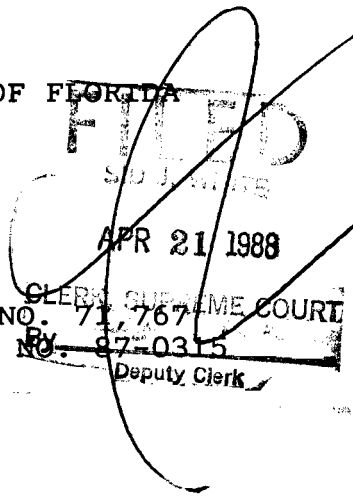
IN THE SUPREME COURT OF THE STATE OF FLORIDA



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

Appellants/Cross Appellees

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

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/Cross Appellants

_____/

REPLY BRIEF OF APPELLANTS/CROSS APPELLEES

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

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.

ARGUMENT POINT I

WHETHER SECTION 723.079(1), FLORIDA STATUTES IS CONSTITUTIONAL AND WHETHER LANCA HOMEOWNERS, INC., CAN BE AN APPROPRIATE CLASS REPRESENTATIVE

Appellees offered no new support for the Fourth District Court of Appeals decision in this case, in which the district court 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 v. Lanca Homeowners, Inc., 516 So2d 1074 (Fla. 4th DCA-1987).

The 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, prevalent throughout Chapter 723, Fl.Stats. 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.

Appellees failed to respond to appellants' challenge to the jurisdiction of the Fourth District Court of Appeals to have taken up and to have considered the appeal of the interlocutory order of the trial court. Rule 9.130, Florida Rules of Appellate Procedure. In Atreco-Florida, Inc. v. Berliner, 360 So2d 784 (Fla. 3rd DCA-1978), cert. den. 366 So2d 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. v. Siksay, 489 So2d 842 (Fla. 4th DCA-1986) as affording jurisdiction. Appellants contend to the contrary. Appellees make no argument in response.

Appellees argue to this court that appellants did not contest the power of the Supreme Court to promulgate rules of practice and procedure for the courts of this state in appellants' brief. Fla.Const.Art. V, Section 2(a). To the contrary, appellants respectfully submitted that 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.

The Appellees incorrectly suggest that the Supreme Court's decision in Avila South Condominium Association, Inc., v. Kappa Corp., 347 So2d 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 So2d 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 language in the condo statute 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", (emphasis added) i.e. if it satisfies the requirements of the rule of procedure. 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 v. State, etc., 390 So2d 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., v. Palm Beach County Bd. of County Commissioners, 429 So2d 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 v. Wright, 403 So2d 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. The district court's persuasive reasoning in Imperial Towers Condominium, Inc., v. Brown, 338 So2d 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.

ARGUMENT 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.

The appellees have taken the position in opposition to the alternative relief requested by the appellants, that no new or amended rule of civil procedure is needed. Appellees (Park Management) are of the belief that because "Lanca is not a tenant, so it can't be evicted" or because "Lanca has no means of raising money other than passing the hat," that as a mobile homeowners' association, it should be denied the right to represent its tenant members. Such a belief, of course, is totally contrary to the legislative intent recognized in Chapter 723, Florida Statutes, otherwise known as the Florida Mobile Home Law. Because of countless abuses in the past by park management and because of the undue leverage and lack of "meaningful choice," which mobile homeowners face throughout the State of Florida, the Florida Legislature determined that mobile homeowners needed an act or set of statutes to protect their interest similar to those statutes which protect the interest of cooperative and condominium owners in the state.

The Appellees, again, seriously suggest that because Lanca and any other mobile homeowners' association may not be collectible for the payment of damages, attorney fees or costs, that the association should not be permitted to act as a class representative (See page 13 of appellees' brief.)

Appellees then counter by taking a totally contradictory position to that which they vehemently argue in their cross appeal, that a new rule or amended rule of procedure is not needed, because individual unit owners (tenants) can be class representatives in litigation such as this litigation between Lantana Cascade and Lanca. Appellees cite several cases in which similar actions were brought as class actions with individual unit owners as the class representatives. However, in their cross appeal in Argument III, appellees are quick to point out that irrespective of those class actions, appellants should not be permitted to pursue their Countercomplaint for class action relief, which was approved by the trial court and affirmed by the appellate court.

Appellees then have the audacity to suggest that "this court should not reward such behavior by promulgating an emergency rule to justify it," referring to the tenants' purported failure to bring the class action in the name of tenant representatives. Appellees state, "Instead Lanca and, without authority, launched this suit." To the contrary, the suit, seeking declaratory relief, was launched by appellees (Park Management) as the plaintiffs in the lower court, seeking to declare whether Lanca was duly formed and could act as a class representative for the tenants in the Lantana Cascade Mobile Home Park. Lanca merely counterclaimed, following the verbatim wording of Florida Statute 723.079(1), and filed a Countercomplaint in behalf of the tenants of the Lantana Cascade Mobile Home Park. It is extremely

difficult to follow the logic of the appellees in wrongfully suggesting to this court that Lanca launched this suit, when in fact, it was placed in the posture of having to defend the action brought by the appellees (plaintiff), Lantana Cascade. It is also difficult to follow the logic of the appellees, when they suggest that Lanca should not be rewarded for such behavior, when in fact Lanca did not initiate the proceedings in the first place. Even if it did, what difference does it really make?

The appellees are fully aware, that in the event that this court affirms the decision of the district court in declaring F.S. 723.079(1)(to be unconstitutional, and does not promulgate a rule in the alternative, as this court did in Avila, that the tenants will amend their Countercomplaint and name individuals as representatives of the class--which is exactly the same thing as would have occurred in the instance of Avila if this court had not promulgated a rule, and allowed the intent of the condominium statute to be carried out through a rule of civil procedure, permitting a condominium association to act as a class representative in a class action.

This court has long recognized the unique relationship between the mobile home park owner and the mobile home lot tenant, as being different than the usual commercial or residential landlord/tenant relationship. In large part, it stems from the grossly unequal bargaining position of a mobile homeowner, once he "cements" his mobile home onto a lot in the mobile home park. It has long been accepted and recognized by this court, that the "mobile" as in mobile home, is in fact a

nullity, because the home is not mobile at all. Its wheels and hitch are removed. It is placed on a concrete base. It is tied down in accordance with state laws and it is joined with available electric, water, sewer, gas, telephone and cable television utility connections. Thereafter, it is commonplace that permanent attachments are added including cabanas, garages, porches, sheds and even additional rooms.

In Stewart v. Green, 300 So2d (Fla.-1974), this court upheld a statute limiting grounds for evictions in mobile home parks and stated:

> "Protection of mobile homeowners from grievous abuse by their landlords, or mobile home park owners was found by the legislature to be essential."
>
> "Often under modern conditions, there is no ready place for an evicted mobile home owner to go due to a shortage of mobile home spaces."
>
> "It is quite expensive to remove a home and relocate it because of the incidental cost of labor and materials and towing once the home has been 'cemented' onto a lot."
>
> "If mobile home park owners are allowed unregulated and uncontrolled power to evict mobile home tenants, a form of economic servitude ensues, rendering tenants subject to oppressive treatment in their relation with park owners and the latters' overriding economic advantage over tenant."
>
> "Separate and distinct mobile home laws are necessary to define the relationships to protect the interest of the persons involved."

No one should, therefore, be surprised, by the attitude and response of the appellees to the alternate suggestion, that the Supreme Court should promulgate a rule incorporating the provisions of F.S. 723.079(1) similar to the action of this court in Avila. The same abuses; the same attitudes;and the same evils

which this court found inimical to mobile homes fourteen years ago in Stewart v. Green, still are prevalent today.

Appellees worry about the collectability of the homeowners' association representing its tenant membership. Thank goodness that Mr. Justice Douglas didn't have similar concerns, when he opined in Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 186, 94 S.Ct. 2140 (1974):

> "The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."

Mobile homeowners throughout the State of Florida ask for just such consideration.

CROSS APPEAL
ARGUMENT POINT III

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

The cross/appellants (Park Management) suggest to this court, raising the issue for the first time, that when the Fourth District Court of Appeals declared F.S. 723.079(1), unconstitutional, that the Fourth District Court of Appeals should have dismissed the entire case, because the district court lost jurisdiction over the issue of the Countercomplaint. Without refutation, it is respectfully submitted that the cross/appellants (Park Management) never raised such an issue, either before the trial court of the district court. Certainly, the cross/appellants cannot argue, that even if this Supreme Court affirms the district court's decision in declaring F.S. 723.079(1) as being unconstitutional, that the Countercomplaint which has been affirmed as stating a valid cause of action for class relief, could not be amended as to the class representative, by naming one or more tenants in the Lantana Cascade Mobile Home Park as class representatives.

As to the merits of the cross appeal, the cross/appellants suggest to this court that the Countercomplaint cannot be maintained as class action because the members of the purported class are not similarly situated with respect to the claims made in the Countercomplaint. The lower court specifically found 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. The Fourth District Court of Appeals affirmed the trial court's January 3, 1987 Order.

The trial court conducted an evidentiary hearing on December 23, 1986. At that hearing Elizabeth Cheeseman, who was the Secretary of Lanca Homeowners, Inc., testified that the services afforded, facilities and common areas available and the amenities provided for the tenants within the park are available and accessible to all of the tenants equally and are of the same type and of the same nature. (Tr, page 34 line 9 through page 38, line 15, Tab5).

The cross/appellants acknowledge that the lower court correctly enunciated the requirements of Rule 1.220(a) and 1.220(d), F.R.C.P., with respect to conducting the evidentiary hearing on December 23, 1986, to determine the class representative. The cross/appellants do not contest the fact that the cross/appellees' Countercomplaint asserted the proper elements for class certification under Rule 1.220, F.R.C.P. Further, it cannot be disputed that, whether the instant case was properly determined to be a class action, necessarily depends on the facts of this case. See Watnick v. Florida Commercial Banks, Inc., 275 So2d 278 (Fla. 3rd DCA-1973).

The cases cited by the cross/appellants in support of their position regarding the certification of the class action in the instant case are either distinguishable from the instant case, or do not stand for the principals suggested by the

cross/appellants. The decision in K. D. Lewis Enterprises Corp. v. Smith, 445 So2d 1032 (Fla. 5th DCA-1984), is clearly distinguishable from the instant case. In K. D. Lewis, the tenants living in different apartments were attempting a class action for damages which admittedly differed from apartment to apartment, individual to individual. In the instant case, however the tenants have challenged the recent rental increase and the current level of rental in light or in consideration of the amenities, maintenance and services offered by the cross/appellants (Park Management) to all of the tenants (members of the cross/appellees' class).

The cross/appellants argue that procedural unconscionability cannot be proven in a class action and they erroneously cite Kohl v. Bay Colony Club Condominium, Inc., 398 So2d 865 (Fla. 4th DCA-1981) review denied, 408 So2d 1094 (Fla.-1981) in support of that position. In Kohl, the district court recognized that the details of each of the plaintiffs' experience and education may be relevant, but the district court identified the basic concept of procedural unconscionability, as "an absence of meaningful choice," at page 869 of the opinion. The district court in Kohl did not hold that the allegations regarding a class action in the Amended Complaint were "per se" insufficient. The decision, in fact, supports the proposition that although the proof may be more difficult, procedural unconscionability can be proven in a class action case.

Procedural unconscionability is a technical, and not always a clearly defined requirement for the common law cause of action relating to relief from owners' contract terms. As the court stated in Kohl, that doctrine does not necessarily apply to statutory causes of action, like this one. Furthermore, procedural unconscionability may be established in a class action context, where the circumstance of each member of the class demonstrate "the absence of meaningful choice" on the part of each member. It should not be necessary to delve into the individual circumstances of each tenant in the Lantana Cascade Mobile Home Park, where the meaningfulness of the choices were negated by a gross inequality of bargaining power. In the Lantana Cascade Mobile Home Park, each mobile home lot renter who when faced with an outrageous and unconscionable demand for increased rent, had no "meaningful choice" due to their common circumstances, Kohl, 398 So2d at 689. The tenants cannot freely move out of the park because their mobile homes are not truly "mobile." To avoid the enormous expense and disruption of moving, they are forced to pay the unconscionable rent.

The cross/appellants relied upon State of Florida v. DeAnza Corp., 416 So2d 1173 (Fla. 5th DCA-1982). Their reliance is misplaced because the DeAnza decision does not hold that mobile homeowners cannot meet the requirements in a class action under Rule 1.220, F.R.C.P. When, as in the instant case, all of the tenants had been charged the same unconscionable rent for the same amenities, maintenance and services, procedural

unconscionability exists because they have "no meaningful choice." See also, Stewart v. Green, 300 So2d 889 (Fla. 1974); Palm Beach Mobile Homes, Inc., v. Strong, 300 So2d 881 (Fla. 1974). This Supreme Court "almost as a matter of law" recognized that a mobile homeowner shows procedural unconscionability because the burden of moving his mobile home or buying another one in another park leaves him with an absence of meaningful choice when faced with an unconscionable rental agreement.

Cross/Appellant's reliance on State v. DeAnza Corp. (ibid) is distinguishable because the DeAnza Corp. case turned only on the adequacy of the allegations of the complaint to establish "procedural unconscionability." Those allegations must be looked at on a case-by-case basis. The trial court and the Fourth District Court of Appeals have already determined that those allegations in the instant Lanca case are adequate under the circumstances of "no meaningful choice."

In Lemon v. Aspen Emerald Lakes Association, Ltd., 446 So2d 177 (Fla. 5th DCA-1984), the district court noted right from the outset of the decision, that "mobile homeowners brought a class action against mobile home park owners challenging rent increases." In the beginning of the decision, the district court notes on page 178 of the decision, that "this is a contract dispute arising from a class action instituted by the tenants of a mobile home park against the owner, Aspen Emerald Lakes Association, Ltd."

More recently, in Ashling Enterprises, Inc. v. Browning, 487 So2d 56 (Fla. 3rd DCA-1986), the district court dealt specifically with the issue of class representation, although not as the major issue in the case. The district court stated, "Appellants' remaining points lack merit" as reflected in the lower court's Amended Final Judgment in Ashling Enterprises in paragraph 3 on page 2, the lower court specifically referred to class representation. The issue of class representation was briefed at the appellate level and argued before the Third District Court of Appeals. In holding that, "appellants' remaining points lack merit," the Third District Court of Appeal specifically held that the appellants' challenge to the certification of class representation by the lower court lacked merit. The lower court's decision was affirmed. The Ashling case, similar to the case at bar, involved a claim by the tenants for unconscionable rent.

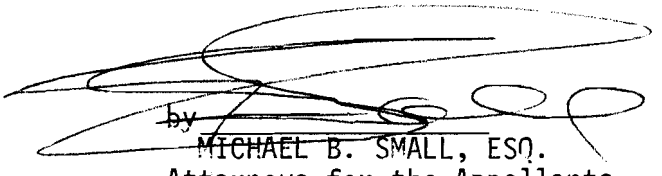
The cross/appellants' challenge to the lower court's January 3, 1987, Order allowing the Countercomplaint to proceed as a class action and the district court's affirmance, should be rejected.

CONCLUSION

Appellants respectfully submit that the trial court's Order of January 3, 1987 approving the Counter Complaint as stating a cause of action for class action relief, 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 interlocutory 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. Appellants do agree that the Fourth District's affirmance of the trial court's complaint stated a course of action for class action relief was correct. 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,

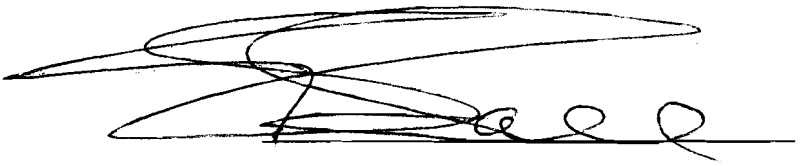
SMALL & BERRIS



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 20th day of April, 1988.



MICHAEL B. SMALL, ESQ.