IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

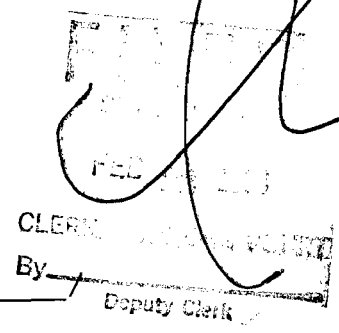
Appellants,

vs.

LANTANA CASCADE OF PALM BEACH, LTD., a Florida limited partnership, and JAMES A. SMITH, as general partner, EDWARD F. HARRIS, as general partner, and RICHARD S. WOLFSON, as general partner.

Appellees.

CASE NO. 71,767
DCA-4 NO. 87-0315



INITIAL BRIEF OF APPELLANTS

SMALL & BERRIS
MICHAEL B. SMALL, ESQ.
Attorneys for the Appellants
Florida Bar No. 074872
Paramount Center
139 North County Road
Palm Beach, Florida 33480

REVISED
TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellants re-adopt and incorporate their Statement of the Case and Statement of Facts from Appellants Initial Brief. Appellees have filed an Answer Brief containing Point III of Argument on Appellees' Cross Appeal.

Appellants reply to Appellees Answer Brief and answer the Cross Appeal in this Brief. The Cross Appeal challenges the trial court's Order certifying the Countercomplaint as a class action, which was affirmed by the district court.

Appellants seek reversal of that portion of the Fourth District Court of Appeals decision, declaring F.S. 723.079 (1) unconstitutional, and to affirm that portion, which affirmed the certification of the class action.

SUMMARY OF THE ARGUMENT

Appellants (mobile home park tenant association) argue that Appellees (mobile home park ownership and management) interlocutory appeal from a non-final trial court Order appointing a class representative and certifying the class was premature. The Fourth District Court of Appeals apparently rejected this argument, without any specific reference to it, but merely mentioning Maner Properties, Inc., v. Siksay, 489 So2d 842 (FL-4th DCA-1986) as affording jurisdiction.

Appellants further argue that Section 723.079(1) FS is constitutional, as determined by the trial court. However, the Fourth District Court of Appeals declared the statute to be unconstitutional in accordance with Avila South Condominium

Association, Inc., v. Kappa Corporation, 347 So2d 599 (FL-1976). Appellants respectfully submit to this honorable court that the condominium statute which was found to be unconstitutional in the Avila case, can be distinguished from the mobile home statute in the instant case, in that the condo association statute gave absolute authority to the condo association to maintain a class action on behalf of the unit owners. In the mobile home statute, the mobile homeowners association is authorized to maintain a class action only if it has the authority pursuant to the provisions FRCP 1.220; in essence, making the mobile home statute substantive and therefore constitutional. The appellants argue, in addition, that the enactment of the mobile home statute created a new cause of action and therefore, likewise is substantive. Finally, in the alternative, this court is asked to consider that the statute is constitutional because it is remedial in nature, affording mobile homeowners and their associations a remedy for a wrong, where none has previously existed. For these reasons, appellants will argue that Section 723.079(1), FS is constitutional.

In the alternative, appellants argue that this Supreme Court should adopt the substance of Section 723.079(1), FS, as a rule of procedure by either amending Rule 1.220 or Rule 1.221, Florida Rules of Civil Procedure, as this court did in Avila South Condominium Association v. Kappa Corporation, ibid. Appellants respectfully submit to this court that the issues are every bit as important to the hundreds of thousands of mobile home owners in the State of Florida as they were to the hundreds of thousands

of condominium home owners in the State of Florida, when this court adopted the rule in the Avila case. Mobile homeowners occupy a unique relationship with park ownership and management, which has been termed to result from a grossly unequal bargaining position. As this court recognized in Stewart v. Green, supra, mobile homes, simply aren't "mobile" once a mobile homeowner "cements" his mobile home onto a lot in a mobile home park.

In response to appellees cross appeal, wherein appellees seek to reverse the Order of the trial court and the affirmance of the Fourth District Court of Appeals in certifying the class action alleged in the appellants counter complaint, appellants respond that an evidentiary hearing was conducted and based upon the evidence submitted, the trial court, later affirmed by the Fourth District Court of Appeals, certified that the counter complaint states a valid cause of action for class action relief. Admittedly, such a determination, necessarily depends on the facts of each case. Appellants respectfully contend that their counter complaint validly states a class action based upon the basic concept of procedural unconscionability, recognizing "an absence of meaningful choice." Once again, as has long been recognized by this court, the tenants can not simply pick up and move without incurring substantial cost and expense. The appellants request that this honorable Supreme Court affirm the decision of the lower court and the Fourth District Court of Appeals on this point.

and as to that portion which declared that Lanca could not represent the class.

STATEMENT OF FACTS

According to the "Order" of the lower court under date of January 3, 1987, which was issued by the Honorable Daniel Hurley, Palm Beach County Circuit Court Judge, following an evidentiary hearing on December 23, 1986, the following determinations were made:

a) Lance Homeowners, Inc., (Lanca) is a Florida not for profit corporation formed in 1985 pursuant to the provisions of Section 723.075, Florida Statutes;

b) Three hundred forty-four (344) of the four hundred sixty-one (461) mobile homeowners (tenants) in the Lantana Cascade Mobile Home Park have consented in writing to become members of Lanca;

c) The "Order" then goes on to find, as a matter of law, that except for certain specific allegations which may not be prosecuted by way of a class action, the balance of the three count Countercomplaint may be prosecuted as a class action;

d) The testimony at the hearing of Elizabeth Cheeseman, the Secretary of Lanca, established that the decision to form Lanca was participated in by the residents of the park at a meeting of the residents. At that meeting, a vote was taken to form the new corporation. (Tr, page 22 through 24, Tab 5);

e) Following the meeting of the park residents, a form was prepared and was signed by 314 residents (please note 314 divided by 461 equals 68%, in excess of the 2/3 required by

statute). (Tr, page 24 through 26, Tab 5);

f) Thereafter, Lanca made an effort to confirm or to ratify the approval of the residents and in so doing, determined that 344 confirmed membership by signing the membership roster. (Tr, page 26 through 28, Tab 5);

g) In addition to the statutory representation of over two-thirds (2/3), the park ownership (petitioners) requested the formation of Lanca Homeowners, Inc., in compliance with the provisions of Section 723.057, Florida Statutes. (Tr, page 24, line 14, through page 25, line 7, Tab 5);

h) After the suggestion or direction of the park's ownership (petitioners) to have Lanca formed, and subsequent to Lanca's formation with a membership in excess of two-thirds (2/3) of the lot owners in the Lantana Cascade Mobile Home Park, the park ownership (petitioners) dealt and negotiated with Lanca in its representative capacity on a regular basis. (Tr, page 31, line 13, through page 34, line 8, Tab 5);

i) The services afforded, facilities and common areas available, and amenities provided for the tenants, within the park, are available to all tenants equally and of the same type and of the same nature. (Tr, page 34, line 9, through page 38, line 15, Tab 5).

The Fourth District Court of Appeals of the State of Florida rendered a decision on December 16, 1987, partially affirming the lower court's Order finding that a cause of action for class action relief had been stated in the Countercomplaint of the

tenants, but partially reversed as to that portion of the lower court's Order which declared Lanca, Inc., (the homeowners association) to be qualified and authorized to represent the class of tenants in the mobile home park, because Lance, Inc., was not a tenant and did not own, nor rent a mobile home in the mobile home park. The Fourth District Court of Appeals also declared that Section 723.079(1), Florida Statutes, was unconstitutional because it authorized a homeowners association to bring class action lawsuits in behalf of the tenants.

The appellants have appealed that portion of the decision of the Fourth District Court of Appeals which reversed the lower court's Order.

The issues, therefore, for this Supreme Court to determine are:

1. Whether Lanca Homeowners, Inc., which is a homeowners association (corporation) can be the class representative for the tenants in prosecuting the Countercomplaint;

2. Whether Section 723.079 (1), Florida Statutes, is constitutional.

The lower trial court in entering its Order of January 3, 1987, answered "yes" to both issues. The Fourth District Court of Appeals said "no". The appellants submit that the answer is "yes" to both issues and seek the affirmance of the lower trial court's January 3, 1987, Order.

In the alternative, the appellants respectfully request

that the Supreme Court concurrently formulate a rule, similar to Rule 1.220 or 1.221, Florida Rules of Civil Procedure, or amend the existing rules, as this Supreme Court did in the Avila South Condominium Association vs. Kappa Corporation, 347 So.2nd 599 (Fla. 1976) case, incorporating the substantive portions of the invalidated statute.

ARGUMENT POINT I

WHETHER SECTION 723.079(1), FLORIDA STATUTES IS CONSTITUTIONAL

The Fourth District Court of Appeals of the State of Florida in its December 16, 1987 decision in this case, found that "the language used in Section 723.079(1), Florida Statutes, which purports to give Lanca the authority to act as a class representative, has been struck down as unconstitutional in that it usurps the Florida Supreme Court's rule making authority". Lantana Cascade of Palm Beach vs. Lanca Homeowners, Inc., ____ So.2nd ____ (Fla. 4th DCA-1987; Case No. 87-0315, rendered on December 16, 1987; copy furnished for easy reference in Appendix (A-1).

That trial court had specifically found Section 723.079(1), Florida Statutes, created "a substantive grant of authority" for the mobile homeowners association to carry through with a representative concept that started with negotiations, mediation and finally litigation in behalf of the mobile homeowners. A process was created for the specific purpose of providing substantive authority to the duly created and authorized mobile homeowners association to act in behalf of the mobile homeowners within a mobile home park to resolve disputes of common interest within the park, including filing a class action in the final analysis, if all else fails. Appellants respectfully submit that the trial court was correct and that the Fourth District Court of Appeals' finding of unconstitutionality was incorrect.

Appellants reiterate their challenge to the jurisdiction of the Fourth District Court of Appeals to have taken up and considered the appeal of the interlocutory order of the trial court. Rule 9.130, Florida Rules of Appellate Procedure. In Atreco-Florida, Inc. vs. Berliner, 360 So.2nd 784 (Fla. 3rd DCA 1978), cert. den. 366 So.2nd 879, the appellate court held that "an order certifying a class action was an 'interlocutory' order from which no appeal could be taken". The Fourth District Court of Appeals apparently rejected this argument in the instant case, because it went on to decide the constitutionality of the statute (Section 723.079(1), Florida Statutes) with only a mention of Maner Properties, Inc. vs. Siksay, 489 So.2nd 842 (Fla. 4th DCA 1986) as affording jurisdiction. Appellants contend to the contrary.

Assuming, arguendo, that the Fourth District Court of Appeals had jurisdiction, appellants contend that the Florida Constitution empowers the Supreme Court to promulgate rules of practice and procedure for the courts of this state. Fla. Const. Art. V, Section 2(a). The Supreme Court found that its rule making power was exclusive and concluded that although the Florida Legislature could repeal procedural rules, it had "no constitutional authority to enact any law relating to practice and procedure". See In re: Clarification of Florida Rules of Practice & Procedure, 281 So.2nd 204 (Fla. 1973). The Supreme Court's interpretation of its procedural rule making power is in conflict with the democratic principle underlying the Florida

Constitution's assignment of the primary role in the determination of public policy to the legislative branch of Florida government. See Means, The Power to Regulate Practice and Procedure in Florida Courts, 32 U. Fla. L. Rev. 442 (1980). The policy issues appropriate to legislative determination exist within both procedural rules and substantive laws. Id. at 477. The exclusivity claimed in the area of practice and procedure by the Supreme Court has effectively undermined the democratic principle by usurping legislative participation in the policy issue determinations inherent in the promulgation of procedural rules. Id. The cited work declares, "[I]t is utterly hopeless to attempt to reconcile any notion of an exclusive judicial rule making authority with generally accepted tenets of democracy". Id. It concludes that the promulgation of procedural rules lies within the legitimate legislative authority of the Florida Legislature. Id. at 485. Thus, assuming arguendo that Section 723.079(1), Florida Statutes (1985), is procedural in nature, the appellee's argument that it is an unconstitutional invasion of the exclusive rule making power of the Supreme Court must be rejected.

Further, the cited work is especially persuasive when considered in the instant issue. The Supreme Court has recognized and discussed the unique relationship that exists between a mobile homeowner and a park owner and the policy determinations which have been made by the legislature in enacting protections for the mobile homeowner. See e.g. Stewart

vs. Green, 300 So.2nd 889 (Fla. 1974); Lemon vs. Aspen Emerald Lakes Associates, Ltd., 446 So.2nd 177, 180-181 f.n. 2 (Fla. 5th DCA 1984). If Section 723.079(1), Florida Statutes (1985), is held to be unconstitutional, the public policies clearly established and intended by the Florida Legislature would be vitiated.

The Appellees incorrectly suggest that the Supreme Court's decision in Avila South Condominium Association, Inc., vs. Kappa Corp., 347 So.2nd 599 (Fla. 1976), is dispositive of the instant issue. In Avila, Section 711.12(2), Florida Statutes (1975), was found to be unconstitutional, in part, as it was procedural and sought "to define the proper parties in suits litigating substantive rights". Id. at 608. The distinction between procedural and substantive rights is neither simple nor certain. "The entire area of substance and procedure may be described as a 'twilight zone' and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made." In re Florida Rules of Criminal Procedure, 272 So.2nd 65, 66 (Fla. 1972) (concurring opinion of Atkins, J.).

The language and clear intent of Section 723.079(1), Florida Statutes (1985), is distinguishable from the condominium statute in Avila, supra. The condominium statute provided in pertinent part:

> The association, whether or not incorporated, shall be an entity which shall act through its officers and shall have the capability of contracting, bringing suit, and being sued

> with respect to the exercise or non-exercise of its powers. For these purposes, the powers of the association shall include, but not be limited to, the maintenance, management, and operation of the condominium property. When the board of administration is not controlled by the developer, the association shall have authority and the power to maintain a class action and to settle a cause of action on behalf of unit owners of a condominium with reference to matters of common interest, including, but not limited to, the common elements, the roof and structural components of a building or other improvement, and mechanical, electrical, and plumbing elements serving an improvement or a building, as distinguished from mechanical elements serving only a unit. 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. If not incorporated, the association shall be deemed to be an entity existing pursuant to this act and shall have power to execute contracts, deeds, mortgages, leases and other instruments by its officers, and to loan, convey, and encumber real and personal property. Service of process upon the association, if not incorporated, may be had by serving any officer of the association or by serving the agent designated for the service of process. Service of process upon the association shall not constitute service of process upon any unit owner. Nothing herein shall limit any statutory or common law right or any individual unit owner or class of unit owners to bring any action which may otherwise be available in any court. (Emphasis supplied.) Section 711.12(2), Florida Statutes (1975).

The foregoing language attempted to give the condominium association absolute authority to maintain a class action on behalf of unit owners once the Board was not controlled by the developer. Section 723.079(1), Florida Statutes (1985), however, attempts no such absolute grant of standing to the association.

Rather, it provides:

> An association may contract, sue, or be sued with respect to the exercise or non-exercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the park property. The association may institute, maintain, settle or appeal actions or hearings in its name on behalf of all homeowners concerning matters of common interest, including but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. 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. Nothing herein limits any statutory or common-law right of any individual homeowner or class of homeowners to bring any action which may otherwise be available. (Emphasis supplied.)

As the trial judge correctly held, the instant statute defers to the requirement of Fla. R. Civ. P. 1.220 by providing that the association can maintain a class action only if it "has the authority to maintain a class action", i.e. if it satisfies the requirements of the rule of procedure.

The differences between the instant statute and the condominium statute in Avila, supra, can be perhaps best illustrated by reviewing the Supreme Court's decisions in Markert vs. Johnston, 367 So.2nd 1003 (Fla. 1978) and Van Bibber vs. Hartford Accident & Indemnity Insurance Co., 439 So.2nd 880 (Fla. 1983). In Markert, the Supreme Court found that Section 627.7262, Florida Statutes (1977), was procedural and held it

unconstitutional for invading the court's exclusive rule making authority. 367 So.2nd at 1006. Subsequently, the legislature amended the statute. In Van Bibber, the issue before the Supreme Court was whether Section 627.7262, Florida Statutes (Supp. 1982) was unconstitutional. The new statute required that a condition precedent be satisfied before one would have a third party interest in an insurance policy and authorized a contractual provision prohibiting direct third party actions. The predecessor statute did not contain these provisions. 439 So.2nd at 882, 883. The Supreme Court found that the foregoing differences existing between the two statutes made the new statute substantive in nature and therefore, constitutional. 439 So.2nd at 883. In the instant statute, the deference to Fla. R. Civ. P. 1.220, in effect, establishes a condition precedent to the association maintaining a class action on behalf of all mobile homeowners concerning matters of common interest. Appellants respectfully suggest that the differences between the instant statute and the condominium statute which was held unconstitutional in Avila, supra, are substantial and make the instant statute substantive and therefore, constitutional.

In addition, if the legislature, by enacting a statute, creates a new cause of action, the statute is substantive law. See e.g., Florida Wildlife Federation vs. State, etc., 390 So.2nd 64 (Fla. 1980). The instant statute effective June 4, 1984, sets out substantive rights by giving the association the capacity to protect the individual homeowners in the matters of common

interest. There is no question that Chapter 723, Florida Statutes (1985), gives the mobile homeowners and the association new rights and causes of action, including without limitation, the requirement of the park owner to provide a prospectus or disclosure statement to the mobile homeowners under Section 723.011; the right of the mobile homeowners to compensation when evicted under Section 723.061; the requirements of lot rental agreements for the protection of the mobile homeowners under Section 723.031; the right of the mobile homeowners to purchase the mobile home park under Section 723.071; and the requirements of mediation or arbitration as a condition precedent to filing suit in state court under Section 723.037. Further, legislative designation of the individuals or entities having standing in litigation is not "ipso facto" procedural in nature and therefore, unconstitutional as a violation of the separation of powers. See e.g., Caloosa Property Owners Association, Inc., vs. Palm Beach County Bd. of County Commissioners, 429 So.2nd 1260 (Fla. 1st DCA 1983). The appellate court, in Caloosa, observed that "[p]art of the process of designing a new cause of action includes delineation of who has standing". Id. at 1267. The grant of authority to the association to act as representative of the class of individual mobile homeowners as a matter of law is proper and a necessary part of the new substantive rights given by the legislature.

In the alternative, in order to give effect to the clear intent of the legislature in enacting Section 723.079(1), Florida

Statutes (1985), appellants respectfully contend that the statute is remedial in nature and therefore, constitutional as written. A remedial statute is defined as one "giving a party a mode of remedy for a wrong, where he had none, or a different one, before". Black's Law Dictionary, 5th Ed., 1979. A remedial statute designed to protect the substantive rights of litigants is not a legislative intrusion into the rule making province of the judiciary. See e.g., Adams vs. Wright, 403 So.2nd 391 (Fla. 1981). In the instant case, the legislature clearly intended to unite common goals in obtaining relief by declaring the association members to be a class insofar as the common elements are concerned and designate the association as the appropriate class representative as a matter of law. This Court's persuasive reasoning in Imperial Towers Condominium, Inc., vs. Brown, 338 So.2nd 1081 (Fla. 4th DCA 1976), seems especially applicable to the instant statute. Section 723.079(1), Florida Statutes (1985) provides the individual mobile homeowner with an alternate means or manner of redress against the park owner and is constitutional.

Appellants respectfully submit that the portion of the Fourth District Court of Appeals' decision finding Section 723.079(1), Florida Statutes, to be unconstitutional should be reversed.

POINT II

WHETHER, IN THE ALTERNATIVE, THE SUPREME COURT SHOULD ADOPT THE SUBSTANCE OF SECTION 723.079(1), FLORIDA STATUTES, AS A RULE OF PROCEDURE BY AMENDING RULE 1.220 or Rule 1.221, FL.R.CIV.P.

A basic precept to deciding the constitutionality of a statute is that if the statute can be construed to be constitutional, it should be. See Falco vs. State, 407 So.2nd 203 (Fla. 1981). The foregoing discussion clearly establishes that Section 723.079(1), Florida Statutes (1985), is constitutional as enacted. In the instant case, the trial judge correctly found that the grant of authority contained in the statute was substantive and the Order Certifying Class Action and Class Representative dated January 3, 1987, should be affirmed. The Fourth District Court of Appeals found to the contrary, in declaring that Section 723.079(1), Florida Statutes, constitutes an unconstitutional incursion by the legislature into the rule making powers of the Supreme Court.

Appellants, however, recognize the difficulties and complexities of the issue before the Court and respectfully suggest that there can be no question, but that the constitutionality of the instant statute is of great public importance and will have a great effect on the proper administration of justice throughout the state. In Avila, supra, the Supreme Court, although holding the condominium statute to be an unconstitutional invasion of its rule making power,

concurrently amended Fla. R. Civ. P. 1.220 to provide that as to controversies affecting the matters of common interest a condominium association would represent a class composed of its members as a matter of law. The wisdom of providing a vehicle for settlement of disputes affecting mobile homeowners concerning matters of common interest as set forth in the instant statute deserves the attention of this Supreme Court.

Appellants respectfully request that in the event that this court follows the philosophy of the ruling in Avila South, supra, and declare Section 723.079(1), Florida Statutes, to be unconstitutional, that the Supreme Court recognize "the wisdom of providing a procedural vehicle for settlement of disputes affecting.." mobile homeowners, "concerning matters of common interest" Avila South Condominium Association, Inc., vs. Kappa Corp., ibid, at page 608. Appellants' request that the Supreme Court adopt the substance of the invalidated statutory sections (723.079(1), Florida Statutes) as a rule of procedure by amending Fla. R. Civ. P. 1.220 or Rule 1,221, accordingly.

The lower trial court's confirmation of Lanca, Inc., as the tenant's class representative would then be affirmed.

POINT III

WHETHER LANCA HOMEOWNERS, INC., CAN BE AN APPROPRIATE CLASS REPRESENTATIVE

The appellees challenged the January 3, 1987, lower court Order certifying Lance Homeowners, Inc., as the class representative of the tenants, because Lance was not a member of the class. The appellants respectfully submit that the lower court Order should be affirmed. Lanca may not be a member of the class, but it is representative of the class and it can and will adequately represent the class.

Appellants suggest that Avila South Condominium Association vs. Kappa Corp., 347 So2nd 599 (Fla. 1976) prohibits the legislature from designating who can be a class representative and who can maintain a class action in a court of law. Appellees claim that Lanca Homeowners, Inc., or for that matter, any corporate or homeowners representative, which was not a tenant, would be foreclosed from being an appropriate class representative. Appellants argue that the recent amendments to Rule 1.220 and 1.221, Florida Rules of Civil Procedure and the provisions of Sections 723.075 and 723.079, Florida Statutes, specifically rebut the position of the appellees. A homeowners association may be capable of bringing unconscionability action. See, for example, Kohl vs. Bay Colony Condominium, Inc., 398 So.2nd 865 (Fla. 4th DCA 1981).

There is no question, but that the legislative intent of Chapter 723, Florida Statutes, was to create and allow for a

homeowners association representation much in the same manner with similar powers to the homeowners associations allowed for condominiums (Chapter 718) and cooperatives (Chapter 719). Why else would the statutory drafters make specific provision for inclusion of the homeowners association in the process leading up to and including litigation. Specific reference is made to Section 723.037, Florida Statutes, referring to "lot rental increases; reduction in services or utilities; . . ." Direct reference is made again in Section 723.037(2), Florida Statutes, that a committee not to exceed five in number is to be designated by a majority of the mobile homeowners, or <u>if a homeowners association has been formed, by the Board of Directors of the homeowners association.</u>

(Emphasis added.) The committee is required to meet with park owners to discuss challenges within 30 days after a rental increase. As an aside, this exact process was followed by the appellees and the appellants in this case, as was confirmed by Elizabeth Cheeseman in her testimony at the December 23, 1986, class certification hearing before the court. Thereafter, Section 723.037(3), Florida Statutes, requires that a majority of the members of the homeowners association, if one has been established, may then seek mediation. In Section 723.075(1), Florida Statutes, it is provided that, "upon incorporation and service of a notice described in Section 723.076, Florida Statutes, the association shall become the representative of the mobile homeowners in all matters relating to this chapter". As a

result, it is absolutely clear that it was the intent of the statutory drafters that the homeowners association, once formed, become the representative of the tenants in all matters involved in Chapter 723. It is respectfully submitted that the instant litigation before this court specifically involves numerous provisions of Chapter 723.

In addition to specifically providing that the homeowners association may act in a representative capacity of the tenants for all matters involving Chapter 723, Florida Statutes, the drafters then went on to specifically allow the homeowners association to, "contract, sue, or be sued" and further, "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 dispute involving the matters for which the association could bring a class action..." See Section 723.079, Florida Statutes.

In implementing the statutory provision, administrative rules were adopted, approved and remain valid, having overcome challenge, to this date. Section 7D-32.01(3), F.A.C., defines "homeowners association" as a corporation for profit or not for profit, which is formed in accordance with Section 723.075, Florida Statutes. "Homeowners committee" is defined as a committee not to exceed five (5) persons designated by the board of directors of the association, if a homeowners association has been formed, for the purpose of meeting with the park owner to discuss lot rental increases, decreases in services or utilities.

Section 7D-32.04 specifically establishes the meeting between the park owner and the homeowners committee, which committee was formed by the homeowners association.

It is particularly ironic that the appellees in this action, who have recognized the appellant, Lanca Homeowners, Inc., in the mediation proceedings leading up to this litigation, now challenge Lanca as to its ability to represent the tenants within the park pertaining to the lot rentals and services in this litigation. Although the appellees have had the opportunity to challenge the rules of the Division such as in the instance of their overall lobby, the Florida Manufactured Housing Association, Inc. vs. Division of Florida Land Sales, Condominiums and Mobile Homes and Federation of Mobile Homeowners, Inc., D.O.A.H. case no: 85-3858R and 85-3859R, their challenge to 7D-32.01 and 7D-32.02, F.A.C. which included the definitions and provisions for meeting with the park owner to discuss lot rental increases and decreases, was unsuccessful. The hearing examiner determined that the Florida Manufactured Housing Association "failed to prove the rules challenged were invalid". Florida Manufactured Housing filed a Notice of Appeal to the First District Court of Appeals in case no: BM4406, which is now pending. Likewise, the appellees could have requested a "declaratory statement pertaining to Chapter 23" from the "Division" as in the instance of, "In re: Paul W. Bird, Jr., at Westhaven Mobile Home Park under date of January 16, 1985. The Division concluded in the Westhaven Mobile Home Park case that

there was no homeowners association in the park. This declaratory statement case, cited for example, to inform this Supreme Court that the appellees in this case had other opportunities and other alternatives to challenge the certification of Lanca Homeowners, Inc., as a class representative, had they chosen to do so.

In the alternative, should this Supreme Court affirm the ruling of the Fourth District Court of Appeals in holding Section 723.079(1), Florida Statutes, unconstitutional, but concurrently adopt the statutory substance as an amendment to existing class action Florida Rules of Civil Procedure, Lanca, Inc., as the homeowners association, would be confirmed as the class representative.

CONCLUSION

Appellants respectfully submit that the trial court's Order of January 3, 1987, certifying the class and authorizing Lanca Homeowners, Inc., having qualified pursuant to Section 723.075 and 723.079, Florida Statutes, to represent the class, was correct. Appellants conclude that the Fourth District Court of Appeals did not have jurisdiction to consider the Order certifying the class; and further, that the Fourth District Court of Appeals was incorrect in declaring Section 723.079(1), Florida Statutes, to be unconstitutional and in declaring Lanca, Inc., to be an inappropriate class representative. In the alternative, appellants request that this Supreme Court recognize the wisdom of providing a vehicle for the resolution of disputes involving mobile home parks by incorporating the substantive portions of the invalidated statute (Florida Statute 723.079(1)) into a rule of civil procedure, by adopting a new rule, or by amending Rule 1.220 or Rule 1.221, Florida Rules of Civil Procedure.

Respectfully,

SMALL & BERRIS

by _____
MICHAEL B. SMALL, ESQ.
Attorneys for the Appellants
Florida Bar No. 074872
Paramount Center
139 North County Road
Palm Beach, Florida 33480
Tel. (305) 833-1100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to EDWARD MAROD, ESQ., 777 South Flagler Drive, West Palm Beach, Florida; DOUGLAS B. BEATTIE, ESQ., Suite 500, NCNB National Bank Building, Orlando, Florida 32801 and DAVID D. EASTMAN, ESQ., P. O. Box 669, Tallahassee, Florida 32302 this 19th day of February, 1988.

MICHAEL B. SMALL, ESQ.