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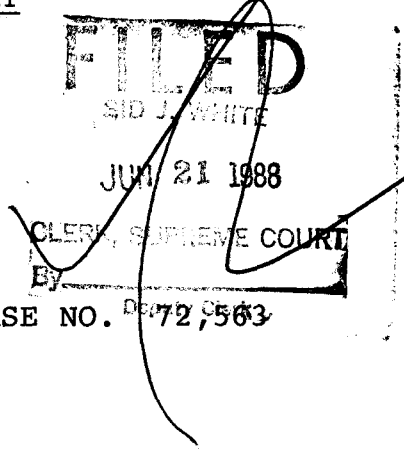
IN THE SUPREME COURT
STATE OF FLORIDA



REBERT JONES, et. al,

Plaintiffs/Petitioners,

vs. CASE NO. 72,563

ARTHUR THOMAS, et al.,

Defendants/Respondents.
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PETITION FOR DISCRETIONARY REVIEW OF
OPINION FILED MARCH 31, 1988 BY THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF PETITIONERS ON JURISDICTION

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners, REBERT JONES, et al., seek to have reviewed the Opinion filed on March 31, 1988 by the Fifth District Court of Appeal. (App. 1-5).

The Petitioners were the original Plaintiffs in the trial court and the Appellees before the District Court of Appeal. The Respondents, ARTHUR E. THOMAS, et al., were the original Defendants in the trial court and the Appellants before the District Court of Appeal. In this brief, the parties shall be referred to by the position they occupy before this Court. The following symbols will be used for reference:

"R" - record on appeal.

"App" - the Appendix of the Petitioners

This case involves a class action filed by the Petitioners, as representatives of the class of mobile home owners living in Friendly Adult Estates Mobile Home Park, against the Respondents (park owners) challenging the rental increase effective April 1, 1984 as unconscionable. (R 1278-1288; 1956-2002). The trial court, on August 9, 1984, found that the Petitioners were subject to the same rent and were provided the same services and amenities and entered an order determining that the claims of the representative plaintiffs were to be maintained as a class action. (R 1473-1474; App. 8-9). After a seven day non-jury trial, the trial court, on January 20, 1986, entered a Partial Final Judgment in favor of the Petitioners on the claim of unconscionable rent. (R 2627-2633). On May 5, 1986, the trial court entered an Amended Final Judgment in favor of the Petitioners

holding that the rental increase was unconscionable and unenforceable and awarding their reasonable attorney's fees and costs. (R 2908-2913; App. 10-15). This was an appeal by the Respondents from the Amended Final Judgment entered on May 5, 1986 by the trial court.

On September 29, 1987, the Fifth District Court of Appeal, entered a per curiam panel decision affirming the Amended Final Judgment of the trial court. (App. 6). On a rehearing en banc and by a three to two (3-2) vote with a written Dissent, the District Court of Appeal vacated its per curiam decision and substituted the written Opinion filed on March 31, 1988, which found that, as a matter of law, procedural unconscionability cannot be asserted in a class action and reversed the Amended Final Judgment of the trial court and remanded the action for further proceedings. (App. 1-5). The Petitioners' Motion for Rehearing and a Rehearing En Banc and a Suggestion of Certification of Opinion to the Supreme Court of Florida were denied by an order dated May 10, 1988. (App. 7).

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE DECISIONS HOLDING THAT PROCEDURAL UNCONSCIONABILITY IN MOBILE HOME CASES CAN BE ASSERTED AND PROVEN IN A CLASS ACTION.

SUMMARY OF ARGUMENT

This Court should invoke its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal in the instant case because it both announces a rule of law in conflict with a rule previously announced by other District

Courts of Appeal and applies the rules of law pertaining to issues of unconscionable rent in mobile home cases to produce a different result in a case involving controlling facts substantially similar to those in prior decisions of this Court and other District Courts of Appeal. In addition, the Fifth District Court of Appeal's decision is in error and the Petitioners maintain that it will be reversed on the merits.

ARGUMENT

The Fifth District Court of Appeal, in its Opinion filed on March 31, 1988, states that "[u]nder the current legal analysis, substantive and procedural unconscionability must both be established to prevail in an unconscionability action." (Emphasis supplied.) (App. 2). Its decision establishes the procedural-substantive analysis as a rule of law in determining the issue of unconscionability. However, the decision in the instant case directly and expressly conflicts with the Third District Court of Appeal's decision in Steinhardt v. Rudolph, 422 So.2d 884, 889 (Fla. 3d D.C.A. 1982), which held that the procedural-substantive analysis is only a general approach to unconscionability and is not a rule of law (emphasis supplied). The Third District Court of Appeal, in Steinhardt, cites other authorities and observes that the legal concept of unconscionability is so flexible and chameleon-like that it defies definition in a black letter rule of law, whether in procedural-substantive terms or otherwise. Id. at 890.

Chief Judge Sharp, in her written Dissent, also establishes that the instant majority decision conflicts with the statement

of the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th D.C.A. 1981), that "procedural unconscionability" does not necessarily apply to statutory causes of action, like this case (App. 5).

The Fifth District Court of Appeal's decision in the instant case finds that "the requirements for procedural unconscionability are too personal, individualized, and subjective to be properly asserted in a class action" and concludes "that, as a matter of law, procedural unconscionability cannot be asserted in a class action." (App. 3-4). This expressly and directly conflicts with the recent decision of the Fourth District Court of Appeal in Lantana Cascade of Palm Beach, Ltd., et al. v. Lanca Homeowners, Inc., et al., 516 So.2d 1074 (Fla. 4th D.C.A. 1987). In Lantana, the class of mobile home owners, through their incorporated association, filed a counterclaim seeking to have rents charged by the park owner declared unconscionable. (App. 16-28). The Fourth District Court of Appeal reversed the trial court's finding that the incorporated homeowners association was a proper class representative, but then stated:

> However, we affirm the trial court's finding that the counterclaim, except for the specified portions, could be maintained as a class action. (Emphasis supplied.) Id. at 1075.

The undersigned advise this Court that the Fourth District Court of Appeal, in Lantana, found Section 723.079(1), Fla. Stat., to be unconstitutional, and an appeal of right was taken and the Lantana case is before this Court as Case No. 71,767. The magnitude of the conflict between the Fourth District Court of Appeal's

decision in Lantana and the subject Fifth District Court of Appeal's decision and the pending review by this Court of the Lantana decision alone establish the jurisdiction of this Court and the need to review the decision in the instant case.

Also, the Opinion filed on March 31, 1988, for which review is sought, is at odds with the earlier decision of the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, Inc., supra. By the express language of the written Dissent in the instant case, Chief Judge Sharp and Judge Daniel identify the conflict by citing Kohl and recognizing that a gross inequality of bargaining power negates the meaningfulness of choice and that procedural unconscionability can be established in a class action. (App. 5). Contrary to the apparent belief of the three majority judges in this case, Kohl does not hold that procedural unconscionability cannot be properly asserted and proven in a class action. 398 So.2d at 869. Although speculating that it may be difficult to prove procedural unconscionability in a class action, the Fourth District Court of Appeal admitted that it was not prepared to make such a finding. Id.

In addition to the conflicts with the foregoing authorities, the instant decision conflicts with the Third District Court of Appeal's decision in Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986). The trial court's Amended Final Judgment, in Ashling, certified the class of mobile home owners after finding the claims of each class member to be identical in amount, based on identical grounds and that class treatment was superior to the filing of 174 different repetitive legal

actions. On appeal, the appellant's issue IV in the Brief of Appellant argued that the trial court erred in allowing the tenants of a mobile home park to proceed with a class action for unconscionable rent against the park owner. (App. 29-60). Although the Third District Court of Appeal did not directly speak to the issue of class action unconscionable rent cases in its published opinion, it did find that "appellant's remaining points lack merit." Id. at 56.

Additional conflict with the instant decision is found in Pearce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282 (Fla. 2d D.C.A. 1988). The Second District Court of Appeal, in Pearce, responded to a park owner's argument that the financial wherewithal of the individual mobile home owners is a material consideration in determining whether a rental increase is unconscionable by stating:

> The relative disadvantage of the mobile home owner vis-a-vis his landlord has little to do with the net worth of either, and very much to do with the demonstrable burden of pulling up stakes and a potential for economic blackmail that is equally abhorrent whether applied to the wealthy retiree or to the social security pensioner or the laborer of limited means. Id. at 284.

Clearly, this appellate decision conflicts with the Fifth District Court of Appeal's pronouncement in the instant case that since the financial condition, etc. of each mobile home owner is different, "the requirements for procedural unconscionablity are too personal, individualized, and subjective to be properly asserted in a class action." (App. 2-3).

The Petitioners maintain that the decision of the Fifth

District Court of Appeal in the instant case is not only in direct conflict with the decisions of other District Courts of Appeal as discussed above, but expressly conflicts with and represents a radical departure from the policies enunciated and intended by this Court in Stewart v. Green, 300 So.2d 889 (Fla. 1974) and Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974) and the Legislature in enacting Chapter 723, Fla. Stat.

A mobile home unconscionable rent case is unique in its application of commercial law. A prerequisite to a meaningful analysis of the instant case is the recognition and understanding of the relationship that exists between a mobile home park owner and a mobile home owner. The gravamen of an unconscionable rent dispute stems from the grossly unequal bargaining position of a mobile home owner once he "cements" his mobile home into a mobile home park. This Court, in Stewart v. Green, supra, and Palm Beach Mobile Homes, Inc. v. Strong, supra, has recognized the grossly inferior bargaining position of the mobile home owner vis-a-vis the park owner and his absence of meaningful choice since the mobile home owner can neither find available space to move his mobile home to another park nor afford the expenses of same.

The Fourth District Court of Appeal, in Kohl v. Bay Colony Club Condominium, Inc., supra, recognized that the details of each tenant's experience and education may be relevant, but identified the basic concept of procedural unconscionability as "an absence of meaningful choice." 398 So.2d at 869. In enunciating the most widely accepted test for contractual unconscionability, the U. S. Court of Appeals, in Williams v. Walker-Thomas

Furniture Co., 350 F. 2d 445 (D.C. App. 1965), explained:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. Id. at 449.

In fact, the trial court in the instant case, in quoting this Court's decisions in Stewart and Palm Beach Mobile Homes, observed that "[t]he Florida Supreme Court appears to recognize that, almost as a matter of law, a mobile home owner 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." See Jones v. Thomas, 16 Fla. Supp. 2d 30 (Fla. 9th Cir. Ct. 1986). (App. 11). The gravamen of the issue of procedural unconscionability in mobile home cases is that the grossly unequal bargaining position of the mobile home owner negates any "meaningful choice" and therefore, it is unnecessary to delve into the individualized circumstances of each member of the class as the instant decision would require. (App. 5; Sharp, W. CJ., dissenting). The failure of the Fifth District Court of Appeal to recognize the grossly unequal bargaining position of the mobile home owner when faced with an unconscionable rent is in direct conflict with the policies and concerns stated by this Court in Stewart v. Green, supra, and Palm Beach Mobile Homes, Inc. v. Strong, supra, and the foregoing authorities.

If not reversed by this Court, the inevitable result of the Fifth District Court of Appeal's decision will be that the elderly mobile home owners, on fixed incomes, will not be able to afford to litigate their claims against an abusive park owner charging unconscionable rents and this will serve to aggravate the very conditions of "economic servitude" discussed by this Court in Stewart v. Green, supra and Palm Beach Mobile Homes, Inc. v. Strong, supra. The Fifth District Court of Appeal's decision in the instant case will have a chilling effect on the administration of justice throughout the State of Florida for the reason that mobile home owners faced with the same rental increase in the same park with the same available amenities, services and facilities, and with the same "absence of meaningful choice," will have to separately prosecute their unconscionable rent claims resulting in a multiplicity of actions, great expense to the parties and the expenditure of an inordinate amount of judicial time.

CONCLUSION

The Opinion filed on March 31, 1988 by the Fifth District Court of Appeal, for which the Petitioners seek review, is in direct and express conflict with the decisions of the District Courts of Appeal and this Supreme Court, to-wit: Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982); Kohl v. Bay Colony Club Condominium, Inc. 398 So.2d 865 (Fla. 4th D.C.A. 1981); Stewart v. Green, 300 So.2d 889 (Fla. 1974); Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974); Pearce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282 (Fla. 2d D.C.A. 1988); Lantana Cascade of Palm Beach, Ltd., et al. v. Lanca Home-

owners, Inc., et al., 516 So.2d 1074 (Fla. 4th D.C.A. 1987); and Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986).

The Petitioners, therefore, request this Court to extend its discretionary jurisdiction to this cause, and to enter its order quashing the decision of the Fifth District Court of Appeal in the instant case, approving the conflicting decisional law discussed in this brief as the controlling law of this state, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted this 20th day of June, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by U.S. Mail, postage prepaid, this 20th day of June, 1988, to Johnie A. McLeod, Esquire, Attorney for Defendants/ Respondents, of McLeod, McLeod & McLeod, Post Office Drawer 950, Apopka, Florida 32703 and John T. Allen, Jr., Esquire and Christopher P. Jayson, Esquire, of John T. Allen, Jr., Esquire, 4508 Central Avenue, St. Petersburg, Florida 33711.

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