IN THE SUPREME COURT OF FLORIDA

REBERT JONES, et al.,

Petitioners,

vs. CASE NO. 72,563

ARTHUR THOMAS, et al.,

Respondents.
_____/

BRIEF ON THE MERITS OF AMICUS CURIAE, FEDERATION OF MOBILE HOME OWNERS OF FLORIDA, INC., ON BEHALF OF PETITIONERS

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CITATIONS OF AUTHORITY
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INTRODUCTION TO AMICUS CURIAE, FEDERATION OF MOBILE HOME OWNERS OF FLORIDA, INC.

The Federation of Mobile Home Owners of Florida, Inc. is a statewide non-profit organization representing over 100,000 mobile home owners or tenants throughout the state of Florida. The Federation, founded in 1962, has participated in numerous landmark unconscionable rent cases in Florida including: Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3rd DCA 1986); Appel v. Scott, 479 So.2d 800 (Fla. 2nd DCA 1985); Aristek Communities, Inc. v. Fuller, 453 So.2d 547 (Fla. 4th DCA 1984); and Fredricks v. Hofmann, 45 Fla.Supp. 44 (Fla. 12th Cir. Ct. Sar. Co. 1976), aff'd., Hofmann v. Fredricks, 354 So.2d 992 (Fla. 2nd DCA 1978).

The Federation and its counsel, John T. Allen, Jr., P.A., have also appeared in numerous other landmark mobile home appellate decisions, including: Lemon v. Aspen Emerald Lake Associates, Limited, 446 So.2d 177 (Fla. 5th DCA 1984); Piereth v. Old Bridge Corp., 473 So.2d 288 (Fla. 2nd DCA 1985); Sheehan v. Marshall, 453 So.2d 481 (Fla. 2nd DCA 1984); Artino v. Cutler, 439 So.2d 304 (Fla. 2nd DCA 1983); Peterson v. Crown Diversified Industries Corp., 429 So.2d 713 (Fla. 4th DCA 1983); and Japanese Gardens Lot Renters Protective Association of Clearwater, Inc. v. Japanese Gardens Mobile Home Estates, Inc., 345 So.2d 409 (Fla. 2nd DCA 1979).

STATEMENT OF THE CASE

Petitioners in this cause, who were plaintiffs in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, are certified members of the class of mobile home owners in Friendly Adult Estates Mobile Home Park, and were appellees in the District Court of Appeal, Fifth District of Florida, will be referred to as the "petitioners." The respondents, Arthur E. Thomas and Shirley Thomas, his wife, d/b/a Friendly Adult Estates, who were defendants in the Circuit Court and appellants in the District Court, will be referred to collectively as the "respondents." Amicus Curiae, the Federation of Mobile Home Owners of Florida, Inc., will be referred to as the "Federation." The following symbols will be used: R - Record-On-Appeal; TR - Transcript of Record; AP - Appendix of Petitioners.

This matter arises from a three count class action complaint filed by a class of mobile home owners in Friendly Adult Estates Mobile Home Park against the mobile home park owners, Arthur E. Thomas and Shirley Thomas, his wife. (R 1278-1288) For purposes of this appeal, only Count I for unconscionable rent is material. The complaint alleged that the 27% rental increase to be effective April 1, 1984, was unconscionable under Section 83.754, Fla.Stat., especially in light of a decrease in services and maintenance in the mobile home park. (R 1284)

The petitioners filed a Motion for Determination of Class Action on April 11, 1984, seeking class certification under Rule 1.220(d)(1), Fla.R.Civ.P. (R 1375) The motion, as did the complaint, set forth the required allegations under Rule 1.220(c), Fla.R.Civ.P. (R 1375) In response, the respondents filed a "Motion to Deny Motion to Determine Class" on May 3, 1984. (Respondents did not include this in the Record-On-Appeal.)

A hearing was held on the respective motions of the parties, a transcript of which is not included in the Record-on-Appeal, and the Court on August 9, 1984, entered an order determining and approving a class action in this matter. (R 1473-1474)

The respondents answered the Complaint on July 13, 1984, essentially denying all the material allegations of the Complaint. (R 1457-1459) An Amended Answer and Affirmative Defenses, including a Counterclaim for Declaratory Relief, was filed by the Park Owner on August 3, 1984. (R 1289-1353)

On June 4, 1984, Chapter 83, Part III, Fla.Stat., was repealed and Chapter 723, Fla.Stat. was enacted. By order dated July 9, 1985, the Court ordered the Residents to amend their Complaint as to Count I, for unconscionable rent, to replead Chapter 723, Fla.Stat. (R 1924-1927) The Court found that the original basis for the unconscionable rent action, Section 83.754, Fla.Stat. (1984), was re-enacted verbatim in Section 723.033, Fla.Stat. (R 1929)

On July 24, 1985, the petitioners filed an Amended Class Action Complaint for Unconscionable Rent under the new statute,

Chapter 723.033, Fla.Stat. (R 1956-2002) On August 2, 1985, the respondents answered the Amended Complaint, again essentially denying all material allegations. (R 2034-2036)

A seven day non-jury trial was held on October 10 and 11, and 21 through 25, 1985, before the Honorable Rom W. Powell, Circuit Court Judge of the Circuit Court of the Ninth Judicial Circuit, in and for Osceola County, Florida. (R 1-1277)

A Partial Final Judgment in favor of the petitioners on Count I for unconscionable rent was entered January 20, 1986. (R 2627-2633) The Court held that the rental increase of $27.50 effective April 1, 1984, was unconscionable. (R 2632) An Amended Final Judgment was filed May 5, 1986. (R 2908-2913) The respondents' Motion for Rehearing was denied by order dated June 5, 1986. (R 2928)

Respondents then filed an appeal to the Fifth District Court of Appeal the trial court's Final Judgment for the petitioners. See, Jones v. Thomas, 16 Fla.Supp.2d 30 (5th Jud. Cir. 1986). The District Court initially on September 29, 1987, affirmed the decision without opinion. (AP 6) Upon Motion for Rehearing, the District Court granted an "En Banc" Rehearing and reversed the trial court's decision (AP 1-5), holding in pertinent part that:

> A threshold issue in this case is whether a claim of unconscionability can be asserted in a class action. Under the current legal analysis, substantive and procedural unconscionability MUST BOTH BE ESTABLISHED to prevail in an unconscionability action. Substantive unconscionability can generally be

established by alleging and proving that the terms of a contract are onerous, unreasonable, or unfair. It has been held that substantive unconscionability can be asserted in a class action. E.g., Kohl v. Bay Colony Club Condominiums, Inc., 398 So.2d 865 (Fla. 4th DCA), rev. denied, 408 So.2d 1094 (Fla. 1984).

By contrast, procedural unconscionability 'speaks to the individual characteristics surrounding each contracting party at the time the contract was entered into.' Id. at 868. The manner in which a particular contracting party's age, education, intelligence, financial position, business experience, etc., affects that party's bargaining position, and whether such factors permit the party to have a 'meaningful choice,' vary from individual to individual.

The residents urge on appeal that because of the unique problems facing many similarly situated mobile home residents, a class action is appropriate to assert both substantive and procedural unconscionability. As in this case, many residents own their mobile home but rent lots from park owners. In contrast to other living arrangements (such as most apartment rentals), if lot rents are raised, mobile home residents lack the option of simply refusing to renew their lease and moving out. Instead, residents must either accept the rent increases, sell their mobile homes, or attempt to move the mobile homes to other sites. The residents in this case conclude that this situation leaves each of them with an 'absence of meaningful choice' which is sufficiently similar that the trial court correctly permitted them to assert procedural unconscionability in their class action.

We reject the residents' contentions. It may be true that each resident was faced with similar lot rental increases and left with similar choices. However, procedural unconscionability involves not external factors faced by an individual, such as an onerous contract term or increased rent, but rather the particular effect each external factor has on each individual and how that individual reacts to such factors. We find, therefore, that because of the basic differences between people, the requirements for procedural unconscionability are too personal, individualized, and substantive to be properly asserted in a class action. The trial court erred in permitting the residents to do so in this case. (Emphasis Supplied In Capital Letters - Emphasis By Underlining Supplied By Court) (AP 2-3)

The en banc decision was a split decision three to two. The minority of judges dissented and stated:

> Furthermore, procedural unconscionability may be established in a class action context, where the circumstances of each member of the class demonstrate 'the absence of meaningful choice' on the part of each member. I do not think it necessary to delve into the individual circumstances of each member of the class where the meaningfulness of the choice is negated by a gross inequality of bargaining power. Kohl, 398 So.2d at 868. In this case it was established that the plaintiffs were mobile home lot renters who when faced with an outrageous demand for increased rent, have no 'meaningful choice' due to their common circumstances. Kohl, 398 So.2d at 689. They 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 unconscionable rents. (AP 5)

The majority opinion has held that: (1) in order to find procedural unconscionability, a Circuit Court must find procedural unconscionability; (2) the fact that all mobile home tenants are captive and cemented into place, cannot move without great expense and have no "meaningful choice" but to pay the rent or suffer substantial economic hardships does not constitute facts upon which a court can find procedural unconscionability; (3) from a practical standpoint, each individual tenant in a mobile home must be individually called to the stand to testify thereby lengthening the trial from a three or four day trial into a one and one-half to two month trial since on the average between two and four hundred mobile home tenants occupy each mobile home park. The essence of the majority opinion directly conflicts with this court's decision in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 FLW 568 (Fla. Sept. 22, 1988) (AP 61-62), and other decisions of Florida's District Courts.

Petitioners' petitioned for discretionary review to the Supreme Court of Florida and on September 28, 1988, the Supreme Court accepted jurisdiction. The court by order dated October 25, 1988, has granted the petition of the Federation of Mobile Home Owners of Florida, Inc. to appear as Amicus Curiae and this brief is respectfully submitted pursuant to this court's order.

STATEMENT OF THE FACTS

Friendly Adult Estates is an adult mobile home park with 106 spaces located on the outskirts of Kissimmee, Florida. (TR 337) The respondents, Arthur E. Thomas and Shirley Thomas, his wife, own the park through a closely held Florida corporation named Friendly Adult Estates, Inc. (TR 25) Arthur Thomas and his wife are the sole officers and directors of the corporation and own 100% of the stock. (TR 25) The trial court specifically found that the corporation was merely an alter ego of the Thomases. (TR 337-342)

Friendly Adult Estates is an older mobile home park consisting of 106 lots containing mobile homes. The rental amount includes water, sewage, and garbage pickup. The amenities provided include a clubhouse, part of which is used as a church by the park owner. The furnishings and equipment located in the recreation hall have been provided by the park residents. The only other amenities provided are two shuffleboard courts, which are maintained and supplied by the park residents. (TR 337-342)

The park residents' expert, Dr. Tom Curtis, testified that out of the 120 to 150 mobile home parks he has studied in the state of Florida, Friendly Adult Estates was the second worst park in terms of the level of maintenance provided. (TR 342)

The material facts in this case clearly show a pattern of significant rental increases accompanied by poor and sometimes non-existent maintenance, services, and amenities in the mobile home park. The Amended Final Judgment held that the poor maintenance, management, deteriorating common areas, odoriferous sewage plant, and unpotable water greatly detracted from the rental value of the lots and rendered the $130.00 proposed rental effective April 1, 1984, to be unconscionable. (R 2911)

In 1979, when the current Park Owner purchased the mobile home park, the lot rents were $50.00 per month. (TR 347) (R 2240) In 1980, the rental amount was increased twice, once to $55.00 and then to $62.00. (R 2240) On April 1, 1981, the rent was increased by the Park Owner to $75.00 per month; in 1982 to $90.00; and in 1983 to $102.50. (R 2240) The proposed 27% 1984 increase from $102.50 to $130.00 is the subject of this litigation.

A large amount of the testimony at trial centered on the maintenance of the mobile home park and the condition of the park's water and sewer systems, roads, recreation hall, and common areas.

All of the Park Residents who testified graphically described the condition of the sewer plant, which was owned and

operated by the Park Owner, and the associated problems resulting from the continuously malfunctioning system. (TR 170-177; 208; 299-301; 451-465; 1176-1178; 1190-1191; 1200-1207; 1232-1233; 1244; 1266) The evidence clearly established a history of severe sewage problems beginning in 1979 when the Park Owner purchased the park. Rebert Jones, a long time resident of Friendly Adult Estates, testified that the sewage situation had continuously been the subject of complaint by the Residents but that the Park Owner failed to correct the problem. TR 458-459) The former park owner, Luther Keene, testified that he had never had any problems with the sewage plant when he owned the park. (TR 669)

Problems with the sewage plant included not only strong unpleasant odors, (TR 452) but actual discharge or backup of raw sewage onto lots in the mobile home park and the surrounding areas. (TR 176) (R 2239) Mr. Stultz, when asked to describe the nature of the materials emanating from an open sewer pipe on one lot (as depicted in Petitioners' Exhibit 36) characterized the material as:

> A. . . . [W]hat you wouldn't tell in mixed company, but it was plain sewage, toilet paper and what.
>
> Q. Feces, raw sewage?
>
> A. Yes, sir.

Every park witness testified to the continuous sewage problem in the mobile home park. Petitioners' Exhibits 34-36 and 40-56, all depicted graphically this specific problem. The volume of testimony and photographs introduced on this issue led

the trial judge to comment at one point during the trial that, "I tell you one thing, if those are pictures of the sewage plant, we're going to have the most photographed sewage plant in the State of Florida." (TR 619)

Equally important were the Residents' complaints about the potable water provided by the mobile home park owner. Witnesses testified that the water was undrinkable at times and that the water had often been in that condition for a period of two to three years. (TR 206; 213; 301; 494; 1178; 1190; 1209; 1226; 1243) According to one witness, approximately 40% to 50% of the Residents of the park, (TR 497) including the Park Owner in both his home (TR 634) and office, (TR 496) resorted to using bottled water. Complaints about the water included terrible odors, low or no water pressure at times, (TR 502) a lack of chlorine in the water resulting in scum forming in toilets and sinks, (TR 206) and too much chlorine at other times. (TR 1179) One Resident testified that at times, the water would contain so much chlorine that it would burn her eyes when she took a shower in her mobile home. (TR 302) Testimony showed that the condition of the water deteriorated significantly since the purchase of the mobile home park by the respondents. (TR 598; 1210)

Other testimony indicated that the recreation hall provided by the respondents was in poor condition including leaks in the ceiling of the men's room, the laundry room, and the recreation hall. (TR 438) One Resident actually testified that you could see the sky from the restrooms in the laundryroom. (TR 438-439)

The residents offered to assist in repairing the recreation hall, however, the respondents declined their offers to help because he didn't have any insurance on the recreation hall. (TR 439-440)

Other complaints in the mobile home park included poor lawn maintenance and grass cutting, (TR 299) lack of an onsite manager to handle problems and tenant complaints, (TR 507-508; 1184) and lax enforcement of the park rules and regulations, (TR 516) including violations by the respondents. (TR 508-516)

As an explanation for the lot rental increased from $50.00 per month to $130.00 per month, the respondents indicated on the Notice of Rental Increase that the increased rentals were necessary for maintenance and repairs in the mobile home park. While the maintenance and repairs were clearly needed from the testimony presented, the evidence proved that the money was not applied for that purpose. The respondents' own expert, Mr. W. H. Morse, (TR 220) testified that upon his review of the records furnished to him by the respondents he could not find any evidence of ordinary ongoing repairs, renovations, or maintenance expenses for the park. (TR 263)

The respondents purchased the mobile home park in 1975 for $325,000 with $75,000 down and the rest in a Purchase Money Mortgage. (TR 98) The respondent admitted at trial that he was delinquent on the Purchase Money Mortgage on the property, (TR 28) and that there was a one million dollar second mortgage on the park upon which he had made no principal or interest payments since 1981. (TR 38) The evidence showed that the rents were not

being used to pay the mortgages and debt service on the mobile home park or to repair and maintain the park.

The respondents, at the same time, withdrew money from the mobile home park in a variety of methods. Although Arthur and Shirley Thomas purchased the park, they leased it to their alter ego, Friendly Adult Estates, Inc., a closely held Florida corporation of which they were the sole shareholders and officers. (TR 51) Each year the respondents' corporation was to pay the respondents $60,000 rent for use of the mobile home park. (TR 52) In reality, the evidence showed that Friendly Adult Estates, Inc. paid the respondents rent in the amount of $52,500 in 1980, (TR 83-84) $54,000 in 1981, (TR 84) $56,500 in 1982, (TR 84) $51,050 in 1983, (TR 84) and $33,000 in 1984. (TR 84) Additionally, the respondents and members of their family and household received salaries from the mobile home park. (TR 122-125)

There were also 13 lots in the mobile home park for which the corporation received no rent. (TR 64) Nine of these lots housed mobile homes owned by the respondents, their family, or mobile homes which they personally rented to other individuals. (TR 53-65) Four other lots were used rent-free by individuals to whom the respondents owed money. The amount of the rental on these lots was credited against the amounts owed by the respondents. (TR 60) The effect of these rent-free lots was, according to the petitioners' expert, to increase the burden on the remaining 93 mobile home owners. (TR 385) Although the 13

lots did not generate any rental income, they received the same services as the remaining home owners. (TR 141)

Despite the personal income received by the respondent, he testified that the park had always operated at a loss. (TR 74) Later in his testimony, the respondent admitted that at least in 1983 the park made a profit, even after his personal withdrawals. (TR 97)

The petitioners also presented testimony of market rents in the Kissimmee area for comparable mobile home parks. The petitioners' expert, Dr. Tom Curtis, compared Friendly Adult Estates Mobile Home Park to a number of comparable parks in the area. (TR 335) The park located closest to Friendly Adult Estates Mobile Home Park was Good Samaritan Mobile Home Park. (TR 344) Good Samaritan was described as an extremely well-maintained mobile home park with extremely good facilities. (TR 344) Sewage, water, garbage pickup, and lawn mowing were provided by the park along with security and a transportation system to take residents to shopping areas. (TR 344) The recreational facilities included a heated swimming pool, two tennis courts, a spa, a recreation room with two pool tables, ping pong tables, and an inside bar shuffleboard game. (TR 345) There was also a miniature golf course and par three golf course located on site. (TR 345) The rents at Good Samaritan in 1984 were $91.00 to $113.00, depending on the size of the lot. (TR 346) As noted by Dr. Curtis, Good Samaritan was charging $39.00 less rental per month, providing more services, facilities, and good maintenance. (TR 347)

Dr. Curtis also compared Friendly Adult Estates Mobile Home Park to Windsor Mobile Home Village. (TR 347) Windsor had a heated swimming pool, (TR 349) two covered and lighted shuffleboard courts, and a nice clubhouse area with a large game room, pool table, and air conditioning. (TR 348) The level of maintenance, according to Dr. Curtis, was outstanding. (TR 349-350) The rents at Windsor were $126.00 per month, (TR 350) however, Dr. Curtis noted it had a great deal more amenities and shows much better maintenance than Friendly Adult Estates. (TR 350)

Finally, Dr. Curtis compared Friendly Adult Estates to Sherwood Forest Mobile Home Park located seven miles away from Friendly Adult Estates. (TR 351) The rents at this park were $119.00 to $129.00 per month depending on the location of the home. (TR 351) Sherwood Forest had a swimming pool, tennis courts, underground utilities, garbage collection, very good streets, and large wooded lots. (TR 351) Sherwood Forest also provided security and a miniature golf course. (TR 352) In Dr. Curtis' opinion, although Sherwood Forest's rents were approximately equal to Friendly Adult Estates, they provided much greater amenities, maintenance, and services. (TR 353)

Dr. Curtis also examined other mobile home parks in this area, however, he did not use them as comparable parks because they were either not adult parks or they were letting young people move into the park. (TR 353)

Based on his comparative study of mobile home parks in the area, Dr. Curtis' professional opinion was that the fair market rental of the lots at Friendly Adult Estates should be between $75.00 and $85.00 per month. (TR 354)

Dr. Curtis also compared the rental increases at Friendly Adult Estates with the increases in the Consumer Price Index. (TR 355) Dr. Curtis testified that if the 1979 rental amount of $50.00 per month was increased according to increases in the Consumer Price Index, the 1984 lot rental would be $68.49 instead of the $130.00 per month. This constituted a difference of $61.51 per month. (TR 357) Dr. Curtis' analysis of the rental increases compared to the Consumer Price Index was admitted into evidence as Petitioners' Exhibit 37. (TR 362) (R 2240)

Finally, Dr. Curtis testified to his examination of the tax records and other financial information furnished by the respondents. (TR 374) Based on his comparison with other mobile home parks which he has examined throughout the state of Florida, (TR 375) Dr. Curtis testified that the park's telephone bills and travel and entertainment expenses seemed to be quite high, and out of line. (TR 379)

The manager of Sherwood Forest Mobile Home Park, one of the comparable parks used by Dr. Curtis, also testified as a witness for the petitioners. (TR 276; 678) Ruth Deetz is the manager of Sherwood Forest Mobile Home Park and resides in Friendly Adult Estates. Ms. Deetz testified that part of her duties as manager of Sherwood Forest Mobile Home Park was to do rent comparisons

and check on other mobile home parks on a yearly, some times semi-yearly basis. (TR 281; 679) In the course of this rent comparison, Ms. Deetz analyzed seven or eight mobile home parks in the Kissimmee area. (TR 281) Based on her knowledge and consideration of other mobile home parks, Ms. Deetz testified that a reasonable monthly lot rental in 1984 for Friendly Adult Estates Mobile Home Park would be approximately $90.00. (TR 295)

Based on five days of testimony, dozens of exhibits, and the Court's view of the mobile home park, (TR 1181) the Court entered its Amended Final Judgment in favor of the petitioners. (R 2908) (AP 10-15)

This Court should give primary consideration to the well-written six page Amended Final Judgment entered by the trial Judge setting forth both the law on unconscionable rent and the law as applied to the facts in this case.

SUMMARY OF THE ARGUMENT

The Circuit Court found that plaintiffs in a mobile home tenant class action were being charged unconscionable rent. The District Court initially affirmed the decision without opinion but on rehearing en banc, in a three to two decision, held that procedural unconscionability was so personal and individual that each tenant had to testify as to the "effect" and their reaction to the rent increase and, therefore, a class action could not be

maintained. The District Court reversed the Circuit Court's judgment. In rendering its decision, the District Court ruled that a finding of procedural and substantive unconscionability was mandatory. The majority rejected the minority's view that plaintiffs as mobile home tenants as a class were faced with "outrageous" demands for increased rents and had no meaningful choice. The minority reasoned that mobile homes were not "mobile" and plaintiffs were forced to pay unconscionable rent to avoid the enormous expense and disruption of moving.

This court in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 FLW 568 (Fla. Sept. 22, 1988) (AP 61-62), specifically had the very question before it of whether or not procedural unconscionability could be established in a class action for unconscionable rent by mobile home tenants. This court, in Lanca, said that it noted that the unique features of mobile home residency call for an effective procedural format for resolving disputes between park owners and residents concerning matters of shared interest. The court noted the direct and irreconcilable conflict of the majority opinion in the case at bar with the cases of Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977), Steinhardt v. Rudolph, 422 So.d 884 (Fla. 3d DCA 1982), review denied, 434 So.d 889 (Fla. 1983), Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th DCA 1981), review denied, 408 So.2d 1094 (Fla. 1981).

The court found that the absence of a meaningful choice for the residents who have their rent increased after their mobile homes have been affixed to the land, serves to meet the class action requirements of "procedural unconscionability" citing the minority decision in the case at bar as well as Steinhardt and Kohl. The court reasoned that the relationship between park owner and residents "clearly outweighs any other factor in determining the effect of the increase on individual residents." THEREFORE, THIS COURT HAS APPROVED THE MINORITY OPINION IN THE CASE SUB JUDICE AND REJECTED THE MAJORITY OPINION IN THE CASE BEFORE THE COURT.

In 1974, this court held that mobile home tenants constitute a sufficient distinct class which permitted the Florida Legislature to protect such tenants by enactment of special laws. Stewart v. Green, 300 So.2d 889 (Fla. 1974); Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974). These are the two cases which should be the "legal root" of this court's decision in quashing the majority opinion under review. In Stewart and Palm Beach, this court ruled that because mobile home owners are tied down as required by law and cemented into place, they were not "mobile" and could not be moved because of the uniform existence of "closed parks" which prohibited a used mobile home from being moved into another park. Because of these factors and the tremendous cost of moving, and the fact that most tenants were elderly and retired and on fixed incomes, the court reasoned that the Legislature properly addressed such tenants as

a class since there were well over 700,000 tenants in mobile home parks in Florida at the time. The Supreme Court in taking all of these factors into consideration specifically held that "a form of economic servitude ensues rendering tenants subject to oppressive treatment in their relations with park owners and the latter's overriding economic advantage over tenants." Stewart at 892. This court squarely held that such tenants were by their very nature subject to unequal bargaining power and lack of meaningful choice. There is now over one and one-half million mobile home tenants in Florida. The Fifth District's decision at bar squarely conflicts with this court's landmark decisions in Green and Strong as well as its recent decision of Lanca Homeowners, Inc. The practical effect of the decision of the Fifth District is to erroneously increase litigative costs and clog up the Florida Circuit Court system by requiring each tenant to testify that he is in an unequal bargaining position and that the rent increase has had a substantial "effect" on him and his "reaction" is that he doesn't like the rent increase one bit. This is exactly what the majority decision has established as the controlling law of Florida. Neither the legislative policy established by Chapter 723, Fla.Stat., nor this court's decisions in Green, Strong, and Lanca are in accord with the majority's rationale in the case at bar. The fact that the absence of meaningful choice for mobile home residents exists far overrides and outweighs any other factor in requiring them to individually testify in order to establish procedural unconscionability.

Therefore, the court's Amicus, the Federation of Mobile Home Owners of Florida, Inc., recommends to the Supreme Court that it quash the majority opinion in the case sub judice and establish the majority opinion as the controlling law of the state of Florida.

ARGUMENT

POINT I

THE SUPREME COURT SHOULD QUASH THE MAJORITY OPINION IN THIS CASE AND ESTABLISH THE MINORITY OPINION AS THE LAW OF THE STATE OF FLORIDA.

A - INTRODUCTION TO MOBILE HOME LAW

Before any unconscionable rent case is reviewed by an appellate court, it is imperative that the Court obtain an overview of mobile home law as codified in the various reported decisions in Florida.

The Federation submits that full consideration must be given to the body of law which prompted the Legislature to enact the Florida Mobile Home Act, Chapter 723, Fla.Stat., and Section 723.033, Fla.Stat., which provides mobile home owners in Florida a remedy for the charging of unconscionable rents.

Section 723.033, Fla.Stat., in essence provides that if the Court shall find a provision of a rental agreement to be unconscionable, including the rental amount, then the Court may refuse to enforce the rental agreement, enforce the remainder of the rental agreement without the unconscionable provision, or so limit the application of any unconscionable provision as to avoid any unconscionable result. (Formerly Section 83.754, Fla.Stat. 1983)

The statute further provides that when it is claimed that rents are unconscionable, "[T]he parties shall be afforded a reasonable opportunity to present evidence as to meaning, relationship of the parties, purpose, and other relevant factors to aid the Court in making the determination." Therefore, it is clear that the legislature intended to permit substantive inquiry into the charging of unconscionable rent. Such inquiry has spawned such decisions as Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986); Appel v. Scott, 479 So.2d 800 (Fla. 2d DCA 1985); Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th DCA 1986); Aristek Communities, Inc. v. Fuller, 453 So.2d 547 (Fla. 4th DCA 1984); State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th DCA 1982); Fredricks v. Hofmann, 45 Fla.Supp. 44 (Cir. Ct. Sarasota Co. 1976), aff'd., 354 So.2d 992 (Fla. 2d DCA 1978).

The problem of unconscionable rent stems from the grossly unequal bargaining position of a mobile home tenant once he "cements" his mobile home into a mobile home park. After the mobile home is in place, the tenant is at the mercy of the mobile home park owner. The threat of requiring the tenant to move is so economically onerous that the Legislature in 1972 passed what is known as the Mobile Home Owners Bill of Rights, now Chapter 723, Fla.Stat. Lemon v. Aspen Emerald Lakes Associates, Ltd., 446 So.2d 177, 180, n. 2 (Fla. 5th DCA 1984). This unequal bargaining power and economic servitude is enhanced by the fact that most mobile homes have permanent attachments to them, such

as cabanas, porches and even rooms. These permanent structures are often lost if the mobile home is moved. Further, when a mobile home is moved, it often is reduced to scrap and sold as a "woods trailer" on the second-hand market. In sum, if a mobile home tenant has to move his mobile home, he will virtually lose his entire investment. This situation is compounded by the existence of "closed parks" which refuse to allow older mobile homes into their park and require the prospective tenant to purchase a new one or exact a high entrance fee for the privilege of bringing into the park an older model.

These facts are not unsupported comments by counsel for Amicus but constitute specific findings of our Supreme Court in the landmark case of Stewart v. Green, 300 So.2d 889 (Fla. 1974). In upholding the statute limiting grounds for evictions in mobile home parks, the Court held:

> The object of the statute is to ameliorate and correct as far as possible by exercise of the police power what the Legislature has found to be evils inimical to the public welfare in the subject considered. Protection of mobile home owners from grievous abuses by their landlords, or mobile home park owners, was found by the Legislature to be essential.
>
> As documented by the 1970 report of Professor Cubberly for the State Department of Community Affairs, and reaffirmed by the Governor's 1974 Mobile Home Task Force, we note that most people who live in mobile homes usually spend several thousands of dollars to purchase a home, usually from a mobile home park owner or an associated dealer. Most mobile home owners find they must also rent the lot on which their mobile home is to be placed from their mobile home dealer or his associate. In most instances, they become month-to-month tenants, subject to being evicted on fifteen days' notice, although their 'home,' with its wheels and hitch removed, appears to

have permanence of location, being tied down on the lot as state law requires and being undergirded with a poured cement base. A great catch in the eviction removal process, as the Governor's Task Force noted, is that 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 in many areas of the state.

There has developed because of space shortage what is known as the 'closed park,' from whose owners a prospective tenant must either buy a new mobile home in order to get in, although he may already own his 'used' or 'removed' home from a park from which he had to move; or the park owner may accept the 'used' or 'removed' home in his park only upon payment of a high entrance fee.

A mobile home is a prefabricated structure built to specifications established by state law. It has all of the conveniences of a modern apartment, and often has more room.

A 'mobile' home is not actually mobile, and even an owner who does not encounter 'closed park' problems often finds it is quite expensive to remove a home and relocate it because of the incidental costs 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 relations with park owners and the latters' overriding economic advantage over tenants.

Regulatory laws that applied to the old tin-can tourists and their easily movable trailers and even those applicable nowadays to rental apartments are inadequate for the regulation of mobile homes under conditions prevailing today. The Legislature finally recognized by Section 83.69 that a hybrid type of property relationship exists between the mobile home owner and the park owner and that the relationship is not simply one of landlord and tenant. Each has basic property rights which must reciprocally accommodate and harmonize. Separate and distinct mobile home laws are necessary to define the relationships and protect the interests of the persons involved." (300 So.2d at 891-892) (Emphasis Supplied)

* * * * * * * *

> Unlike the tenant in an apartment house who, upon eviction, merely has personal possessions to move, the mobile home tenant, renting space in a lot or park, has to incur additional expenses and problems in having the mobile home itself transported to another site upon eviction. Furthermore, the mobile home park owners, in trying to prorate many newer sales of mobile homes without sufficient land area on which to locate them, may resort to eviction of present tenants in order to make future sales. These problems affecting the special interests and necessities of a large segment of the state's citizenry were given legislative attention. Accordingly, since the classification of mobile home park owners, for the reasons outlined, rests upon differences which bear a reasonable and just relationship to the objectives and purposes of Section 83.69 its constitutionality should be upheld.
>
> There are now some 700,000 mobile home dwellers in Florida most of whom absent the benefit of Section 83.69 would be subject to being evicted on 15 days' notice for no reason except the park owner's desire to be rid of them. The state police power under the Constitution permits the Legislature to correct or ameliorate evils of the magnitude explicated which directly affect so large a number of people, provided no constitutional guarantees are abridged. (300 So.2d at 892-893) (Emphasis Supplied)

Because of the tenants' investment in a mobile home park, our Supreme Court has reasoned that the relationship is that of owner and owner with each having reciprocal rights which are not akin to a landlord/tenant relationship. In Stewart v. Green, 300 So.2d at 892, the Supreme Court said:

> The Legislature finally recognized by Section 83.69 that a hybrid type of property relationship exists between the mobile home owner and the park owner and that the relationship is not simply one of landlord and tenant. Each has basic property rights which must reciprocally accommodate and harmonize. Separate and distinct mobile home laws are necessary to define the relationships and protect the interests of the persons involved.

Under these adverse conditions, the Legislature has sought to protect the mobile home tenant in such areas as restriction of grounds for eviction, (Section 723,061, Fla.Stat.) protection of a mobile home owner's right to sell their mobile home in the mobile home park, (Section 723.071, Fla.Stat.) protection from undisclosed assessments and costs, (Section 723.041(1)(b), Fla.Stat.) and protection from unconscionable rents. (Section 723.033, Fla.Stat.) No longer, as the Park Owner in the case sub judice contend, may mobile home owners merely arbitrarily demand whatever income in the form of rents they desire. Under Section 723.033, Fla.Stat., a tenant has the right to have a Court after trial on the facts decide if the tenant is being charged unconscionable rent under Section 723.033, Fla.Stat., which states:

> 723.033 Unconscionable lot rental agreements.
>
> (1) If the court, as a matter of law, finds a mobile home lot rental agreement, or any provision of the rental agreement to have been unconscionable at the time it was made, the court may:
> (a) Refuse to enforce the rental agreement.
> (b) Enforce the remainder of the rental agreement without the unconscionable provision.
> (c) Limit the application of the unconscionable provision so as to avoid any unconscionable result.
>
> 2. When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purposes, the relationship of the parties, and other relevant factors to id the court in making the determination.

Therefore, it should be clear to the Court that the controlling case in mobile home law is the landmark decision of

Stewart v. Green, 300 So.2d 889 (Fla. 1974), and that the Court should consider the case sub judice in light of the Supreme Court's findings and the legislative intent that mobile home owners or tenants in the state of Florida be protected from abuses such as unconscionable rent.

The bottom line is that with the captive nature of mobile home parks and the total lack of bargaining power of a mobile home owner, a park owner can charge anything he wishes. The only protection the mobile home owner has is an unconscionable rent action under and pursuant to Section 723.033, Fla.Stat.

Chapter 723, Fla.Stat., the current Mobile Home Act, as well as the former act under Part III, Chapter 83, Fla.Stat., envision a relationship between the rents charged and the services and amenities provided. This concept is now codified in Section 723.037(1); (3)(b), Fla.Stat., which provides that a park owner has to give written notice of a "reduction in services or utilities" which in effect constitutes an actual increase in rent. Under Section 723.037(3), Fla.Stat., mobile home owners are entitled to a meeting with the park owner and ultimately mediation or arbitration of disputes where the sole issue is "the decrease in services or utilities is not accompanied by a corresponding decrease in rent or is otherwise unreasonable."

The statutory scheme also envisions that if mediation is not effective, then the mobile home owners or tenants may bring an unconscionable lot rental action under the provisions of Section 723.033, Fla.Stat.

B - WHY SHOULD THE SUPREME COURT EXERCISE ITS POWER OF DISCRETIONARY REVIEW AND QUASH THE DECISION OF THE DISTRICT COURT?

Prior to this court's decision in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., the last time this court addressed mobile home tenant problems was in 1974 when it held that mobile home tenants constitute a sufficient distinct class which permitted the Florida Legislature to protect such tenants by enactment of special laws. Stewart v. Green, 300 So.2d 889 (Fla. 1974); Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974). This court ruled that because mobile homes are tied down as required by law and cemented into place, they were not "mobile" and could not be moved because of the uniform existence of "closed parks" which prohibited a used mobile home from being moved into another park. The court noted, because of these factors and the tremendous cost of moving, and the fact that most tenants were elderly and retired and on fixed incomes, that the Legislature properly addressed such tenants as a class since there were well over 700,000 tenants in mobile home parks in Florida at that time. The Supreme Court, in taking all these factors into consideration, specifically held that, "a form of economic servitude ensues rendering tenants subject to oppressive treatment in their relations with park owners and the latter's overriding economic advantage over tenants." Stewart at 892. This court squarely held that such tenants were by their very nature subject to unequal bargaining power and lack of meaningful choice. There is now over one and one-half million mobile home

tenants in Florida. The Fifth District's decision at bar squarely conflicts with this court's landmark decisions in Green and Strong and has a total chilling effect upon mobile home tenants exercising their rights of protection by bringing an action for the charging of unconscionable rents. The practical effect of the decision is to enormously increase litigative costs and clog up the Florida Circuit Court system by requiring each tenant to testify that he is in an unequal bargaining position and that the rent increase has had a substantial "effect" on him and his "reaction" is that he doesn't like it one bit. This is exactly what will be required if the majority decision is allowed to become the controlling law of Florida.

The District Court's decision also has direct effect on unconscionable rent actions now pending in Florida in mobile home parks which usually number from 100 to 500 individual tenants since each of the tenants still would have to individually testify in each case in order to meet the procedural unconscionability requirement thereby imposing the same economic impact on the case and causing a total waste of judicial time. Thus, the District Court's decision impacts both actions brought as class actions and individual actions by tenants in their own names. The decision at bar is oppressive, unworkable, and legally impractical. It turns the "mobile home owner's bill of rights," found in Chapter 723, Fla.Stat., (See, Lemon v. Aspen Emerald Lake Associates, Limited, 446 So.2d 177 (Fla. 5th DCA 1984), footnote 2 at page 180), into an ineffective and expensive

legislative remedy. The statutory protection intended by the Legislature to be granted to mobile home tenants is substantially dissipated. Since the decision squarely conflicts with Stewart and Strong, supra, and the other decisions cited in this brief, and obviously constitutes a case of great public interest, this court should exercise its discretionary review powers and take a long hard look into the merits of the announced legal rule on procedural unconscionability and the material surrounding facts in this case. A serious split decision (three to two) should be reviewed by the Supreme Court.

C - THE DISTRICT COURT ERRED IN FINDING THAT PROCEDURAL UNCONSCIONABILITY WAS SO PERSONAL AS IT COULD NOT BE ASSERTED AS A CLASS ACTION.

The District Court's rational sub judice is totally inconsistent with this court's initial landmark decisions of Stewart and Palm Beach Mobile Homes, Inc., supra. The obvious basis of this court's granting of discretionary review jurisdiction is the decision rendered in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 FLW 568 (Fla. Sept. 22, 1988) (AP 61-62). In Lanca, the court had before it the question of constitutionality of Section 723.079(1), Fla.Stat. (1985). The court also had before it the question of whether or not a class action could be asserted in the homeowners' action and specifically held that, "In the instant matter, we similarly note that the unique features of mobile home residency call for an effective procedural format for resolving disputes between

park owners and residents concerning matters of shared interest." (Opinion at page 4) This court went on to recognize and cite with approval the dissenting opinion by Chief Judge Sharp in Thomas v. Jones, 524 So.2d 693 at 695:

> Section 723.033(2), Florida Statutes (1985), which provides a cause of action for unconscionable rental agreements states:
>
> 'When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.'
>
> The key here is 'the relationship of the parties.' Where a rent increase by a park owner is a unilateral act, imposed across the board on all tenants and imposed after the initial rental agreement has been entered into, park residents have little choice but to accept the increase. They must accept it or, in many cases, sell their homes or undertake the considerable expense and burden of uprooting and moving. The 'absence of a meaningful choice' for these residents, who find the rent increased after their mobile homes have become affixed to the land, serves to meet the class action requirement of procedural unconscionability. See Thomas, 524 So.2d at 695 (Sharp, C. J. dissenting); Steinhardt; Kohl. As a rule, the relationship that exists between park owner and resident clearly outweighs any other factor in determining the effect of the increase on individual residents. This circumstance is shared equally by each member of the park. Thus, the alleged unconscionability of such an increase lends itself to proof in the class action format. (Emphasis Supplied)

This court clearly has recognized the irreconcilable conflict in District Court precedent as to whether a claim of unconscionable rent increase in a mobile home park setting is suitable for allegation and proof in a class action. The court recognized this point in stating:

> The third count presents the following issue: whether a claim of unconscionable rental increase in a mobile home park setting is suitable for allegation and proof in a class action. Some courts have indicated that unconscionability claims are too individualized for class action proceedings. See generally Thomas v. Jones, 524 So.2d 693 (Fla. 5th DCA 1988); Garrett v. Janiewski, 490 So.2d 1324 (Fla. 4th DCA 1985), review denied, 492 So.2d 1333 (Fla. 1986); State v. DeAnza, 416 So.2d 1173 (Fla. 5th DCA), review denied, 424 So.2d 763 (Fla. 1982). Others have indicated that they are not. See generally Avila; Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d DCA 1982), review denied, 434 So.2d 889 (Fla. 1983); Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th DCA), review denied, 408 So.2d 1094 (Fla. 1981).

Since this court specifically ruled that the absence of a meaningful choice after residents have attached their mobile homes to the land "serves to meet the class action requirements of procedural unconscionability" and "clearly outweighs any other factor in determining the effect of the increase on individual residents," it clearly disapproved the majority opinion in the case sub judice. Therefore, in Lanca, this court has already, in Amicus' view, determined that the majority opinion in the case at bar must be quashed. Thus, there is a direct and unequivocal holding by this court directly in point in Lanca, supra, on the question of the merits before the court.

The rationale of the minority opinion in Thomas is compelling. It is candidly ridiculous to believe that the individual "effect" on each individual resident as to how he "reacts" to an unconscionable rent increase is a sufficient basis in the mobile home context to prevent the bringing of class actions for unconscionable rent in mobile home cases. The

parties definitely have a common cause and are similarly situated especially as far as procedural unconscionability is concerned. As a matter of law, the fact that mobile home tenants have "no meaningful choice" as recognized in the dissenting opinion in Thomas, supra, has been established in Stewart v. Green and Palm Beach Mobile Homes, Inc. v. Strong, supra, in 1974.

There is no reason for Amicus to belabor the introduction paragraphs in subparagraphs A and B of this argument as to why, in the mobile home context, the Supreme Court should not rule that there are sufficient existing legally established facts to permit a class action to be brought. In fact, this case is still in litigation and the new rule established by this court in Lanca permitting class actions in mobile home unconscionable rent cases definitely applies retroactively. Therefore, for all of these reasons, it is recommended by your Amicus that the decision of the District Court be QUASHED.

CONCLUSION

In the opinion sought to be reviewed, the District Court has departed from established Florida law and held that procedural unconscionability must individually be proven by a mobile home tenant and, therefore, a class action cannot be maintained. The District Court has reasoned that the proof of procedural and substantive unconscionability is a mandatory rule of law in unconscionability cases. This court's decision in Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., the dissenting opinion in the case at bar, Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977), Steinhardt v. Rudolph, and Kohl v. Bay Colony Club Condominium, Inc., supra, hold to the contrary.

The majority opinion in the case at bar, Garrett v. Janiewski, and State v. DeAnza, are not well reasoned and have been rejected by this court in Lanca upon the basis that the absence of meaningful choice serves to meet the class action requirement of procedural unconscionability. This court has held that the existence of an absence of meaningful choice clearly outweighs other factors in determining the effect of a rent increase on individual residents.

Therefore, it is the recommendation of Amicus Curiae, the Federation of Mobile Home Owners of Florida, Inc., through its counsel, that the majority decision under review by quashed and the minority view established as the law of Florida thereby affirming the lower court's decision in favor of petitioners.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to JOHNIE A. McLEOD, ESQUIRE, 48 East Main Street, P.O. Drawer 950, Apopka, Florida 32703; LEE JAY COLLING, ESQUIRE, and DOUGLAS B. BEATTIE, ESQUIRE, 500 NCNB Bank Building, 250 North Orange Avenue, Orlando, Florida 32801, this 31st day of October, 1988.

JOHN T. ALLEN, JR.