which mobile home park tenants sought to prove unconscionable rent, the district court of appeal held:

> We note in passing that there appears to be a serious question involved in the court's findings of procedural unconscionability because there is no evidence proving the circumstances of most of the tenants. We held in Kohl that the prerequisites for procedural unconscionability are too individualized to permit a class action. Further, as stated by the court in State v. DeAnza, 416 So.2d 1173, 1175 (Fla. 5th DCA 1982): "Procedural unconscionability relates to the individualized circumstances surrounding each contracting party at the time of contracting and cannot be established as a general proposition for a whole range of contracts merely containing similar terms between various persons."

Id., (emphasis added). In Garrett v. Janiewski, the district court of appeal reversed and remanded a trial court decision holding rentals to be unconscionable. Ironically, the judge who wrote the Order on appeal here concurred in the opinion of the district court of appeal in Garrett v. Janiewski, supra, in his former position as a judge of that court.

Based upon the foregoing, the Park Owner submits the decision below was erroneous insofar as it determined that the Counter-Complaint in this action based upon the facts in the record in this action is amenable to class prosecution.

CONCLUSION

Based upon Article V, Section 3, of the Florida Constitution as interpreted in Avila, the Court should affirm the district court's holdings that Section 723.079(1) Fla. Stat. (1985) except its its first two sentences is an unconstitutional incursion by the legislature into this court's exclusive rule making power and that Lanca cannot be the class representative of the tenants of the Park under Fla. R. Civ. P. Rule 1.220 because it is not a member of the class.

In deference to the Florida Rules of Judicial Administration, since there is no "emergency" established by either the record in this case or the legislative history of The Florida Mobile Home Act, the Court should refer Appellants proposal for a new or amended class action rule to the Civil Procedure Rules Committee of the Florida Bar to be dealt with in the ordinary course.

Because the district court's ruling as to Lanca's lack of authority to represent the tenants of the Park renders the counterclaim a nullity, this Court should quash that portion of the district court's opinion which holds the counterclaim to be, in part, maintainable as a class action. In the alternative, this court should reverse that portion of the district court's decision because the uncontradicted evidence shows the situations of the alleged class members to be too dissimilar to be prosecuted in a class action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael B. Small, Esq., Paramount Center, 139 North County Road, Palm Beach, Florida 33480; Douglas B. Beattie, Esq., 250 North Orange Avenue, Suite 500, Orlando, Florida 32801 and David D. Eastman, Esq., David D. Eastman, Esq., P. O. Box 669, Tallahassee, Florida 32302 this 28th day of March, 1988.

Edward A Marod
EDWARD A. MAROD, ESQ.

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