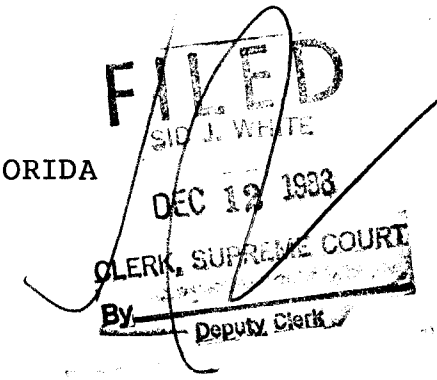
IN THE SUPREME COURT OF FLORIDA



REBERT JONES, et al.,

Petitioners,

vs. CASE NO. 72,563

ARTHUR THOMAS, et al.,

Respondents.
_____/

REPLY BRIEF ON THE MERITS OF AMICUS CURIAE, FEDERATION OF MOBILE HOME OWNERS OF FLORIDA, INC., TO AMENDED ANSWER BRIEF OF RESPONDENTS

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INDEX TO REPLY BRIEF ON THE MERITS OF AMICUS CURIAE

CITATIONS OF AUTHORITY

CITATIONS OF AUTHORITY
(Continued)

STATEMENT OF THE CASE AND FACTS

The parties and symbols as used in the Brief on the Merits of Amicus Curiae, Federation of Mobile Home Owners of Florida, Inc., will be used in this Reply Brief. The additional symbol "B" will be used to refer to the Brief of Respondents.

Amicus challenges the statement that the tenants have continued to reside on the respective lots and have paid no rent direct to the defendants since March 1, 1984, as not being supported by reference to the record. (B 1) Respondents' assertion that the trial court nor the District Court passed upon the question of whether or not the proposed lot rental increase was unconscionable in the absence of a mobile home lot rental agreement between the parties is incorrect. (B 3) Once a mobile home tenant agrees to make his investment in the mobile home park owners mobile home park, he cannot be removed without having committed one of the grounds for eviction of a mobile home tenant under Section 723.061, Fla.Stat. See, Stewart v. Green, 300 So.2d 889 (Fla. 1974).

The respondents have not filed a Statement of the Facts and, therefore, no reply is necessary by Amicus.

ARGUMENT

POINT I

THE LANCA HOMEOWNERS, INC. V. LANTANA CASCADE OF PALM BEACH, LTD. DECISION APPLIES TO THE CASE AT BAR. (As Raised by Respondents' Point I)

Respondents initially challenge the application of Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 FLW 568 (Fla. Sept. 22, 1988), as applying to the case at bar. Respondents feel that it is unjust to apply the new rule promulgated by the Supreme Court of Florida retroactively. (B 4) The question of retroactivity in its application of the rule has already been decided by this court in Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977), and, therefore, respondents' contention is without merit. Respondents also admit that the mobile home association is a party to these proceedings. (B 4)

Respondents next contend that there is no "absence of meaningful choice" of a mobile home tenant to either pay the rent demanded by the mobile home park owner or move his mobile home at great expense. Not only has this contention been squarely rebuked by this court in Stewart, supra, but also Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974). Other District Courts have followed this precedent. Appel v. Scott, 479 So.2d 800 (Fla. 2d DCA 1985); Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d DCA 1986); Lemon v. Aspen Emerald Lakes Associates, Ltd., 446 So.2d 177 (Fla. 5th DCA 1984). Therefore, respondents' contention in this regard is likewise

without merit. Since respondents have chosen to treat this particular matter with only two pages of argument, no further reply is necessary.

POINT II

THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE PROPOSED LOT RENTAL INCREASE WAS UNCONSCIONABLE UNDER SECTION 723.033, FLA.STAT., SINCE IN THE CONTEXT OF MOBILE HOME LAW AND THE STATUTE, THERE IS NO LEGAL REQUIREMENT OF THE EXISTENCE OF A WRITTEN LOT RENTAL AGREEMENT BETWEEN THE PARK OWNER AND THE RESIDENTS. (As Raised by Respondents' Point II)

The initial question before the Supreme Court is whether or not it wishes to revisit this second point as well as the additional points raised by respondents on appeal. See, Bould v. Touchette, 349 So.2d 1181 (Fla. 1977). In Bould, this court has held that it is within the court's discretion to revisit collateral issues raised on the merits of the appeal before a District Court. Both the lower court and the appellate court held that the imposition of a rental increase violated Section 723.033, Fla.Stat. (formerly Section 83.754, Fla.Stat.). Although both the Circuit Court and the District Court ruled contrary to the reasoning of respondents on this point, respondents still contend that the refusal of the tenants (petitioners) to pay the additional rent had the legal effect of creating a situation in which there was no lot rental agreement between the parties. (B 6-9)

When a mobile home owner first purchases a mobile home, an initial mobile home agreement is entered into between the mobile home owner as tenant and the mobile home park owner as landlord in which the mobile home tenant agrees to permanently affix his mobile home to the park owner's lot. Implicit in the initial mobile home lot rental agreement is the obvious understanding that there will be increases in the lot rental amount in the future. Under Section 723.031(5)(a), Fla.Stat. (1986 Supp.), rent can only be increased annually.

Therefore, when the mobile home owner comes into the park, he agrees to pay a certain monthly rent. He purchases his mobile home from the park owner at a substantial profit to the park owner. At this point, the bargaining power between the parties is equal -- the tenant doesn't have to purchase in the park if he doesn't like the amount of rent he is to pay. Once he buys into the mobile home park and makes a substantial investment which would be permanently lost if he were required to move his mobile home, the bargaining power between the two parties drastically changes. The park owner has total bargaining power -- the tenant then has no meaningful choice when the rent is unilaterally raised or increased. The mobile home owner is faced with the proposition that he must either pay the increased rent or rip out his mobile home, lose the permanent amenities, and in effect lose his mobile home since in all probability there is no other park in which his mobile home may be moved. There is no negotiation, no explanation as to why the increase is imposed, usually a

notice is simply received in the mail. At this juncture, a new mobile home agreement is made where usually the only term being changed is the amount of rent. It is at this point that the rental term of the lot rental agreement often becomes unconscionable.

Due to the mobile home owner's lack of bargaining power in entering the second or subsequent rental agreement, the Legislature has sought to protect the mobile home tenant by enacting Section 723.033, Fla.Stat. The only bargaining power the tenant has is the Courts and the statute to protect him against unfair and unreasonable rents. Absent Section 723.033, Fla.Stat., there is nothing to prevent the mobile home park owner from raising rents to any figure he arbitrarily desires. In fact, the examples are legend across Florida of mobile home park owners setting low rents to entice mobile home tenants into the park and once the park is full, drastically and exponentially increasing rents.

What the Courts must do in the mobile home context is make the park owner justify rental increases. Certainly, if a rent is reasonable, it can be justified. There are legitimate benchmarks which can be used to determine whether the rent increase is arbitrary, capricious, or unfair. Such things as the Consumer Price Index, the "All Rents" section of the Consumer Price Index measuring rents in America, and what other comparable parks are charging are but few examples of such benchmarks.

The respondents in their appeal suggest that when a park owner unilaterally raises the rent, the mobile home owner is faced with the alternative of accepting the mobile home written agreement or suffering eviction and loss of his entire investment. This was not the type of legal protection envisioned by the Legislature in enacting Section 723.033, Fla.Stat., permitting courts to declare rental agreements unconscionable. The existing Florida cases concerning unconscionable rent disprove the respondents' theory entirely. All decisions involve a situation in which lot rentals were increased unilaterally by a mobile home park owner at the end of a rental period and the increases were declared unconscionable by the Court. See, 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); Fredricks v. Hofmann, 45 Fla.Supp. 44 (Fla. 12th Cir. Ct. Sar. Co. 1976), aff'd., Hofmann v. Fredricks, 354 So.2d 992 (Fla. 2d DCA 1978).

Florida case law governing eviction of mobile home owners also totally refutes the respondents' argument on this point. In Artino v. Cutler, 439 So.2d 304 (Fla. 2d DCA 1983), the mobile home park owner passed a rule requiring the tenants to sign a new mobile home agreement, with terms dictated by the park owner. The tenants refused to sign the park owner's lease and the park owner brought eviction proceedings against the tenants. The Circuit Court ruled that since the tenants did not sign the lease, they must be evicted. The District Court reversed holding

that the tenants could not be made to execute a lease unilaterally dictated by the park owner after they had come into the park. The Court specifically held that the ploy attempted by the park owner was merely an attempt to circumvent the provisions of Chapter 83, Fla.Stat., (now Chapter 723, Fla.Stat.), and the rights of the mobile home tenants.

The Federation's position that the residents could not be forced to sign new rental agreements is squarely supported by Donovan v. Environs Palm Beach, 309 So.2d 561 (Fla. 4th DCA 1975). In this case, Mrs. Donovan refused to sign a new lease proffered by the mobile home park owner. The Fourth District refused to permit the park owner to evict her holding that the refusal to sign a lease was not one of the grounds for eviction permitted under the eviction statute. Similar limitations on a park owner's right to evict mobile home owners are now in effect under Section 723.061, Fla.Stat.

In both Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), and Stewart v. Green, 300 So.2d 889 (Fla. 1974), the Supreme Court has upheld the constitutionality of the statute limiting the grounds for eviction of mobile home tenants. In effect, these decisions when applied to the point in controversy sub judice clearly hold that a park owner may not unilaterally raise rents and then evict mobile home owners who refuse to sign the new lease and pay the increased rents. The case law and Section 723.061, Fla.Stat., prohibit the park owner from coercing mobile home owners into signing written leases with oppressive and unconscionable terms.

This exact argument was made in Appel v. Scott, 479 So.2d 800 (Fla. 2d DCA 1985), and rejected by the Court. In Appel, the park owner claimed that no written agreements existed between the residents and the park owner and, therefore, since the residents "chose" to live in the park after the rental increase, they had "impliedly agreed" to pay the rental increase.

In dismissing this argument, the Court held that:

> There is a bona fide dispute over whether the rental increases were unconscionable and, therefore, unenforceable. . . . A declaration by the court would either establish the appellant's right not to pay the increases or establish the appellee's right to collect the increases. (479 So.2d at 803)

If the logic of the respondents sub judice was followed, there could never be an unconscionable rent action. If a proposed new contract including an increase in rents were forced upon the tenants and they agreed to the increase, they would be barred by the law of contract, estoppel, and waiver from bringing an unconscionable rent action under Section 723.033, Fla.Stat.

The respondents cite State of Florida v. De Anza Corp., 416 So.2d 1173 (Fla. 5th DCA 1982), in support of their position. The Court, in De Anza, upholds the dismissal of an unconscionable rent action stating at one point that the complaint for unconscionable rent "does not allege that the lessees were bound by any agreement to pay the increased rental." This quotation is taken out of context in light of an understanding of mobile home law and mobile home living. In the case at bar, the mobile home

owners or tenants were clearly "bound" to pay the increased rental because they had no meaningful choice. They could either pay the increase or be evicted and lose their mobile homes and their investment unless the Court declared the increase to be unconscionable.

As previously discussed, there is a basic mobile home agreement wherein the mobile home owner agrees to permanently affix his mobile home onto the mobile home park owner's lot with the implied agreement that rental increases in the future (which are not unconscionable) will be paid by the mobile home owner. Therefore, the facts in the case at bar amply support the utilization of the unconscionable rent statute to afford the residents remedial relief from the unilaterally imposed rent increase.

This argument is bolstered by the fact that, as admitted in the respondents' argument, the respondents proceeded to enforce the new rent increase and had to be enjoined from evicting the residents. Using the respondents' own circular argument, how could the respondents attempt to evict for non-payment of rent if there was no agreement to pay the additional rent???

In sum, there does not have to be a mutual understanding between the parties in order to invoke the provisions of Section 723.033, Fla.Stat., and therefore, the respondents' contentions in this point are totally without merit.

POINT III

ATTORNEY'S FEES TO COUNSEL FOR PETITIONERS SHOULD BE GRANTED. (As Raised by Respondents' Point III)

Respondents contend that since there was no contract between the parties which would invoke Section 723.033, Fla.Stat., (respondents cite Section 83.754, Fla.Stat.), the petitioners would not be entitled to attorney's fees. The case at bar was decided in the lower court on the basis of Section 723.068, Fla.Stat. (1984), as opposed to Section 83.761(3), Fla.Stat., as cited by respondents. (B 10-12) Therefore, the same remedy was provided under both chapters invoking the principle that where a statute has been repealed and substantially reenacted by another statute, the reenacted provisions are deemed to have been in operation continuously from the original enactment. McKibben v. Mallory, 293 So.2d 48 (Fla. 1974). Therefore, since attorney's fees were granted under Section 723.033, Fla.Stat., respondents' argument is without merit.

It is next suggested by respondents that since no written fee agreement between petitioners' counsel and his clients was produced at the hearing on fees that the lower court's award of attorney's fees should be reversed. (B 11-12) This argument on its face is without merit. It is academic that a trial judge sits as the trier of fact on the question of attorney's fees. If there is competent evidence upon which he could have based his award of fees, then no reversible error can be shown. Hanlon v. A.P. Clark Motors, Inc., 487 So.2d 427 (Fla. 4th DCA 1986). Any

alleged disparity between the amount of attorney's fees awarded and the ultimate relief granted to petitioners is for the trial judge to determine. This type of argument was rejected in Sockolof v. Edan Point North Condominium Association, Inc., 487 So.2d 1114 (Fla. 3d DCA 1986). Since Section 723.068, Fla.Stat., is mandatory and an action was brought under Chapter 723, Fla.Stat., attorney's fees should be awarded throughout these proceedings.

POINT IV

THE ISSUE OF WHETHER OR NOT FRIENDLY ESTATES MOBILE HOME PARK, INC. WAS THE ALTER EGO OF THE INDIVIDUAL RESPONDENTS WAS NOT RAISED ON APPEAL OR BY PETITION FOR REHEARING IN THE LOWER COURT.
(As Raised by Respondents' Point IV)

For the first time, respondents raise the question of whether or not the lower court's finding that respondents were the alter ego of Friendly Estates Mobile Home Park, Inc. was erroneous. (B 12-14) Amicus appeared in the Fifth District as Amicus Curiae on behalf of the appellees. Amicus has included in its Appendix to its Reply Brief the two Briefs of respondents filed with the Fifth District. (A 1-50) Nowhere is the issue of alter ego raised or is it contended that the lower court erred in finding that Friendly Estates Mobile Home Park, Inc. was the alter ego of the individual respondents. There is no showing that respondents objected to the court's findings or made the issue of alter ego the subject of a Petition for Rehearing in the lower court. It is academic that an issue may not be raised for

the first time on appeal. Condrey v. Condrey, 92 So.2d 423 (Fla. 1957). Respondents may not raise the issue of alter ego for the first time before the Supreme Court. Therefore, Amicus recommends rejection of this point attempted to be raised for the first time before the court.

POINT V

THE TRIAL COURT'S ORDER CERTIFYING THE MATTER AS MAINTAINABLE AS A CLASS ACTION WAS PROPER AND SHOULD NOT BE REVERSED.
(As Raised by Respondents' Point V)

Respondents claim that no testimony was taken or evidence given in the lower court on the issues pled in petitioners' complaint that an action was maintainable by petitioners as a class action under Rule 1.220(a), Fla.R.Civ.P. Respondents also claim that the notice of class action was also defective. (B 15-17)

The assertion of this alleged error has been rendered moot by this court's decision in Lanca and Avila, supra. A proper rule has been promulgated permitting the petitioners to file an action as a "class action" and since the action is still pending, the issues raised by respondents in this point are irrelevant.

Whether or not a hearing was actually held and what the state of the record shows in this regard is unknown to Amicus. It was Amicus' understanding that a hearing was held on the class action, however, this particular argument will be left to petitioners in this cause. Therefore, upon the basis that the

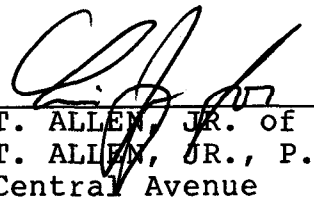
claimed error has been rendered moot by the promulgation of this court's rule and the application of Lanca and Avila, Amicus recommends that this court reject the argument of respondents on this point.

CONCLUSION

In their Brief, respondents by-pass the real questions on the merits of whether or not a class action was maintainable by mobile home tenants and whether or not there was competent substantial evidence in the record to support the trial court's judgment. Instead, respondents challenge the judgment on grounds rejected by the Fifth District itself. The collateral issues raised by respondents should be rejected by this court. A finding that there must be an agreement to pay an unconscionable mobile home rent before an action may be brought challenging the rent is illogical on its face. Such reasoning would contravene the legislative intent of Section 723.033, Fla.Stat.

Challenging the question of attorney's fees in the face of the mandatory language of Section 723.068, Fla.Stat., and raising for the first time the question of the propriety of the lower court's application of the doctrine of alter ego is also unworthy of this court's consideration. The rule of this court permits the bringing of a class action by mobile home tenants and, therefore, Lanca and Avila require that the District Court's decision be quashed and the District Court's dissenting opinion and this court's decision in Lanca be determined to be the law of this case.

Respectfully Submitted



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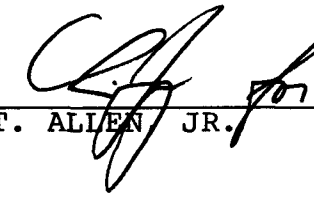
CERTIFICATE OF SERVICE

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; JACK M. SKELDING, JR., ESQUIRE, and DAVID D. EASTMAN, ESQUIRE, P.O. Box 669, Tallahassee, Florida 32302; and ALAN C. SUNDBERG, ESQUIRE, of Carlton, Fields, Ward, Emanuel, Smith & Cutler, P.A., P.O. Box 190, Tallahassee, Florida 32302, this 7th day of December, 1988.



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