IN THE SUPREME COURT OF THE STATE OF FLORIDA

REBERT JONES, et al.,

Petitioners,

vs. Case No. 72,563

ARTHUR E. THOMAS, et al.,

Respondents.
_____/

AMICUS CURIAE BRIEF OF CLUB WILDWOOD MOBILE HOME VILLAGE IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Amicus Club Wildwood Mobile Home Village adopts the respondents' statement of the case and facts.[1]

SUMMARY OF ARGUMENT

The Florida Mobile Home Act, Chapter 723, Florida Statutes, allows for interference with the contractual rights of private parties only under those limited circumstances wherein a contractual term can be shown to be both substantively and procedurally unconscionable. This Court should not eliminate the burden of proving procedural unconscionability in cases where the mobile homeowners' association is not a named party or in cases which do not involve the "common property" of the Park. Where a mobile homeowners' association is named as class representative in a suit regarding one of the issues set forth in Rule 1.222, Fla.R.Civ.P., it is fair to bind all of the tenants since their procedural due process rights are protected by the by-laws of the association. Furthermore, the narrow category of issues that are properly addressed in such actions naturally lend themselves to resolution in a class action setting since, by definition, those issues relate to the "common property."

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[1] All emphasis is supplied unless otherwise noted.

Since this case involves neither the "common property" nor was a mobile homeowners' association named as a class representative, the Fifth District Court of Appeal was correct in holding that the petitioners could not establish procedural unconscionability by a class action. This Court should affirm that holding.

Argument

Florida law requires the satisfaction of a two pronged test to establish unconscionability in a case such as this.[2/] First, the claimant must establish substantive unconscionability. Bennett v. Behring Corp., 466 F. Supp. 689, 696 (S.D. Fla. 1979); Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865, 868 (Fla. 4th DCA), review denied, 408 So.2d 1094 (Fla. 1981). Substantive unconscionability has been defined as proscribing contractual terms that are "monstrous" or "shocking to the conscience." See Garrett v. Janiewski, 480 So.2d 1324, 1326 (Fla. 4th DCA), review denied, 492 So.2d 1333 (Fla. 1986). In mobile home rent cases brought pursuant to Chapter 723, Florida Statutes, substantive unconscionability is established by showing that the rents complained of are "grossly in excess of what those similarly situated are paying." Pearce v. Doral Motor Home Villas, 521 So.2d 282, 283 (Fla. 2d DCA 1988); Garrett, supra, at 1326. Hence, courts have allowed substantive unconscionability to be asserted in a class action. Kohl, supra, at 869.

2/ The courts have described the two-pronged analysis as only a "general approach" and not a rule of law. See Steinhardt v. Rudolph, 422 So.2d 848, 889 (Fla. 3d DCA 1982). However, the analysis has been uniformly applied in mobile home rent cases. See Thomas v. Jones, 524 So.2d 693, 694 (Fla. 5th DCA 1988), review pending; Pearce v. Doral Mobile Home Villas, 521 So.2d 282, 283 (Fla. 2d DCA 1988); Garrett v. Janiewski, 480 So.2d 1324, (Fla. 4th DCA), review denied, 492 So.2d 1333 (Fla. 1986). See also Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865, (Fla. 4th DCA), review denied, 408 So.2d 1094 (Fla. 1981).

Plaintiffs must also demonstrate the separate and distinct element of procedural unconscionability, which addresses the circumstances of the individual parties as they relate to bargaining position and the availability of "meaningful choice." Id. at 868. The District Courts of Appeal that have addressed the issue, including the Court appealed from here, have uniformly held that procedural unconscionability may not be asserted in a class action brought by individual mobile homeowners. Thomas v. Jones, 524 So.2d 693, 695 (Fla. 5th DCA 1988), review pending; Kohl, supra, at 868; Garrett, supra, at 1327. See also State v. De Anza, 416 So.2d 1173, 1175 (Fla. 5th DCA), review denied, 424 So.2d 763 (Fla. 1982) (procedural unconscionability cannot be established as a general proposition for a whole range of contracts merely containing similar terms).

This Court recently addressed a mobile homeowners' association's attempt to establish procedural unconscionability in a class action. Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 F.L.W. 568 (Fla. Sept. 22, 1988). The Court declared unconstitutional a statute which allowed mobile home owners associations to "maintain, settle or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest. . . ." The Court concluded that, in enacting the statute, the Legislature had impermissibly intruded upon the Court's rulemaking authority. It then adopted Florida Rule of Civil Procedure 1.222, titled "Mobile Homeowners' Association," which provides that:

> A mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common-law right of any individual home owner or class of home owners to bring any action which may otherwise be available. An action under this rule shall not be subject to the requirements of rule 1.220.

See id. at 569.

Applying this rule, the Court held that the unconscionability of a rent increase in a mobile home park could be established in a class action brought by the homeowners' association. Id. at 569. In so holding, the Court recognized the need to take individual circumstances into account, observing that subclasses should be designated in class actions "to the extent that some of the class members may not occupy the same position." Id. at 569 n.*.

The effect of new Rule 1.222, Fla.R.Civ.P., is to give automatic class standing to mobile homeowner's associations to assert a limited number of claims of the specific nature set forth in the Rule. This narrow interpretation is compelled by both the title and the language of the Rule itself, as well as by the due

process requirement of adequate class representation, which can be provided by the mobile homeowners' association as to the limited matters specified by the Rule.

The very title of Rule 1.222, "Mobile Homeowners' Association," establishes that it is intended to give automatic class standing only to mobile homeowners' associations, not individualized groups of particular homeowners who join together to bring a lawsuit. The reason for allowing the associations to bring such class actions on behalf of their members is plain. Because class actions bind the absent class members, the class representative must be determined by the court to be able to adequately protect their interests. As one commentator put it: "due process in the class action context must assure procedural fairness to absent members before they will be held bound by a final decision on the common issues involved." Newberg, Newberg on Class Actions, (2d ed. 1985), § 4.46 at p. 375. By virtue of their very nature, mobile homeowners' associations are peculiarly equipped to protect the due process rights of mobile home tenants in class actions.

The association can assure effective and adequate representation with respect to its members since the member tenants have the right to appear, debate and vote under the associations' bylaws. Thus, the procedural determinations which must precede class action certification, e.g., typicality of claims and adequacy of representation, are assured through operation of the mobile

homeowners associations' own democratic rules. It is, therefore, fair to bind all of the mobile home owners who are represented by such associations.

But all homeowners are not so protected when suit is unilaterally filed by individual homeowners, as was the case in Thomas. Thus, to extend automatic class standing beyond mobile homeowners' associations would eliminate the due process requirements required in a class action suit to protect absent class members. That result could not have been intended nor should it be allowed. Rather, the Rule should be limited to class actions by associations, just as stated in the Rule's title.

For quite a distinct reason, the decision of the District Court should be approved. The language of the Rule establishes that it is intended to apply to a particular category of narrow claims. The Rule specifically lists the type of claims that may be asserted in a class setting: actions concerning "the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities." Rule 1.222, Fla.R.Civ.P. Each of those specified claims relates to property used by every homeowner and they are, then, by definition matters of common interest.

Claims of rent unconscionability for individual homeowners' lots obviously do not relate to "common property." As such, they do not fall within the category of claims expressly enumerated by this Rule. Under fundamental rules of construction, a statute or

rule which expressly enumerates the items upon which it is to operate, impliedly excludes from its operation those things not expressly mentioned. Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); Devin v. City of Hollywood, 351 So.2d 1022, 1025 (Fla. 1976).

Application of this principle is especially appropriate here. The matters enumerated in the Rule pertain to matters of common interest to all tenants and, thus, each are capable of being fairly resolved in a class setting. In contrast, rent disputes of the nature at issue here do not lend themselves to resolution in a class action for the same reasons this Court has consistently refused to allow claims of fraud in individual contracts to be asserted in a class action. See Lance v. Wade, 457 So.2d 1008 (Fla. 1984); Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977); Osceola Groves v. Wiley, 78 So.2d 700 (Fla. 1955).

In Osceola Groves, purchasers of acreage in an orange grove sought to bring a class action against the sellers of the property on the basis of fraud. However, this Court held that the claims could not be asserted as a class action because of the inherent diversity among the various claimants:

> [T]he demands of the various defrauded parties are not only legally distinct, but each depends upon its own facts, and . . . material difference in facts may exist.
>
> * * *
>
> To allow [the case] to proceed as a class suit could work great injustices upon many persons who were not subject to the processes of the

> Court. . . . There may be differences in every area of the many contracts involved of a nature that would result in the legal rights of the parties, in each instance being different.
>
> * * *
>
> We fail to find any community of interest between the two plaintiffs in this suit and no common ground upon which they can join in building a single [class] action. . . .

Osceola Groves, 78 So.2d at 702-703.

In light of this Court's settled decisions that class actions are an inappropriate vehicle to determine fraud claims, the Fifth District Court of Appeal was clearly correct in concluding that procedural unconscionability likewise may not be asserted in a class action. Indeed, claims by mobile park homeowners of procedural unconscionability raise precisely the type of factual issues held to preclude fraud class actions. Such claims inherently involve many different claimants -- with varying degrees of experience, business acumen, age -- who contracted at different times with respect to different lots. Each claim necessarily rests on its own facts -- a person who came into a park one year before suit was filed is in a vastly different posture than the person who had resided there for 20 years. Because of these inevitable differences, procedural unconscionability cannot be established on a class-wide basis, and the Thomas Court was correct in so holding.

To the extent that the Lanca decision held that procedural unconscionability of rent increases could be asserted in a class action brought by the homeowners' association, it failed to take into account the explicit language and the rationale of Rule 1.222.

That rule correctly points to matters of shared interest which easily lend themselves to proof in class actions filed by the homeowners' association. It does not apply to claims brought by particular individuals that a rent increase was imposed upon them in a procedurally unconscionable manner. Even more importantly, it effectively eliminated the burden of proving that element in order to establish a claim of unconscionability under the Florida Mobile Home Act. Since that Act constitutes an interference with private parties' constitutional rights and obligations, the requisite proof to permit that interference should not be lessened by the mere device of allowing suit by class action.

Conclusion

Because this case was not brought as a class action by the homeowners' association and does not involve claims relating to "common property" of the nature specifically enumerated in the rule, it does not come within new Rule 1.222. That rule should not be extended beyond its narrow and plainly stated parameters, and the District Court's decision should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Amicus Brief has been furnished by U.S. Mail to John T. Allen, Jr., Esquire 4508 Central Avenue, St. Petersburg, Florida 33711; Christopher P. Jayson, Esquire, John T. Allen P.A., 4508 Central Avenue, St. Petersburg, Florida 33711; Johnnie A. McLeod, Esquire, P.O. Drawer 950, Apopka, Florida 32704; Douglas B. Beattie, Esquire, 250 N. Orange Avenue, Orlando, Florida 32801 and Lee Jay Colling, Esquire, 250 N. Orange Avenue, Orlando, Florida 32801 this 14th day of November, 1988.

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