11-18

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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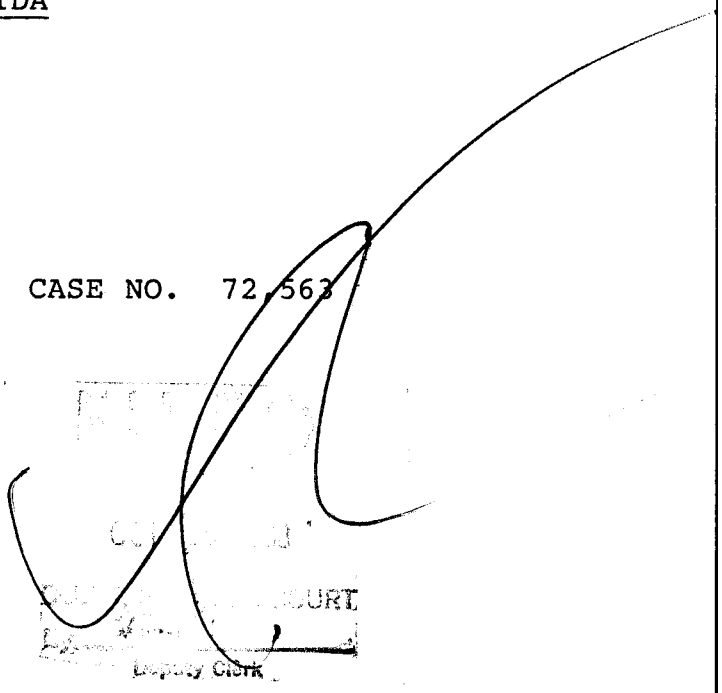

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

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.

"T" - trial transcript

"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 under Section 83.754, Fla. Stat. (R 1278-1288; 1956-2002). On April 11, 1984, the Petitioners filed a Motion for Determination of Class Action seeking class certification under Fla. R. Civ. P. 1.220(d)(1). (R 1375). In response, the Respondents filed a motion in opposition. A hearing was held on the respective motions, a transcript of which is not included in the record on appeal, and on August 9, 1984, the trial court 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).

On June 4, 1984, Chapter 83, Part III, Florida Statutes, was repealed and Chapter 723, Fla. Stat., was simultaneously enacted. By its order dated July 9, 1985, the trial court directed the Petitioners to amend their Complaint for unconscionable rent to plead Chapter 723, Fla. Stat. (R 1924-1927). The trial court found that the original basis for the unconscionable rent action, namely Section 83.754, Fla. Stat., was reenacted verbatim in Section 723.033, Fla. Stat. (R 1929). On July 24, 1985, the Petitioners filed an Amended Complaint for unconscionable rent under Section 723.033, Fla. Stat. (R 1956-2002). On August 2, 1985, the Respondents answered the Amended Complaint by denying all material allegations. (R 2034-2036).

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 effective April 1, 1984 was unconscionable and unenforceable and awarding their reasonable attorney's fees and costs. (R 2908-2913; App. 10-15). The Respondents' Motion for Rehearing was denied by the trial court's order dated June 5, 1986. (R 2928). This was an appeal by the Respondents from the Amended Final Judgment entered on May 5, 1986 by the trial court. (R 2938).

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).

On June 9, 1988, the Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction with the Clerk of the Fifth District Court of Appeal. After consideration of the briefs filed on jurisdiction, this Court, on September 28, 1988, entered an Order Accepting Jurisdiction and Dispensing with Oral Argument.

STATEMENT OF THE FACTS

Friendly Adult Estates is an adult mobile home park located just outside Kissimmee, Florida. (T 337). At all times material to this case, the Respondents, Arthur E. Thomas and Shirley Thomas, his wife, owned the mobile home park through a closely held Florida corporation named Friendly Adult Estates, Inc. (T 25). Arthur E. Thomas and his wife were the sole officers and directors of the corporation and owned 100% of the stock. (T 25). The trial court made a specific finding that the corporation was merely the alter ego of the Thomases. (T 337-342).

Friendly Adult Estates is an older mobile home park consisting of 106 lots, a modest recreational hall (part of which is used as a chapel and park office), a sewer plant, well and water-treatment plant (both owned and operated by the Respondents), paved streets with street lights and two outdoor, uncovered shuffleboard courts. During all times material to this case, the rental amount included water, sewage and garbage pickup. The only amenities provided were the recreational hall (the furnishings and equipment located therein were provided by the Petitioners), and the two shuffleboard courts, which were maintained and supplied by the Petitioners. (T 337-342).

In 1979, when the Respondents purchased the mobile home park, the lot rents were $50.00 per month. (T 357; R 2240). In 1980, the rental amount was increased twice, once to $55.00 per month and then to $62.00 per month. (R 2240). On April 1, 1981, the rent was increased by the Respondents to $75.00 per month; in

1982 to $90.00 per month; and in 1983 to $102.50 per month. (R 2240). The proposed rental increase effective April 1, 1984, which was to increase the lot rent from $102.50 to $130.00 per month, is the subject of this litigation.

All of the Petitioners who testified at trial graphically described the condition of the sewer plant, which was owned and operated by the Respondents, and the associated problems resulting from the continually malfunctioning system. (T 170-177; 208; 299-301; 451-465; 1176-1178; 1190-1191; 1200-1207; 1232-1233; 1244; and 1266). The evidence clearly established a history of severe sewage problems beginning in 1979 when the Respondent purchased the park. Rebert Jones, a longtime resident of Friendly Adult Estates, testified that the sewage situation had constantly been the subject of complaints by the residents but that the Respondents failed to correct the problem. (T 458-459). The former park owner, Luther Keene, testified that he never had any problems with the sewage plant when he owned the park. (T 669). The problems with the sewage plant included not only strong unpleasant odors, but actual discharge or backup of raw sewage onto lots in the mobile home park and the surrounding areas. (T 452; 176; R 2239). One resident, when asked to describe the nature of the materials emanating from an open sewer pipe on one lot (as depicted in Plaintiffs' Exhibit 36) described the materials 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.

Plaintiffs' Exhibits 34-36 and 40-56 graphically depict this problem with the sewage plant.

The Petitioners also complained about the potable water provided by the Respondents. The witnesses testified that the water was undrinkable at times and that the water had often been in that condition during the past two to three years. (T 206; 213; 301; 494; 1178; 1190; 1209; 1226; and 1243). According to one witness, approximately 40% to 50% of the residents of the park, including the Respondents in both their home and office, resorted to using bottled water. (T 497; 634; 496). The complaints about the water included the terrible odors, low or no water pressure at times, a lack of chlorine in the water resulting in scum forming in toilets and sinks and too much chlorine at other times. (T 170-177; 208; 299-301; 451-465; 1176-1178; 1190-1191; 1200-1207; 1232-1233; 1244; 1266; 502; 206; and 1179). One resident testified that at times the water contained so much chlorine that it would burn her eyes when she took a shower in her mobile home. (T 302). The quality of the water provided to the Petitioners significantly deteriorated after the Respondents purchased the mobile home park. (T 598; 1210).

The recreation hall provided by the Respondents was in poor condition including leaks from the ceiling of the men's room, the laundry room and the main hall. (T 438). One resident testified that you could actually see the sky from the restrooms in the laundry room. (T 438-439). The Petitioners offered to assist in repairing the recreation hall; however, the Respondents

declined their offers to help because they did not have any insurance on the recreation hall. (T 439-440).

The Petitioners also experienced poor lawn maintenance and grass cutting, problems associated with the lack of an on-site manager to handle problems and complaints and problems created by the lax enforcement of the park rules and regulations including violations by the Respondents themselves. (T 299; 507-508; 1184; 516; 508-516). The Respondents explained that the numerous lot rental increases (from $50.00 per month to $130.00 per month) were necessary for maintenance and repairs in the mobile home park. The Respondents' own expert, W. H. Morse, however, 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. (T 220; 263).

The Respondents, Arthur E. Thomas and his wife, purchased the mobile home park in 1979 for $325,000.00, with $75,000.00 down and the balance in a Purchase Money Mortgage. (T 98). The Respondents were delinquent in paying the Purchase Money Mortgage on the property and also disclosed that there was a $1,000,000.00 second mortgage on the property for which they had made no principle or interest payments since 1981. (T 28; 38). However, the Respondents, at the same time, withdrew money from the mobile home park through a variety of methods. The Respondents, Arthur E. Thomas and his wife, leased the park to their alter ego, Friendly Adult Estates, Inc. (T 51). Each year the Respondent corporation was to pay the Respondents, Arthur E. Thomas and his wife, the

sum of $60,000.00 as rent for use of the mobile home park. (T 52). In fact, the Respondent corporation paid the Respondents, Arthur E. Thomas and his wife, rent in the amount of $52,500.00 in 1980, $54,000.00 in 1981, $56,500.00 in 1982, $51,050.00 in 1983 and $33,000.00 in 1984. (T 83-84). In addition, the Respondents, Arthur E. Thomas and his wife, and other members of their family and household received salaries from the mobile home park. (T 122-125).

There also were 13 lots in the mobile home park for which the Respondent corporation received no rent. (T 64). Mobile homes owned by the Respondents, Arthur E. Thomas and his wife, or their family or mobile homes which the Respondents personally rented to other individuals occupied nine of these lots. (T 53-65). In addition, four other lots in the mobile home park were used rent-free by individuals to whom the Respondents owed money. The amount of the rental on these additional lots was credited against the amounts owed by the Respondents. (T 60). The Petitioners' expert observed that the effect of these rent-free lots was to increase the burden on the remaining 93 mobile home lots. (T 385). Although the aforedescribed lots did not generate any rental income, they did receive the same services as the Petitioners. (T 141).

While admitting the personal income received from the Respondent corporation, Arthur E. Thomas testified that the mobile home park always had operated at a loss. (T 74). Later, he did admit that at least in 1983 the park did make a profit even after payment of the Respondents' personal income. (T 97).

The Petitioners presented evidence through their expert, Dr. Tom Curtis, concerning market rents in the Kissimmee area for comparable mobile home parks. Dr. Curtis compared Friendly Adult Estates to a number of comparable parks in the area. (T 335). The park located closest to Friendly Adult Estates was the Good Samaritan Mobile Home Park. (T 344). Good Samaritan was described as an extremely well-maintained mobile home park with extremely good facilities. (T 344). The lot rent at Good Samaritan included sewage, water, garbage pickup, lawn mowing, security and a transportation system to take the residents to shopping areas. (T 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. (T 345). There also was a miniature golf course and a par 3 golf course located on site. (T 345). In 1984, the lot rents at Good Samaritan were $91.00 per month to $113.00 per month depending on the size of the lot. (T 346). As noted by Dr. Curtis, Good Samaritan was charging $39.00 less rental per month while providing more services, facilities and good maintenance. (T 347).

Dr. Curtis also compared Friendly Adult Estates with Windsor Mobile Home Village. (T 347). Windsor had a heated swimming pool, two covered and lighted shuffleboard courts and a nice clubhouse area with a large game room, pool table and air conditioner. (T 348). The level of maintenance was outstanding. (T 349-350). The lot rents at Windsor were $126.00 per month; however, Dr. Curtis noted that it provided a great deal more ame-

nities and showed much better maintenance than Friendly Adult Estates. (T 350).

Finally, Dr. Curtis compared Friendly Adult Estates to Sherwood Forest Mobile Home Park, which is located seven miles from the subject park. (T 351). The lot rents at Sherwood Forest were $119.00 per month to $129.00 per month depending on the location of the lot. (T 351). Sherwood Forest provided its residents with a swimming pool, tennis courts, underground utilities, garbage collection, very well-maintained streets, large wooded lots, security and a miniature golf course. (T 351-352). Dr. Curtis opined that although the lot rents at Sherwood Forest were approximately equal to Friendly Adult Estates, the residents of Sherwood Forest were provided with much greater amenities, maintenance and services. (T 353).

In fact, Dr. Curtis testified that out of the 120 to 150 mobile home parks that he has studied in the State of Florida, Friendly Adult Estates was the second worst park in terms of the level of maintenance provided. (T 342). Based on his comparative study of mobile home parks in the area, Dr. Curtis opined that the fair market rental of the lots at Friendly Adult Estates should be between $75.00 and $85.00 per month. (T 354). It should be noted that Dr. Curtis also examined other mobile home parks in the area but did not use them as comparable parks in his study because they either were not adult parks or they were letting young people move into the park. (T 335).

Dr. Curtis also compared the rental increases at Friendly Adult Estates with the increases in the Consumer Price

Index. (T 355). He testified that if the 1979 rental amount of $50.00 per month was increased according to the increases in the Consumer Price Index, the 1984 lot rental would be $68.49 instead of the $130.00 per month or a difference of $61.51 per month. (T 357). The expert's analysis of the rental increases at Friendly Adult Estates compared to the Consumer Price Index was admitted into evidence as Plaintiffs' Exhibit 37. (R 2240; T 362). In addition, Dr. Curtis testified concerning his examination of the tax records and other financial information furnished by the Respondents. (T 374). Based on his comparison with other mobile home parks which he had examined throughout the State of Florida, Dr. Curtis testified that the subject park's telephone bills and travel and entertainment expenses seemed to be quite high and out of line. (T 379).

In addition to the expert testimony by Dr. Curtis, the Petitioners offered the testimony of the manager of Sherwood Forest Mobile Home Park. (T 276; 678). Although managing the Sherwood Forest Mobile Home Park, she resides in Friendly Adult Estates. She testified that part of her duties as manager of Sherwood Forest was to do rent comparisons and check on other mobile home parks on a yearly, sometimes semi-yearly basis. (T 281; 679). In the course of this rent comparison, she analyzed seven or eight mobile home parks in the Kissimmee area. (T 281). Based on her knowledge and consideration of other mobile home parks, she testified that in 1984 a reasonable monthly lot rental in Friendly Adult Estates would have been approximately $90.00. (T 295).

After a seven day non-jury trial and a view of the subject mobile home park, the trial judge held that the poor maintenance, management, deteriorating common areas, odoriforous and malfunctioning sewage plant, and unpotable water substantially depressed the rental value of the lots and rendered the $130.00 per month rental increase effective April 1, 1984 unconscionable and unenforceable. (T 1181; R 2911). On May 5, 1986, the trial court entered an Amended Final Judgment in favor of the Petitioners. (R 2908-2913; App. 10-15).

SUMMARY OF ARGUMENT

I

The Supreme Court's Opinion in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under a certificate dated October 6, 1988) holds that given the special relationship which exists between a park owner and mobile home owners, the grossly inferior bargaining power of the mobile home owners and the unique features of mobile home residency, a unilateral rent increase imposed across-the-board by the park owner leaves the mobile home owners with the "absence of meaningful choice" necessary to meet the class action requirement of procedural unconscionability as a matter of law. The Lanca decision, once final, is absolutely on point with the case sub judice and finally dispositive of the issue on appeal.

The policies and principles enunciated in Lanca were first recognized by the Supreme 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). There, this Court acknowledged the grossly inferior bargaining position of the mobile home owners vis-a-vis the park owner and their absence of meaningful choice since the mobile home owners can neither find available space in other parks to move their mobile homes nor afford the expenses of same. The basic concept of procedural unconscionability has been identified in Florida as "an absence of meaningful choice." Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th

D.C.A. 1981). In deciding issues of contractual unconscionability, courts have long recognized that in many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. See e.g. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (DC App. 1965).

The Fifth District Court of Appeal's decision in the case sub judice directly conflicts with the foregoing authorities and represents a radical departure from the policies and principles stated therein. In the instant case, procedural unconscionability exists as a matter of law because of the Petitioners' absence of meaningful choice and can be proven in a class action.

II

The Fifth District Court of Appeal, in its Opinion filed on March 31, 1988, establishes the procedural-substantive analysis as a rule of law in determining the issue of unconscionability. This departure from existing law which holds that the procedural-substantive analysis is only a general approach to unconscionability is unwise and unfounded. See generally, Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982); Kohl, supra.

ARGUMENT

I

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT, AS A MATTER OF LAW, PROCEDURAL UNCONSCIONABILITY CANNOT BE ASSERTED IN A CLASS ACTION.

The Supreme Court has decided the very issue on appeal in its recent decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under a certificate dated October 6, 1988). This Court's Opinion in pertinent part, provides:

> 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 been 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. Id. at 569.

The trial court, in the case sub judice, found that all of the class members 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 Petitioners were to be maintained as a class action. (R 1473-1474; App. 8-9). In addition, the record on appeal is replete with evidence that the Petitioners lacked any "meaningful choice" when faced with the unilateral rental increase by the Respondents. See Petitioners' Statement of the Facts. The Lanca decision, once final, is absolutely dispositive of the instant issue on appeal.

As this Court in Lanca, supra, recognized, the gravamen of a mobile home unconscionable rent dispute stems from the unique relationship that exists between the park owner and mobile home owners and the grossly unequal bargaining positioning of the mobile home owner once he "cements" his mobile home into a mobile home park. It is clear that once the mobile home is "cemented" in place, the mobile home owner is at the mercy of the park owner. This unequal bargaining power and the recognition that the threat of requiring a mobile home owner to move is so economically onerous that the Legislature's enactment of the Florida Mobile Home Act, now Chapter 723, Fla. Stat., was described by the Fifth District Court of Appeal as the mobile home owners "Bill of Rights." See Lemon v. Aspen Emerald Lakes Associates,

Ltd., 446 So.2d 177, 180 f.n. 2 (Fla. 5th D.C.A. 1984).

In fact, once a mobile home is placed in a park it has a permanence of location. Its wheels and hitch are removed, it is placed on a concrete base, tied down in accordance with state laws and joined with the available electrical and water connections. Generally, once a mobile home is located in a park permanent attachments are added such as a cabana, garage, porch, shed or additional rooms. These permanent structures often are lost if the mobile home is moved. In addition, it is both expensive and difficult to move a mobile home. This situation is further aggravated 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 the older mobile home into the park. The mobile home owners are generally older people in the lower income brackets. The reality, therefore, is that even if the mobile home owners can find another park to move to, it is not economically feasible for them to move their mobile homes since if they are forced to do so they will lose virtually their entire investment.

Although equally applicable to the instant case, the foregoing facts and opinions are not from the trial transcript or record on appeal in the case sub judice. Rather, they represent the specific findings of this Supreme 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). In Stewart, this Court upheld the statute limiting grounds for evictions in mobile home parks

and stated:

> 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 abuse 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 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 relation with park owners and the latters' overriding economic advantage over tenants.
>
> Regulatory laws that apply 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 landowner 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. (Emphasis supplied) Id. at 892, 893.

The procedural-substantive analysis of unconscionability generally has been employed by the courts in Florida in deciding unconscionable rent issues in mobile home cases. See the Petitioners' Argument in Issue II. In order to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability. See Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865, 868 (Fla. 4th D.C.A. 1981). The trial court's finding of substantive unconscionability in the case sub judice, as confirmed by the Fifth District Court of Appeal, is not at issue before this Court and will not be discussed. The instant issue is whether, as a matter of law, procedural unconscionability can be asserted in a class action.

The Fourth District Court of Appeal in Kohl, 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." Id. 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 (DC App. 1965), stated:

> 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. (Emphasis supplied). Id. at 449.

See also the Dissent by Sharp, C.J. (App. 5).

In the very articulate opinion written by the Honorable Rom W. Powell, Circuit Judge, in the instant case, he explains that the Petitioners' evidence sufficiently establishes the requisite "quantum" of procedural unconscionability and observes:

> The 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 Palm Beach Mobile Home, Inc. v. Strong, 300 So.2d 881 (Fla. 1974); Stewart v. Green, 300 So.2d 889 (Fla. 1974). (App. 11).

Other trial courts in this State also have recognized the unique circumstances of mobile home residency and the lack of meaningful

choice on the part of mobile home owners when faced with a unilateral across the board rent increase. In Offner v. Keller Park Investors, 19 Fla. Supp. 2d 140 (Fla. 6th Cir. Ct. Pasco Cty., 1986), the trial court discussed the disparate bargaining power and the mobile home owners' options as follows:

> The facts set out above establish procedural unconscionability because of the absence of any meaningful choice on the part of the mobile home owners, together with terms and benefits unreasonably favorable to the partnership and the management company. Kohl v. Bay Colony Club Condominium, 398 So.2d 865 (Fla. 4th D.C.A. 1981), petition for review denied, 408 So.2d 1049 (Fla. 1981); Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982). The mobile home owners find themselves bound by the bargain they never made. They have no voice in the matter of rents. The mobile homes, if not the owners themselves, are captives of the partnership and the management company. The owners have three choices: (1) pay the rent no matter how high it is set, (2) sell their mobile home at less than their actual value, (3) move the homes at possibly a greater loss than from a sale. Id. at 143.

In the instant case, the Fifth District Court of Appeal stated that procedural unconscionability "speaks to the individualized circumstances surrounding each contracting party at the time the contract is entered into" and held that "because of the basic differences between people, the requirements for procedural unconscionability are too personal, individualized, and subjective to be properly asserted in a class action." (App. 2, 3). The appellate court erred. It failed to recognize the unique circumstances of mobile home residency and that the meaningfulness

of the choice of each member of the class is negated by a gross inequality of bargaining power. In addition, the authorities cited by it in support of its decision either can be easily distinguished from the instant case or do not provide authority for the principles advanced.

In K. D. Lewis Enterprises Corp. v. Smith, 445 So.2d 1032 (Fla. 5th D.C.A. 1984), the tenants living in different apartments were attempting a class action for damages which admittedly differed from apartment to apartment, individual to individual. Clearly, a class action could not be maintained under that factual situation. In the instant case, however, the unilateral rent increase in question was imposed across the board on all residents. The decision in K. D. Lewis can easily be distinguished and is not controlling of the instant facts.

Similarly, the Fifth District Court of Appeal's reliance on its decision in State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th D.C.A. 1982), is misplaced. The DeAnza decision does not hold that mobile home owners cannot meet the requirements of a class action under Florida Rules of Civil Procedure 1.220. In addition, the general comment that individual circumstances surrounding each contracting party at the time of contracting cannot be established as a general proposition for a whole range of contracts merely containing similar terms between various persons is not specifically applicable to the question presented in the case sub judice, namely whether the grossly inferior bargaining position of the mobile home tenants in Friendly Adult Estates negated the meaningfulness of their choice

when faced with the unilateral rent increase imposed across the board by the Respondents. The Fifth District Court of Appeal, in the instant case, also cites Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th D.C.A. 1985), in support of its conclusion that procedural unconscionability cannot be proven in a class action. The statement of the Fourth District Court of Appeal in Garrett that the "prerequisites for procedural unconscionability are too individualized to permit a class action" is dictum. The Petitioners wish to emphasize to this Court that the basis for the appellate court's statement in Garrett was a misinterpretation of the holding in Kohl v. Bay Colony Club Condominium, Inc., supra. In Kohl, the appellate court stated:

> Finally we address the question of pleading and proving procedural unconscionability. To meet the threshold test of adequacy allegations of procedural unconscionability must clearly demonstrate the absence of meaningful choice on the part of the plaintiff. Ordinarily this requires an examination into a myriad of details including plaintiff's experience and education and the sales practices that were employed by the defendant or his predecessor-assignor. However, the basic concept is "an absence of meaningful choice." While we foresee monumental obstacles of proof of such an allegation (which is a legal conclusion only) in a class action setting, we are not prepared to hold that the allegations of the amended complaint are per se insufficient. We note that we are not called upon here to determine evidentiary questions. (Emphasis supplied). 398 So.2d at 869.

Thus, the Garrett decision provides no precedential value to a consideration of the instant issue on appeal and is not controlling in this case.

In Lanca Homeowners, Inc., et al. v. Lantana Cascade of

Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under certificate dated October 6, 1988), discussed previously, 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, in Lanca, reversed the trial court's finding that the incorporated home-owners 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). 516 So.2d at 1075.

Another case which must be considered in deciding the instant issue is Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986). In Ashling, the trial court's Amended Final Judgment 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 lacked merit." 487 So.2d at 56.

In its decision in the instant case, the Fifth District Court of Appeal opines that 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. (App. 2). In Pierce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282 (Fla. 2d D.C.A. 1988), the Second District Court of Appeal responded to a park owner's argument that the financial wherewithall 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.

After reviewing the foregoing authorities and specifically, the Supreme Court's decisions in Lanca, supra, Stewart v. Green, supra, and Palm Beach Mobile Home, Inc. v. Strong, supra, it is clear that the Fifth District Court of Appeal failed to properly consider the special relationship that exists between the park owner and the mobile home owners and the gross inequality of bargaining power that negates any meaningfulness of choice on the part of the mobile home residents. In a factual situation such as in the instant case, there is procedural unconscionability as a matter of law and a class action provides an effective forum

to hear and decide the issues of common interest applicable to all members of the class.

II

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN ESTABLISHING THE PROCEDURAL-SUBSTANTIVE ANALYSIS AS A RULE OF LAW IN DETERMINING THE ISSUE OF UNCONSCIONABILITY.

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. In this respect, the appellate court erred.

A definitive discussion of the analysis for finding unconscionability under Florida contracts law can be found in Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982). Although recognizing that most modern courts do take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability, the Third District Court of Appeal, in Steinhardt, stated that "this procedural-substantive analysis is, however, only a general approach to the unconscionability question and is not a rule of law." (Emphasis supplied) Id. at 889. In citing other authorities, the Third District Court of Appeal 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.

In addition, the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, 398 So.2d 865 (Fla. 4th D.C.A. 1981), observed that procedural unconscionability is a technical, and not a clearly defined requirement for the common law cause of action relating to relief from onerous contract terms. As the appellate court stated in Kohl, procedural unconscionability does not necessarily apply to statutory causes of action, like this one. See also the Dissent by Sharp, C.J. (App. 5).

The Petitioners wish to emphasize that they are not asking for the procedural-substantive analysis to be abolished or limited in any way; rather, it simply should not be adopted as a rigid rule of law in determining the issue of unconscionability in mobile home cases in Florida.

CONCLUSION

The Fifth District Court of Appeal erred in the instant case by (1) holding that, as a matter of law, procedural unconscionability cannot be proven in a class action and (2) establishing the procedural-substantive analysis to unconscionability as a rule of law.

If individual unconscionable rent actions must be maintained by mobile home owners throughout this State, as required by the decision under review, the increased amount of time and additional costs to be expended by the Courts and the litigants would be devastating to the administration of justice in this State. In addition, the requirement of individual actions would effectively eliminate any economically viable forum for the generally older, lower income mobile home owners to protect their interests against unilateral, unconscionable rent increases by their park owner. The special relationship that exists between the park owner and the mobile home owners and the grossly inferior bargaining power on the part of the mobile home owner once he "cements" his mobile home into a park dictate that "procedural unconscionability" exists as a matter of law and the mobile home unconscionable rent action can be maintained as a class action.

For the reasons discussed in this Brief, the Fifth District Court of Appeal's majority Opinion filed on March 31, 1988 should be reversed without further proceedings.

Respectfully submitted this 24th day of October, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief and Appendix have been provided by U.S. Mail, postage prepaid, this 24th day of October, 1988, to Johnie A. McLeod, Esquire, 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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