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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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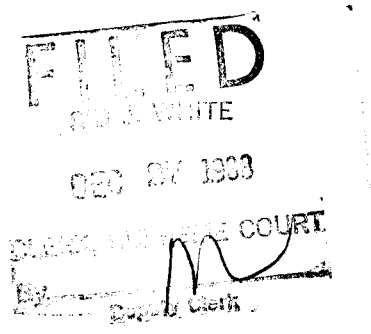

PETITIONERS' REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Petitioners incorporate by reference, as though fully set forth herein, the Statement of the Case from their Brief on the Merits served under a certificate dated October 24, 1988. All symbols identified in the Petitioners' Brief on the Merits shall be used in this Reply Brief and all references in this brief to "App." shall refer to the Appendix of the Petitioners filed with their initial brief and "App.-R" shall refer to the Appendix to the Petitioners' Reply Brief on the Merits.

The Petitioners disagree with the Respondents' Statement of the Case as the same is substantially inaccurate, including without limitation (1) their suggestion that the Petitioners have continued to reside on their respective lots and not paid rent is absolutely untrue, (2) that the trial court's Order Determining And Approving Class Action dated August 9, 1984 was defective is without basis in law or fact, and (3) that the Fifth District Court of Appeal did not pass on the Respondents' "additional issues," including their argument that there was no lot rental agreement between the parties, is incorrect.

STATEMENT OF THE FACTS

The Respondents did not include a Statement of the Facts in either its Initial Brief or Amended Initial Brief (Answer Brief) and thus has accepted without objection the Petitioners' Statement of the Facts set forth in its Brief on the Merits served under a certificate dated October 24, 1988. The Petitioners incorporate by reference, as though fully set forth herein, their Statement of the Facts from the Brief on the Merits.

ARGUMENT

I

LANCA HOMEOWNERS, INC., ET AL. V. LANTANA CASCADE OF PALM BEACH, LTD., ET AL., 13 F.L.W. 568 (FLA. SEPT. 22, 1988).

The Respondents and the Amici, The Florida Manufactured Housing Association, Inc. (FMHA) and Club Wildwood Mobile Home Village (Club Wildwood), argue that the instant case is not controlled by this Court's recent decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988), for the reasons that the new rule of procedure (Fla. R. Civ. P. 1.222) adopted in Lanca only concerns representative actions by mobile home owners' associations and even if applicable to the instant case, it would be unjust to apply such a rule retroactively. In addition, it is argued that in mobile home class actions such as the instant case procedural unconscionability or the absence of meaningful choice must be proven in each case. Their positions are without merit and do not accurately reflect the clear language and intent of the Lanca opinion.

It must first be emphasized that the Respondents and the Amicus, FMHA, by their very arguments, acknowledge that the Fifth District Court of Appeal erred in the instant case by holding that procedural unconscionability as a matter of law cannot be proven in a class action. They recognize that as the result of the Lanca decision mobile home owners may prosecute an unconscionable rent case as a class action. As identified above, they

attempt only to distinguish and limit the scope of this Court's decision in Lanca. The other Amicus, Club Wildwood, on the other hand, apparently disagrees with FMHA and the Respondents, in support of whom it filed its brief. Club Wildwood argues that procedural unconscionability cannot be proven in a class action and attempts to equate the factual circumstances of mobile home unconscionable rent cases with fraud claims and further, cites the same authorities that were fully briefed, argued and rejected by this Court in Lanca (and which were cited by the Fifth District Court of Appeal in its opinion under review in the instant case). The Petitioners have discussed Kohl v. Bay Colony Condominium, Inc., 398 So.2d 865 (Fla. 4th D.C.A. 1981), Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th D.C.A. 1985), State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th D.C.A. 1982) and the other authorities cited in their Brief on the Merits and will not restate those arguments herein.

However, the Petitioners will respond to the argument that the inherent differences between individual mobile home owners make it impossible to assert their claims for unconscionable rent in a class action. This argument is merely a restatement of the Fifth District Court of Appeal's written opinion under review in the instant case. Its logic and the attempts to analogize the other types of claims and factual circumstances are defective because of the failure to recognize the very unique relationship that exists between the park owner and mobile home owners. It is suggested that it is unfair and unjust to categorize all mobile home owners as elderly, low income people

without any meaningful choice in the contractual relationship with the park owner, but they discuss only the "choice" available to the mobile home owner when he or she decides to first enter a mobile home park. The gravamen of an unconscionable rent case such as the instant case is that once the mobile home is "cemented" into a park the mobile home owner is at the mercy of the park owner. The grossly unequal bargaining position of the mobile home owner once his home is "cemented" in place establishes the lack of any "meaningful choice" when faced with a unilateral rent increase by the park owner. This Court, in Lanca, described the circumstances as follows:

> 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 meaningful choice" for these residents, who find the rent increased after their mobile homes have been affixed to the land, serve to meet the class action requirement of procedural unconscionability. See Thomas, 524 So.2d at 695 (Sharp, C.J. dissenting); Steinhardt; Kohl. 13 F.L.W. at 569 (App. 62).

This Court, in its earlier decisions in Stewart v. Green, 300 So. 2d 889 (Fla. 1974) and Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), specifically identified the unique circumstances of mobile home residency, including without limitation the permanence of location once the mobile home is located

in a park, the substantial expense involved in moving a mobile home once anchored in a park and the inability to find other mobile home parks that will accept a used mobile home.

An additional argument advanced in support of the Respondents' position is that the Lanca decision does not establish that procedural unconscionability exists as a matter of law for mobile home owners challenging an unconscionable rental increase by their park owner. The Petitioners disagree. In discussing the unique features of mobile home residency and the grossly unequal bargaining position of the mobile home owners, this Court, in Lanca, stated:

> The "absence of 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. . . . 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.* 13 FLW at 569 (emphasis supplied).
>
> [*To the extent that some of the class members may not occupy the same position, the court is always at liberty to designate subclasses. See Imperial Towers Condominium, Inc. v. Brown, 338 So.2d 1081 (Fla. 4th D.C.A. 1976).]

It is clear that the grossly unequal bargaining position of the mobile home owner vis-a-vis the park owner has little to do with the individual circumstances of education, net worth, etc., 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, the laborer of limited means or to the social security pensioner. Pearce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282, 284 (Fla. 2d D.C.A. 1988). Thus, the individual circumstances of each mobile home owner in an unconscionable rent action is not determinative of the issue of procedural unconscionability; rather, the very position of the mobile home owners relative to the park owner establish their "lack of a meaningful choice" as a matter of law.

The argument that the Lanca decision and the adoption of Fla. R. Civ. P. 1.222 intend to give automatic class standing only to mobile home owners' associations, not individual mobile home owners acting together, is without merit and contrary to the express language of the Lanca opinion. Also, the argument that rent disputes are not matters of shared interest and therefore, not the proper subject of a class action is contrary to this Court's holding in Lanca. Clearly, the intent of the Lanca decision is to provide the mobile home owners, regardless of whether they are organized as an incorporated association or acting together as individual home owners, with an effective procedural format (i.e., a class action) to challenge unconscionable rents charged across the board by the park owner. 13 FLW at 569 (App. 62).

In Lanca, after adopting Fla. R. Civ. P. 1.222 and stating that the association can act as class representative, this Court holds that the Counterclaim for unconscionable rent can itself be maintained as a class action - without any limita-

tions or restrictions that the individual mobile home owners acting together cannot maintain such an action. 13 F.L.W. at 569. In fact, in support of its conclusion that the "absence of meaningful choice" for mobile home owners serves to meet the class action requirement of procedural unconscionability, this Court cites cases, including Chief Judge Sharp's written dissent in the instant action, which involved individual home owners acting together as a class. 13 F.L.W. at 569. In light of this Court's clear expression of its intention in Lanca, the arguments raised in support of the Respondents' position are illogical.

In the instant case, it is uncontroverted that the Petitioners were all subject to the same unilateral, across the board rental increase by the Respondents, the rental increase was imposed after their initial rental agreement, and because they were all "cemented" into the park they faced the dilemma of either accepting the rental increase, selling their mobile homes or undertaking the considerable expense and burden of uprooting and moving. See Petitioners' Statement of the Facts. In addition, as the Respondents acknowledged on page 4 of their Amended Initial Brief (Answer Brief), a mobile homeowners association did exist and the trial court in the instant case made it a party to this action.

The Respondents' contention that the Lanca decision cannot or should not be applied retroactively to decide the instant case is incorrect and without any basis in the law. See e.g. Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977).

II

THE TRIAL COURT DID NOT ERR AS ALLEGED BY THE RESPONDENTS.

In their Issues II through V, the Respondents allege numerous errors by the trial court and seek this Court's review of same. Since it has accepted jurisdiction in this appeal, this Court may dispose of all contested issues. See generally, 13 Fla. Jur.2d Courts and Judges §54; Bould v. Touchette, 349 So.2d 1181 (Fla. 1977).

However, the Petitioners urge this Court to exercise its discretion and summarily reject the new issues raised by the Respondents since they were either not raised on appeal to the Fifth District Court of Appeal or the trial court's decisions were affirmed by the Fifth District Court of Appeal (see App.-R; Per Curiam Affirmed Decision filed on December 29, 1987; App. 6), they were not raised by the Petitioners in this appeal, they bear no relationship to the conflict of prior authorities upon which this Court accepted jurisdiction of this cause and this Court accepted jurisdiction and dispensed with oral argument at least in part because of the limited issues presented and the Court's recent decision in Lanca Homeowners, Inc., et al., v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988). Further, the Petitioners respond to the new issues raised by the Respondents as follows:

(a) THE TRIAL COURT DID NOT ERR IN FINDING THE PROPOSED LOT RENTAL INCREASE WAS UNCONSCIONABLE (RESPONDENTS' ISSUE II).

On June 4, 1984, Chapter 83, Part III, Florida Statutes, was repealed and Chapter 723, Florida Statutes, was simultaneously enacted. The trial court, by its order dated July 9, 1985, directed the Petitioners to amend their complaint for unconscionable rent to plead Chapter 723, Florida Statutes (R 1924-1927). On July 24, 1985, the Petitioners filed an Amended Complaint for unconscionable rent under Section 723.033, Florida Statutes (R 1956-2002). On August 2, 1985, the Respondents answered the Amended Complaint by denying all material allegations (R 2034-2036). Therefore, the Respondents' argument concerning the proposed lot rental increase and the applicability of Chapter 83, Part III, Florida Statutes is entirely inappropriate and must be rejected in the instant case.

Further, the Respondents' argument that since the home owners had refused to sign the rental agreement, there was no lot rental agreement and therefore, the trial court could not find the increased rent unconscionable is absurd. Mobile home owners are not required to sign leases, and in the absence of written leases, the required statutory provisions shall be deemed to be part of the rental agreement. See Section 83.760, Florida Statutes (1983) and Section 723.031(2), Florida Statutes. The unique tenancy of a mobile home owner begins when he first assumes occupancy in the park, continues and can only be terminated in accordance with the statutory provisions governing eviction [Section 83.759, Florida Statutes (1983) and Section 723.061, Florida Statutes also, see Section 83.760(1) and Section 723.031(9)] or by the mobile home owner voluntarily vacating the

lot. After the initial lot rental agreement has been entered into, the tenancy is unaffected by the mobile home owners' refusal to sign a new written agreement and they are legally bound by the terms of the tenancy as imposed by the park owner's initial disclosures and by Chapter 723, Florida Statutes. See Section 83.754, Section 83.755 and Section 83.764, Florida Statutes (1983) and Sections 723.031, 723.032 and 723.033, Florida Statutes. Apparently the Respondents argue that if a new lease is not signed by the mobile home owners as in the instant case, they lack standing to file an action under Section 723.033, Florida Statutes. But, if they do sign the new lease with the proposed rent increase they could be barred from prosecuting an unconscionable rent action under the same section of Chapter 723 by the doctrines of estoppel and waiver and applicable contract law. The Florida cases concerning unconscionable rent, including the instant case, involve rents which were increased unilaterally by the park owner at the end of the rental period. See e.g. Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986); Appel v. Scott, 479 So.2d 800 (Fla. 2d D.C.A. 1985). In Appel, no written lease agreement existed and the park owner argued that since the tenants had continued to reside in the park after the rental increases, they had impliedly agreed to pay the rental increases. 479 So.2d at 801-802. The appellate court disagreed and found that there was a bona fide dispute over whether the rental increases were unconscionable and stated:

> Appellants have deposited a sum representing the increases into the court registry. The right of the appellants

> not to pay these increases is dependent upon whether the amount of increases are unconscionable.
>
> . . .
>
> A declaration by the court would either establish the appellants' right not to pay the increases or establish the appellees' right to collect the increases. 479 So.2d at 803.

In support of their position, the Respondents cite State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th D.C.A. 1982). The appellate court, in DeAnza, upheld the dismissal of a complaint for unconscionable rent because it did not allege that the lessees were bound by any agreement to pay the increased rental (emphasis supplied). There was no finding that the mobile home owners in DeAnza were not, in fact, bound to pay the increased rental. In the instant case, the record is replete with evidence that the Petitioners were legally bound to pay the rental increase or they would be evicted and lose their investment. The Respondents' statement that the Petitioners did not allege that they were bound by any agreement to pay the increased rent is untrue and refuted by the record in this cause. See Petitioners' Amended Complaint (R 1956-2002).

Finally, the Respondents' statement, without any supporting authority, that it has been the practice to advise tenants to sign the lease and then proceed with their unconscionable rent claims is unfounded, untrue and impermissible speculation.

(b) THE PETITIONERS ARE ENTITLED TO RECOVER THEIR REASONABLE ATTORNEY'S FEES AS AWARDED BY THE TRIAL COURT (RESPONDENTS' ISSUE III).

As found by the trial court, there was a mobile home lot

rental agreement, as defined in Section 723.003(3), in the instant case and the Respondents' argument that there can be no award of fees fails for this reason and those set forth in sub-paragraph (a) above. In addition, the Respondents' apparent argument that the Petitioners were not the prevailing parties in the trial court and therefore not entitled to an award of fees is contradicted by the record in this cause. See Partial Final Judgment (R 2627-2633) and the Amended Final Judgment (R 2908-2913; App. 10-15).

The Respondents now attempt to raise, for the first time, an argument that absent counsel's written fee agreement with the Petitioners there is no basis in the record for the trial court's award of attorney's fees. This issue was not raised by the Respondents in their appeal to the Fifth District Court of Appeal and they have waived any such claim (App.-R). In addition, the allegations are without any factual basis as the record contains the testimony and evidence presented by the Petitioners in support of the trial court's award of attorney's fees. The Respondents are attempting to impose a burden on the Petitioners that neither the ethics of the legal profession nor applicable law place on the undersigned counsel, to-wit: that the fee agreement with the Petitioners must be in writing to be enforceable. The Respondents' position is without merit.

(c) THE TRIAL COURT DID NOT ERR IN FINDING THAT THE RESPONDENT CORPORATION WAS AN ALTER EGO OF THE RESPONDENTS, ARTHUR E. THOMAS AND SHIRLEY THOMAS (RESPONDENTS' ISSUE IV).

The Respondents, for the first time in this entire pro-

appeal. There is no question that the Respondents must overcome the presumption of correctness the judgment of the trial court carries by making reversible error clearly appear on the record. The responsibility is on the Respondents to bring to this Court a trial record containing every phase of the trial proceedings that must be considered to find prejudicial error. See Fla. R. App. P. 9.200. It is well-established that an issue on appeal will not be reviewed where a material portion of the record is not included in the record on appeal or, as in the instant case, a transcript of the evidence required to review the trial court's actions is not included in the record. See Ben-Hain v. Tacher, 418 So.2d 1107 (Fla. 3d D.C.A. 1982); Firkel v. Firkel, 391 So.2d 351 (Fla. 5th D.C.A. 1980). The determination and certification of the Petitioners' class action should be affirmed on this basis alone.

This Court's decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988) is controlling of the Respondents' arguments on this issue. The decision in Lanca establishes, as a matter of law, the Petitioners' ability to maintain the instant cause as a class action. The Respondents' arguments must be rejected.

CONCLUSION

This Court's opinion in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988), is dispositive of the instant appeal and establishes that procedural unconscionability exists as a matter

ceeding, now object to the trial court's finding that the corporation was an alter ego of the individual Respondents and apparently argue that the trial court's finding is reversible error. The Respondents neither objected to the presentation of evidence at trial concerning the "alter ego" theory (and therefore the same was tried with their consent) nor did they raise this issue on appeal to the Fifth District Court of Appeal (App.-R).

The Respondents' factual allegations are unsupported by the record in this cause, but any further discussion is unnecessary as the Respondents have waived their objection to the trial court's finding and the arguments contained in this Issue IV must be rejected.

(d) THE TRIAL COURT DID NOT ERR IN APPROVING AND CERTIFYING THE CLASS ACTION (RESPONDENTS' ISSUE V).

Although the Respondents did previously argue that the trial court erred by approving and certifying the instant action as a class action, they are raising the specific arguments contained in their Amended Initial Brief (Answer Brief) for the first time in this Court. In addition, the objections now raised by the Respondents were not made to the trial court either during the hearing on class certification or after the order was entered certifying the class. The Respondents have waived any objection and certainly, the specific arguments now raised before this Court.

In addition, the Respondents failed to include the transcript of the class certification hearing in the record on

of law for individual mobile home owners acting together as a class in an unconscionable rent case.

For the reasons discussed in the Petitioners' briefs submitted in this cause, the arguments raised by the Respondents and the Amici, FMHA and Club Wildwood, are without merit and inapplicable to the instant case and the record on appeal. Therefore, the Fifth District Court of Appeal's opinion in the instant case holding that procedural unconscionability cannot be proven in a class action is incorrect and must be reversed with instructions to the appellate court to reinstate its Per Curiam Decision affirming the judgments of the trial court and its award of attorney's fees and costs to the Petitioners.

Respectfully submitted this 22nd day of December, 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 22nd day of December, 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, Alan C. Sundberg, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Drawer 190, Tallahassee, Florida 32302, and David D. Eastman, Esquire, P. O. Box 669, Tallahassee, Florida 32302.

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