IN THE SUPREME COURT
STATE OF FLORIDA

DONALD HARPSTER, et. al,

Plaintiffs/Petitioners

vs. CASE NO. 73,002

J.T.A., INC.,

Defendant/Respondent

---/

RESPONDENTS ANSWER BRIEF ON THE MERITS TO PETTIONERS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Attached, as an appendix is 1) Table as to repealing of Chapter 83 as new section in Chapter 723, Florida Statutes 1984; 2) copy of the brief filed by Florida Manufacturing Housing Association, Inc. in the Supreme Court in Case No. 72,563, Jones v. Thomas and 3) brief filed by Club Wildwood Mobile Home Village, Case No. 72,563, Jones v. Thomas, to which reference shall be made throughout the Brief. Chapter 83, Part III, Florida Statutes (1983) known as the "Florida Mobile Home Landlord and Tenant Act" shall be referred to as "Chapter 83" or "83" followed by the Section number such as, for example, "83.750". The other Statute, Chapter 723, Florida Statutes (1985), is known as the "Florida Mobile Home Act" which repealed Chapter 83, Part III, effective June 4, 1984, and shall be referred to as "Chapter 723" or "723" followed by the Section number such as, for example, "723.001.

We shall refer to Respondent-Appellee as Defendant, "mobile home park owner" or "landlord".

The Petitioners-Appellants shall be referred to as Plaintiffs-Appellants", "Appellants", or "tenants".

References to the Record on Appeal shall be to the volume number and page number (Vol. page).

The Trial Court did find that the mobile home park owner and operator, J.T.A., Inc's proposed rent increase of $50.00 per month was unconscionable but $10.00 per month increase was reasonable.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court when it ordered the proposed rental increase to be unconscionable under Section 723.033 when there was no mobile home lot rental agreement in force and effect as between Appellees and Appellant on June 1, 1984?

2. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court because the Trial Court lacked the legal authority to adjudge a lot rental increase unconscionable under 723.033 when the parties were not bound by an agreement?

3. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in approving Plaintiffs-Appellants' class action Complaint for relief under 723.033?

4. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in stating it had a right to award Appellees attorney fees and costs pursuant to Chapter 723?

5. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in allowing the trial to be conducted pursuant to Chapter 723 rather than Chapter 83?

6. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in not referring the matter to the County Court?

7. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in stating that the Plaintiffs-Appellants had proved their case as to substantive and procedural unconscionability?

8. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in allowing the Complaint be amended on the 3rd day of the 6 day trial?

9. Whether the Fifth District Court of Appeal erred when it reversed the Trial Court in granting an injunction to prevent the Respondent/Appellee from proceeding in County Court for eviction in that the Complaint and Amended Complaints were not verified?

10. Whether the Fifth District Court of Appeal erred when it reversed the Trial court in creating a lease between the landlord and tenant contrary to Chapter 83-760, Subparagraphs 1 and 2?

STATEMENT OF THE FACTS

The Respondent/Appellee agrees with Petitioners/Appellants statement of the facts as to testimony except it fails to include the following:

The initial Complaint filed July 5th, 1984, (Vol. VIII, pages. 986-993) contained two Counts based on various and sundry violations of Chapter 83, Part III, with Count I alleging the unconscionability of a proposed lot rental increase to be effective June 1, 1984, pursuant to 83.754, and Count II alleging damages in excess of $5,000.00.

Chapter 83, Part III was repealed and effective on June 4, 1984. An amended complaint was filed on March 28, 1986, (Vol. IX, pages 1141-1147) containing one count based on Part III, Florida Statutes Chapter 83. On August 5, 1986, Motion for Amendment to Plaintiffs' Amended Complaint was filed (Vol. IV, pages 1284-1290) and Order entered on Motion on same day to authorize the amendment to substitute Florida Statute Chapter 723 for Florida Statute Chapter 83, Part III.

From the confusion created by Plaintiff's claims to which the Trial Court entered a final judgment (Vol. IX, pg. 1337-2338) there surfaced certain uncomplex admitted facts which when squeezed into an irrelevant Statute compounded the confusion and lead the Trial Court to, we submit, reversible error.

Florida Statute 83.754 and 723.033 provides that the court may strike a mobile home lot rental agreement, or any provision thereof, if found to be unconscionable at the time it was made. (Emphasis supplied).

The mobile homes in the park were placed there prior to January 1, 1975 (Vol. I, p. 147) none of the tenants signed the proposed lease. Florida Statute Chapter 83.760(2). Notice of 19 days of proposed increase was given (Vol. I, p. 18).

Before June 1st, 1984, and before the expiration of any leases held by the Appellants, written leases were offered by owners prior to J.T.A., Inc. purchasing the property on April 30, 1984 (Vol. I, p. 11). The park owner by letter dated May 11, 1984, proposed a lot agreement increase effective June 1st, 1984, of $50.00 per month and submitted a mobile home lot rental agreement (lease) reflecting increases for signatures. Appellants refused to sign the agreement (lease). On July 5th, 1984, the Appellants filed a Complaint in the Circuit Court. They have continued to reside on their respective lots and have only paid the rental amount that was paid prior to June 1st, 1984. The landlord states that no rental agreement existed between the parties on June 1, 1984, and therefore the tenants are tenants at sufferance, Florida Statute Chapter 83.04.

The cause was filed thirty-one (31) days after Chapter 83 was repealed and 35 days after the alleged violation occurred, and replaced by Chapter 723 of the Florida Statutes and with particularity as to §723.033 which provides that the Court may strike a mobile home lot rental agreement, or any provision thereof, if found to be "unconscionable" at the time it was made. The new rate increase was to be effective three (3) days before Florida Statute Chapter 83, Part III, was repealed. The Plaintiffs/Appellants on the first day of trial over two years

later, July 28, 1986, orally, without written motion requested that the Court allow Petitioners/Appellants to amend its complaint to show it was proceeding under Chapter 723 rather than Chapter 83, over Appellee/Defendant's objection. The Trial Court agreed to allow the amendment, finding there was no material differences in the two Chapters. This Motion was made on the third day of trial (Vol. V, p. 4).

The Appellee/Defendant made repairs and improvements to the park after purchasing the park (Vol. I, pages 32, 33 and 34) and hired a park manager (Vol. I, pages 36, 37). The stockholders of J.T.A., Inc. put in $18,000 to operate the park after the purchase (Vol. I, p. 43).

A survey was made by owner as to increases of rental fees in other parks (Vol. I, pages 62-63).

The Court stated (Vol. I, page 97) that he would consider the park rental for 13 months from June 1, 1984, to June 30, 1985 (Vol. II, page 67). There was no written lease (Vol. V, page 70).

One of Petitioners/Appellants' witnesses testified he moved from park in 1985 (Vol.. II, page 71) and eight (8) new tenants had moved into the park since the suit was filed (Vol. V, page 63). Three of the tenants were paying the proposed increased rent (Vol. V, pages 81, 82).

State and County regulatory bodies determine where mobile homes can be located.

The Court ruled that the case during the second day of trial was then to proceed under Chapter 723 rather than Chapter 83.

Chapter 83 was repealed and Chapter 723 was effective on June 4th, 1984. Chapter 83 was comprised of 27 sections. Chapter 723 had 52 sections and 27 of them being the same or similar to portions of Chapter 83 as shown by the attached Appendix I. There are 25 sections in Chapter 723 that are not shown in Part III, Chapter 83, and are new sections.

Petitioner/Appellants then failed to file their Amendment to their Amended Complaint as ordered and did not file same until the third day of trial when the Court demanded to know if the Amended Complaint had been field and ordered the Plaintiff to comply immediately (Vol. IV, page 215, lines 17 through 22).

At no time prior to or after filing the suit did the Plaintiffs/Appellants as a "Class" request under Chapter 723 (§723.033) mediation prior to filing even though learned counsel was well aware of those requirements at the time of filing. No compliance was shown as to Chapter 723.075(1). The class action issue should have been ruled upon after complaint and each amendment was filed (Fla. Rules of Civil Procedure 1.220).

After five and one-half days of trial the Court found that the rate $50.00 per month proposed increase was "unconscionable". The Court awarded attorney's fees and costs, reserving jurisdiction as to the amount after a hearing was filed on reasonableness of fees. The Court further found that it would deny the Defendant all but $10.00 of its requested increase; this being $15.00 less per month than the "fair market rent value" testified to and unrebutted or contradicted by an expert witness of Appellee. A Final Judgment and Amendment to Final Judgment

declared the rental increase of $50.00 per month to be unconscionable, under Chapter 723.033, but authorized a $10.00 per month increase.

SUMMARY OF THE ARGUMENTS

I.

The Fifth District Court of Appeal was corret in reversing the trial court in declaring proposed lot rental increase to be unconscionable under the provision of 723.033. The proposed lot rental increase was to become effective June 1, 1984. Appellees rejected the proposed rental increase and did not sign the proposed lease with proposed increase. Thereafter, there was no mutual understanding, lease or tenancy between the parties that would constitute a mobile home lot rental agreement. For the foregoing reasons the Order of the Trial Court declaring the proposed rental increase unconscionable under 723.033 should be reversed on the authority of State of Florida v. De Anza Corporation, 416 So. 2d 1173 (Fla. 5th DCA 1982) and the order of the 5 D.C.A. should be affirmed. (Emphasis supplied).

II.

The Fifth District Court of Appeal was correct in reversing the Trial Court as it lacked the legal authority to adjudge the proposed lot rental increase unconscionable under 723.033 because disputes concerning lot rental increases are specifically to be resolved, if possible, by mediation or arbitration in accordance with 723.037. Florida Statutes Chapter 723, Section 723.004(4) provides that a civil action under 723.037 can only be enforced after the party has exhausted its administrative remedy. Appellants have not complied with 723.037 wherein their right rests. The Trial Court lacked legal authority to resolve the dispute, as it did, by declaring the proposed lot rental increase of $50.00

per month was unconscionable under 723.033 but said a $10.00 per month was not unconscionable. (Emphasis supplied).

III.

The Fifth Distirct Court of Appeal was correct in reversing the trial court when it approved Petitioners' Complaint for relief and declaring it a class action without the requirement of Florida Rules of Civil Procedure 1.220 being complied with, and granting relief in accordance with 723.033 because prospective disputes over lot rental increases are resolved by the specific language of 723.037 whereby a committee must be designated by a majority of mobile home owners to meet with the park owner to mediate or arbitrate their dispute before a suit can be filed. Even if we assume, without admitting, that a dispute over a proposed lot rental increase can be maintained under 723.033 such suit, in which unconscionability must be proven, cannot be maintained as a class action due to the variable facts giving rise to the different claims of each member of the class. This goes particularly to the difficulty of proving procedural unconscionability which cannot be established as a general proposition for a whole range of individuals lumped together in a class action. K. D. Lewis Enterprises Corp. v. Smith, 445 So. 2d 1032 (Fla.5th DCA, 1984). The tenants did not comply with Chapter 723.075(1). Lanca Homeowners, Inc. v. Lantana Cascades of Palm Beach, Ltd., 13 Fla. L.W. 568 (Fla. Sup. Ct. September 22, 1988).

IV.

Florida Statutes Chapter 83.7594 as to remedies, provides for the landlord to apply to the County court for relief.

V.

The Fifth District Court of Appeal was correct in reversing the trial court by allowing the Complaint to be amended the second time during the third day of trial by changing the law to be applicable to Chapter 723 instead of Chapter 83 which was the applicable law when the suit was filed.

Fla. R.C.P. 1.440(e) provides the conditions as to when an action is ready for trial.

Bennett v. Continental Chemicals, Inc., 492 So. 2d 724 (Fla. 1 DCA 1986).

Broussard v. Broussard, 506 So. 2d 463 (Fla. 2 DCA 1987).

VI.

The Fifth District Court of Appeal was correct in reversing the trial court by giving relief as requested by tenants by considering the parties had a lease/agreement binding on the parties on June 1, 1984, although Chapter 83.760(2) required a sixty (60) days notice to tenants in writing upon January 1, 1975, and the landlord had only given a nineteen (19) notice. The landlord's notice was not legally sufficient to establish an agreement by the parties and was merely an offer which was not accepted by the tenants.

VII.

The Fifth District Court of Appeal was correct in reversing the trial court in stating it would award the

Petitioners/Appellants attorney's fees and court costs when entitlement thereto is stated to be based on 723.068 effective June 4, 1984. Said Section provides for reasonable attorney's fees except as provided in 723.037. Inasmuch as it is admitted that the dispute in this case involves the proposed lot rental increase to be effective June 1, 1984, and Florida Statutes Chapter 723 was not effective until after June 4, 1984, it is necessary to read the provisions of 723.037 to ascertain counsel's entitlement to fees under Chapter 723. The dispute not having been resolved in accordance with said Section counsel is not entitled to fees under the express provisions thereof. Entitlement is also claimed under the repealed Statute 83.761, which was not reinstated in Chapter 723. Inasmuch as there was no mobile home lot rental agreement between the parties on June 1, 1984, and Appellants' claim for damages was not sought in the amendment to the Amended Complaint then the attorney fees are not to be awarded under said Florida Statutes Chapter 723.068. Furthermore, counsel for Appellants testified that he had agreed to represent his clients for $65.00 per hour (Vol. VIII, page 35) and the Court stated it will award the counsel $125.00 per hour upon proper proof (Vol. VIII, page 38).

The Court by ruling the case was tried under Chapter 723 rather than 83, it allowed the Plaintiffs-Appellants to pick and choose any area of either Chapter to be considered by them as beneficial to them.

ARGUMENT

I.

THE COURT OF APPEALS WAS CORRECT WHEN IT REVERSED TRIAL COURT WHEN IT ORDERED THE PROPOSED LOT RENTAL INCREASE TO BE UNCONSCIONABLE UNDER SECTION 723.033 WHEN THERE WAS NO MOBILE HOME LOT RENTAL AGREEMENT BINDING APPELLANTS AND APPELLEE ON JUNE 1, 1984.

The complexity inherent in this case to which the Trial Court alludes in its Final Judgment is attributable largely to Petitioners/Appellants disjointed pleading, their evident indecision, their refusal to sign a lease prior to J.T.A. Inc.'s purchase and subsequent thereto, their refusal to pay rent, their refusal to quit or vacate their lots, to the trial court's insensitivity to Respondent/Appellee's legal rights in the circumstances and to the trial court's failure to adhere to the provisions of Section 83.754 or 723.033 after Court ordered an amendment to the Amended Complaint with respect to the determination of unconscionable lot rental agreements during the third day of the trial.

The Amended Complaint as amended when stripped of its vacuous averments, limits the ultimate issue to the unconscionability of a proposed lot rental increase of $50.00 per month offered by the park owner and rejected by Petitioners/Appellants who owned or rented mobile homes located in the park. The Court below, in its Final Judgment, declared the proposed rental increase of June 1, 1984, of $50.00 per month to

be unconscionable, but agreed that the rental increase would not be unconscionable if only limited to $10.00 per month.

Turning therefore to Petitioners/Appellants alleged remaining issue in which they urge before the trial court the unconscionability under 723.033 of the proposed rental increase of $50.00 per month offered by the park owner and rejected by Petitioners/Appellants when in fact it is undisputed that Appellants not only refused to pay the proposed increase but also there was no mobile home lot rental agreement between them after May 31, 1984. This case comes to this Court with presumption of being correct.

Section 723.003(3) defines a "mobile home lot rental agreement" as meaning any mutual understanding, lease or tenancy between the home owner and the park owner in which the home owner is entitled to place his mobile home on a mobile home lot for the payment of consideration to the park owner.

Section 723.033 relates to an unconscionable home lot rental agreements and grants power to the court to give relief should unconscionability be found therein.

Under the foregoing facts and under the foregoing Sections tenants had no justiciable claim of unconscionability against the park owner absent a mobile home lot rental agreement and the trial court had no legal authority or power to declare there was an agreement between the parties.

In State of Florida v. De Anza Corporation, 416 So. 2d 1173, (Fla. 5th DCA 1982) the State sought in its Count II to have the trial court declare the landlord's prospective rental increase

declared unconscionable within the meaning of Section 83.754 of Chapter 83, Part III, (Section 723.033 contains the same language). The State appealed from the trial court's order dismissing Count II. The Fifth District Court of Appeals affirmed. In its opinion the Court stated:

> "Section 83.754, upon which Count II is based, allows the court to declare 'a mobile home lot rental agreement, or any provision of the rental agreement, to have been unconscionable at the time it was made.' Section 83.752(4) defines 'mobile home lot rental agreement' as ' any mutual understanding, lease or tenancy between a mobile home owner and a mobile home park owner' and contemplates that a contract must exist between the parties before it, or any term of it, may be declared to be unconscionable. While Count II generally alleges that defendant's rent structure was unconscionable because rental was increased at a rate in excess of the cost of living, it does not allege that the lessees were bound by any agreement to pay the increased rental." (Emphasis supplied)

The Complaint as amended two (2) times did not state there was an agreement by the parties nor was there any testimony offered that there was an agreement by the parties effective June 1, 1984.

In Kohl v. Bay Colony Condominium, Inc., 398 So. 2d 865 (Fla. 4th DCA 1981) relief was sought based on the terms of a "lease" of recreational facilities on grounds of unconscionability as was in Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA 1986) where unconscionability under Section 83.754 was based on a "rental provision in a lease". Absent a mutual understanding, lease or tenancy for the payment of consideration to the park owner, unconscionability cannot be declared under 83.754 or 723.033.

The trial court's Amended Final Judgment declaring the proposed increase of $50.00 to be unconscionable but an increase

of $10.00 is reasonable ignores the provisions of Chapter 723.033 and the Order of 5 D.C.A. should be affirmed.

The tenants in the park on January 1, 1975, were to be dealt with according to Chapter 83.760(2). Those in the park prior to January 1, 1975, would be dealt with in a different manner.

Paragraph Number 7 of Amended Complaint was struck by Court order entered August 5, 1986, which stated the landlord had not given proper notice as required by Florida Statute Chapter 83.760.

II.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT REVERSED THE TRIAL COURT AS THE TRIAL COURT LACKED THE LEGAL AUTHORITY TO ADJUDGE A LOT RENTAL AGREEMENT UNCONSCIONABLE UNDER 723.033.

On July 5th, 1984, Petitioners/Appellants filed their two count Complaint in which they alleged various claims based on violation by landlord of Chapter 83, Part III. On June 4, 1984, said Chapter was repealed by the State Legislature and Chapter 723, Florida Statutes, was adopted in lieu thereof with 25 sections added that were not comparable to any in Chapter 83 and did not reallege Chapter 83.761. On August 5th, 1986, the third day of the trial, the Petitioners/Tenants amended their Amended Complaint that was basing their claims on 83, Part III, Florida Statutes to seek relief under Chapter 723 but wanted to collect attorney fees pursuant to Chapter 83.

The Court later ordered that the case would be tried under Chapter 723 (Vol. IX, pages 1282-1283).

Upon the repeal of 83, Part III, effective June 4, 1984, by the Florida Legislature 84-80, Section 83.754 was no longer effective and the Court lacked legal authority to adjudge a claim based thereon after June 4, 1984.

49 Fla. Jur. 2d, Statutes §210 states:

". . . when the jurisdiction of the Court depends upon a statute that is repealed or otherwise nullified, the jurisdiction falls even over pending causes, unless the repealing statute contains a savings clause."

In State v. Revels, 109 So. 2d 1 (Fla. 1959) the Supreme Court stated as follows:

"While no decision on the point has been made by this Court, it appears to be universally held in the courts

> of other states and the federal courts that when the jurisdiction of a court depends upon a statute which is repealed or otherwise nullified, the jurisdiction falls even over pending causes, unless the repealing statute contains a savings clause."
>
> Gewant v. Florida Real Estate Commission, 166 So. 2d. 230 (Fla. 3rd DCA 1964).
>
> Gulf American Corporation v. Florida Land Sales Board, 206 So. 2d 457 (Fla. 2d DCA 1968).
>
> Williams v. Gund, 334 So. 2d 314 (Fla. 2d DCA 1976).

At a passing glance it appears that the statutory language of 83.754 survived its repeal by the adoption of 723.033 where the court may find as a matter of law a mobile home lot rental agreement or any provision thereof unconscionable if the agreement was being enforced by the landlord on or after June 4, 1984.

It should be noted, however, that 723.004(4) provides that nothing in Chapter 723 shall be construed to prevent the enforcement of a right under Section 723.033 and Section 723.037 by civil action after the party has exhausted its administrative remedies, if any. (Emphasis suppled). No administrative remedies were sought in this case before, during or after the suit was filed.

A lot rental increase whether it is "proposed", as in this case, or stipulated in a mobile home lot rental agreement, or in any provision thereof, is governed by the mediation or arbitration provisions of 723.037 where unreasonableness is the test. And further, it is the intention of the State Legislature and mandated by 723.004(4) that no action relating to a dispute over a lot rental increase can be filed in any court until mediation or arbitration has been processed. (Emphasis supplied). Florida

Statutes Chapter 723.037 requires a 90 day notice for an increase in rent.

A dispute concerning a lot rental increase cannot be written into 723.033 by the Trial Court when such dispute is clearly identified in 723.037. All sections of Florida Statutes Chapter 723 should be read in pari materia. The test is weighted "unreasonable" not "unconscionable". And, this is so whether the dispute concerns a prospective lot rental increase as in this case or a similar dispute contained in a mobile home lot rental agreement or any provision thereof. The control and regulation of mobile home lot rents in mobile home parks has been preempted to the State by the Legislature and incorporated in Chapter 723.

In 13 Fla. Jur. 2d, Courts and Judges §122, the author states:

> "Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review."

For the foregoing reasons the Trial Court lacked the power to adjudge there was a lot rental agreement in being on June 1, 1984, the proposed increase unconscionable under Florida Statutes Chapter 723.033 as that statute was not effective until after June 4, 1984.

Department of Business Regulation, et al v. National Manufactured Housing Federation, Inc., 370 So. 2d 1132 (Sup. Ct. of Fla. 1979).

City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Sup. Ct. of Fla. 1974).

Florida Statutes Chapter 723.063(2) provides for rights of the tenant to raise defenses, if any, as to payment of rent or any other defense but must pay the rent into the Registry of the Court of the deposited amount.

Unconscionability is just short of the crime of fraud. A class action cannot be maintained as to fraud or for damages. Chapter 723 was not effective as to this park until January 1, 1985, at the earliest.

Turney v. Kulozenka, 341 So. 2d 551 (1 DCA 1977)

Puppert v. Mobilinium Associates, 512 So. 2d 1096 (Fla. 4 DCA 1987).

Was the lot rental agreement unconscionable on June 1, 1984, and the first day of each month thereafter? When can the landlord increase the rent? This suit has been pending since July 5, 1984, and no increased rent has been paid as of June 1, 1984--four (4) years and eight (8) months.

III.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT WHEN IT APPROVED PETITIONERS/-APPELLANTS CLASS ACTION COMPLAINT FOR RELIEF IN ACCORDANCE WITH 723.033.

Petitioners/Appellants' Complaint was filed July 5th, 1984, in which various claims were alleged in two counts based upon violations of Chapter 83, Part III (Vol. VIII, pages 986-993). An Amended Complaint was filed March 28, 1986, in which one claim was alleged based upon violations of Chapter 83. An amendment to the Amended Complaint was filed and approved by Court order on August 5, 1986, the third day of the trial, that the case was to be tried under Chapter 723 rather than Chapter 83.

The tenants in this case were not mobile home owners as defined in 723.003(4) as they did not rent or lease a lot within the mobile home park as of June 1, 1984, because of their refusal to pay the rent as proposed. After their lease or rental period expired on May 31, 1984, they rejected the park owner's proposal for a lot rental increase of $50.00 per month, refused to sign a lease and remained on their respective lots without paying rent to the park owner without any mutual understanding, lease or tenancy between them. The tenants are therefore a limited group of individuals who dispute the lot rental increase submitted by the park owner and are tenants at sufferance. Chapter 83.01, 83.05 and 83.06.

With their damage claims withdrawn and having successfully obtained an order from the Trial Court enjoining Respondent's right to evict them for non-payment of rent in the county court even though the Complaint was not verified. they erroneously

turned to 723.033 to have a prospective lot rental increase declared unconscionable.

Disputes over prospective lot rental increases cannot be resolved by the terms of 723.033 until they are attempted to be resolved according to the specific language of 723.037 where a committee designated by a majority of mobile home owners meet with the park owner and mediate or arbitrate the dispute. No action may be filed in any court until a request for mediation has been submitted and duly processed.

Petitioners/Appellants amended their Complaint after Chapter 83, Part II was repealed to meet the terms of the succeeding Chapter 723. They knew the terms of 723.037 and there is no suggestion in the pleadings why a committee could not have been designated to have their dispute processed according to law. Having failed to do so their action based on 723.033 should have been dismissed. See also Chapter 723.075(1).

However, the prospective lot rental agreement was tried as a class action upon issues raised by 723.033 and found by the Trial Court to be unconscionable (Vol. IX, pages 1337-1338) as to $50.00 per month, but approved a $10.00 per month increase.

In K. D. Lewis Enterprises Corp. v. Smith, 445 So. 2d 1032 (Fla. 5th DCA 1984)(rehearing denied) an issue on appeal was whether the trial court erred in refusing to permit the tenants to appear as representatives of a class of tenants who refused to pay rent claiming that the landlord did not maintain their apartments and the rental increase was unfair. The court on appeal concluded that the trial court correctly refused to permit

the tenants to appear as representatives of a class. The Court said:

> "Although class representation does not require an absolute identity of questions of law and fact among its members, issues such as involved here make probably substantially variable facts giving rise to different claims. While each tenant may have been affected by the omissions or non-compliance of the landlord, the extent, nature and effect of such omissions or non-compliance would unquestionably vary from apartment to apartment and from tenant to tenant."

In Kohl v. Bay Colony Club Condominium, Inc., 398 So. 2d 865 (Fla. 4th DCA, 1981)(rehearing denied) an appeal was taken from a non-final order in which the trial court ruled that a class action seeking relief from the terms of a lease on the grounds of unconscionability could be maintained based on allegations in the pleadings. The Court on Appeal affirmed the Trial Court's ruling on the pleadings but expressed the difficulty of providing procedural unconscionability in a class action. As the Court pointed out "monumental obstacles of proof" could be foreseen in a class action requiring a "myriad of details including plaintiff's experience and education". The court affirmed solely on the pleading.

The difficulty of proving procedural unconscionability is commented upon by the Court in State v. De Anza Corp., 416 So. 2d 1173 (Fla. 5th DCA, 1982)(rehearing denied). It relates to "the individual circumstances surrounding each contracting party . . . and cannot be established as a general proposition for a whole range of contracts merely containing similar terms between various person".

Likewise, the Court in Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA 1985)(rehearing denied) observed that "We note in passing that there appears to be a serious question involved in the court's finding of procedural unconscionability because there is no evidence proving the circumstances of most of the tenants". Citing Kohl, supra, the Court called attention to the holding that the prerequisites for procedural unconscionability are too individualized to permit a class action.

Not only was the Trial Court in error in declaring the proposed lot rental increase unconscionable under 723.033, but error was committed in finding that in this class action procedural unconscionability was proven by testimony submitted on behalf of the class as a whole (Vol. I through VIII). The Court of Appeals was correct in its order reversing the lower court's order.

See William R. Bennett, et al. v. Behring Corporation, 466 Fed. Supp. 689 (1979) S. D. of Fla.

Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., 13 Fla. L. W. 568 (Fla. Sept. 22, 1988).

Attached in Appendix are two briefs as to the question of applicability of the above cited case as to procedural unconscionability.

The issue as to whether the Complaint or Amended Complaints (amended two times) should require the Petitioners/Appellants to recertify the Complaint as a class action each time on the date the Amended Complaint was approved by the court (Florida Rules of Civil Procedure, Rule 1.220).

IV.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT WHEN IT AGREED TO AWARD PETITIONERS' ATTORNEY FEES AND COURT COSTS.

Petitioners/Appellants had 31 days to apply for mediation after June 4, 1984, pursuant to Chapter 723 and prior to the filing of their complaint. This was not done. The counsel for Petitioners/Appellants cannot be awarded attorney fees by virtue of Part III, Chapter 83. He asked for and was granted the request to try the matter pursuant to Chapter 723. He is bound by the Court order. (See Transcript of Proceedings dated October 9, 1986, page 3 through 21).

Completing the mediation process is a prerequisite to entitlement of attorney fees pursuant to Chapter 723.037 and 723.068.

Florida Statutes Chapter 723.068 states: "Except as provided in 723.037, in any proceedings between private parties to enforce provisions of this Chapter, the prevailing party is entitled to a reasonable attorney's fee. The legislature intented this to be applicable to private parties and not a class. Florida Statutes Chapter 723.004(4) makes it very clear that no one should be awarded attorney fees until administrative remedies have been exhausted. (Emphasis supplied)

Florida Statutes Chapter 723 was not to be an attorney relief act but to hold down costs and time to mediate differences between landlord and tenants without court action, if possible.

The only two exceptions that Florida Statute Chapter 723.068 is applicable to are 723.022 and 723.023, Florida Statutes

Section 723.005. Florida Statutes Chapter 723.068 providing for attorney fees would only be applicable if suit was brought to get relief under Chapter 723.022 and/or 723.023.

In any event, Florida Statutes Chapter 723.063 defenses would be applicable.

V.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT REVERSED TRIAL COURT WHEN THE TRIAL COURT ALLOWED THE TRIAL TO BE CONDUCTED PURSUANT TO CHAPTER 723 RATHER THAN CHAPTER 83.

It is well established in Florida that courts are not to favor a construction of statutes as being retrospective in operation. Statutes are presumed to act prospectively, State Department of Revenue v. Zucherman Vernon Corp., 354 So. 2d 353 Fla. 1977); Heberle v. Pro Liquidating Co., 186 So. 2d 280 (Fla. 1st DCA 1966). Perhaps the clearest statement of the principle is in Fleeman v. Case, 342 So. 2d 815 (Fla. 1977) wherein the Florida Supreme Court declared that a statute will be given prospective application unless a declaration otherwise was expressly contained therein.

An example of the application of this rule is found in Seitz Duval County School Board, 366 So. 2d 119 (Fla. 1st DCA 1979) cert. denied 375 So. 2d 911 (Fla.). In Seitz, the Court stated that the rule of Fleeman v. Case, supra, is the threshold standard to be applied. The defendants claimed that the statute giving the plaintiff, a public employee, the right to sue was remedial, and thus an exception to the rule against retroactive application. The Court disagreed, opining that

> A statute is presumed to be prospective in nature unless the legislature manifests a contrary intention in the statute itself. Fleeman v. Case, 342 So. 2d 815 (Fla. 1977). In the Fleeman case, the Supreme Court declined to infer legislative intent either from a declaration of legislative purpose or from one attempt to amend the proposed law in one chamber of the legislature and insisted that as a condition to retroactive application a declaration to that effect be made in the legislation under review. Accordingly, since there is no such express language in Chapter 77-343 we hold that

Chapter 77-343 is inapplicable to the charge brought in this case.

Thus before any claimed exception to the rule against retrospective application will be applied, the statute being considered must contain an express declaration of its retrospective effect. Accord, Lewis v. Creative Developers, Ltd., 350 So. 2d 828 (Fla. 1st DCA 1977), Foley v. Morris, 339 So. 2d 215 (Fla. 1976).

The new statutes sought to be applied retroactively by the Petitioners/Appellants in this case, sub judice, do not contain an express declarion that they must be applied retroactively, and thus cannot be so applied. In fact, a provision of the chapter expressly states the legislature's intent without mentioning is retroactive application.

See §723.004, Florida Statutes which states:

723.004 Legislative intent.--

(1) There is hereby expressly preempted to the State all regulation and control of mobile home lot rents in mobile home parks and all those other matters and things relating to the landlord-tenant relationship treated by or falling within the purview of this chapter. All units of local government are prohibited from taking any action, including the enacting of any law, rule, regulation or ordinance, with respect to the matters and things hereby preempted to the state.

(2) It is expressly declared by the Legislature that the relationship between landlord and tenant as treated by or falling within the purview of this chapter is a matter reserved to the state and that units of local government are lacking in jurisdictional and authority in regard thereto. All local statutes and ordinances in conflict herewith are expressly repealed.

(3) If any provision of this chapter is held invalid it is the legislative intent that the preemption of this section shall no longer be applicable to the provision of the chapter held invalid.

(4) Nothing in this chapter shall be construed to prevent the enforcement of a right or duty under this

part by civil action after the party has exhausted its administrative remedies, if any. (Emphasis supplied)

Although the act specifically preempts the field of regulation of mobile home landlord tenant rights and remedies, it does not make provision for its retrospective application and thus cannot be so applied in the subject case.

In addition to failing the initial standard to be applied when a statute is sought to be retroactively applied, Fleeman v. Case, supra, Chapter 723 cannot be retroactively applied because to do so effectively abolishes the mobile home owner's right to redress claims against mobile home tenants by substituting a remedy which cannot be complied with before a suit can e brought by either party.

An equally well-settled rule as that against the retrospective application of statutes in general, is that a statute cannot be so applied if to do so effectively abolishes the right of action without providing a reasonable alternative by which the people's existing rights are redressed or injuries may be enforced. For instance in Kludger v. White, 281 So. 2d 1, Fla. 1973), the Florida Supreme Court found a portion of the No-Fault Statute to be unconstitutional because a claimant was denied access to the Court for recovery of property damage without being supplied any commensurate remedy. In Sunspan Engineering and Construction Co. v. Spring-lock Scaffold Co., 310 So. 2d 4 (Fla. 1975), the constitutionality of a statute dealing with the rights of a third party tort feasor, against the claimant's employer and the confiscation of the third party's right to sue an employer for his negligence, was questioned. The Florida Supreme Court's

rationale was that a third party tort feasor should be entitled to file a third party action for indemnification against a subcontractor, whose employee sued the third party tort feasor. This remedy was deemed necessary because the third party tort feasor gained nothing by the statute which granted immunity to the subcontractor and thus was denied access to the courts.

A change in a party's remedy under existing law, which if applied retroactively abolishes a plaintiff's right of action without some alternative, also cannot be so applied. Thus, in Royal v. Clemons, 394 So. 2d 155, 158 (Fla. 4th DCA 1981) the statute sought to be applied retrospectively changed the requirements regarding notice which must be given prior to the enforcement of a lien. However, if applied retroactively, the newly imposed time limit would have precluded plaintiff from bringing suit. Since the plaintiff's substantive right to sue was thus abolished without any alternative relief being provided, the statute could not be applied retroactively.

The same is true in this case. The statute sought to be applied retroactively requires that arbitration be instituted prior to any civil suit being filed. Florida Statues Chapter 723.037. Thus, a retrospective application of the new Chapter723's arbitration requirement requires the tenant to comply with Chapter 723 and not Chapter 83.

Finally, a statute may not be retrospectively applied if it imposes a new obligation or an additional disability is established in connection with transactions or considerations had or expiated. McCord v. Smith, 43 So. 2d 704, 708 (Fla. 1949);

Phillips v. West Palm Beach, 70 So. 2d 345 (Fla. 1935). New Chapter 723, if retrospectively applied in repealing the formerly applicable law (Chapter 83, Part III) would impose upon tenants with suits currently pending, such as the tenants in the instant case, a new obligation and additional disability of first seeking arbitration before any civil suit will be entertained and thus cannot be retrospectively applied to the tenants.

In conclusion, the Respondent/Appellee contends that Chapter 723, Florida Statutes should not be applied retroactively as it does not contain a specific or express declaration of retroactive application. Legislation is presumed to operate prospectively unless there exists a showing on the face of the law that retroactive application is intended. See City of Orlando v. Ronald J. Desjardins, et ux., 469 So. 2d 831 (Fla. App. 5 DCA, 1985). Chapter 723 did not become effective until June 4th, 1984. The alleged unconscionable act of the Appellees was done prior to June 1st, 1984, and was to be effective June 1st, 1984. No contract was entered into by the parties on or before June 1st, 1984, for the increase in rent to be effective June 1, 1984. Chapter 723 had 27 sections comparable to Chapter 83, Part III, but had additional 25 sections not comparable to Chapter 83, and the matter should not have been tried under Chapter 723. It was tired pursuant to court order under Florida Statutes Chapter 723 as requested by the tenants. The tenants wants to pick and choose what is best for them to get attorney fees.

VI.

THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT REVERSED THE TRIAL COURT AS IT ERRED IN NOT REFERRING THE MATTER TO THE COUNTY COURT.

Chapter 34.011 Florida Statutes notes that the County Court has exclusive jurisdiction of landlord tenant actions. See Wisconsin Real Estate Investment Trust, et. al. v. Joseph J. Rouse, 466 So. 2d 289 (Fla. 5 DCA, 1985). this action was brought in the Circuit Court although it was a landlord tenant case, and should have been transferred to the County Court for trial. By filing the matter in Circuit Court it took extra time and cost, plus attorney fees, to both sides when the matter could have been disposed of less expensively int he County Court. Homes v. The Honorable Steven D. Robinson, et al., 426 So. 2d 1164 (3rd DCA 1983); Palm Corporation v. 183rd St. Theatre Corporation, 344 So. 2d 252 (3rd DCA 1977); Sam Kugears v. Casino, Inc., 372 So. 2d 1132 (2 DCA 1979).

When tenants amended their Complaint two times and dropped their claim for damages, the Trial Court lost the jurisdiction it allegedly had to hear the matter. As of the date of the Amended Complaint the County Court clearly had exclusive jurisdiction to hear the matter.

VII.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING TRIAL COURT WHEN IT STATED THAT THE PETITIONERS/APPELLANTS HAD PROVED THEIR CASE AS TO SUBSTANTIVE AND PROCEDURAL UNCONSCIONABILITY.

The status of mobile home owners and mobile home park owners is of such a unique nature that the state legislature has strictly regulated the rights of both in the operation and residency within the park. This fact is clearly set forth in Palm Beach M. H., Inc. v. Strong, 300 So. 2d 881 (Fla. 1979) and Stuart v. Green, 300 So. 2d 889 (Fla. 1974).

Reliance can be made in each of these two cases on the issue of "unconscionability" of a lease (agreement) requirement and to determine the constitutionality of a law by the state in controlling abuses by the mobile home owners and the mobile home park owners.

Such a reliance by anyone on these two cases would be misplaced unless a distinction is made in those fact situations and the facts at hand. In both cases cited, the court was dealing with a mobile home park owner's use of lease terms and park rules to "discriminate among mobile home park tenants or any class therein, . . . " and ". . . to circumvent intent and purposes of any provision of statute.", Stewart v. Green, supra, with the end desire to evict tenants. In the case at hand no situation exists. the issue is whether a proposed monthly rental fee increase is unconscionable and not whether tenants are being evicted by improper modification of lease terms. As the court states in Stewart v. Green, supra, "If the rules and regulations established by the mobile home park owners or operators are

equal, nondiscriminating, and reasonable as to any class or classes of mobile home owners in his park, they may provide for periodic adjustment of monthly or other term rentals."

With this in mind, the Court has recognized the right of the "mobile home park owner or operator" to make adjustments in their rules and regulations; the issue is only of whether the adjustment of the rental fee creates the two elements of unconscionability, substantive and procedural, based on the facts. Kohl v. Bay Colony Club Condominium, Inc., 398 So. 2d 865 (Fla. 1981); Aristek Communities, Inc. v. Fuller, 453 So. 2d 547 (Fla. 1984); State v. DeAnza Corp., 416 So. 2d 1173 (Fla. 1982) and Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 1982), each state distinctions of the two forms of unconscionability and their characteristics. But even more importantly, the cases point out that most courts take a balancing approach, where "most courts require a certain quantum of procedural plus a certain quantum of substantive unconscionability." Kohl v. Bay, supra, citing J. White and R. Summers, Uniform Commercial Code 128 (1972). (Emphasis added). The distinction of the two forms of unconscionability are critical because it required both of the two forms exist to show contract unconscionability. State v. DeAnza Corp., supra, and Kohl v. Bay, supra.

> "Procedural unconscionability relates to the individualized circumstances surrounding each contracting party at the time of contracting and cannot be established as a general proposition for a whole rouge of contracts merely containing similar terms between various persons". State v. DeAnza Corp., supra, citing Kohl v. Bay Colony Club Condominiums, Inc., supra.

While to find substantive unconscionability, it must be shown that:

> "A case is made out of substantive unconscionability by alleging and proving that the terms of the contract are unreasonable and unfair." (Emphasis added).
>
> and that
>
> "The 'substantive' heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable." (Emphasis supplied).
>
> Kohl v. Bay Colony Club Condominiums, Inc., supra.

It is required that both elements must be shown and proven for contractual unconscionability to be found by the Court. The Plaintiff must prove that each member of the class has a contract on which to rely as to procedural unconscionability. But in all cases as to each tenant within the Plaintiff's class there must be ". . . an examination into a myriad of details. . . " Kohl v. Bay Colony Club Condominiums, Inc., supra. The Court found that this creates a sub-issue for each tenant within the Plaintiff's class. "While we foresee monumental obstacles of proof of such an allegation. . .: Kohl v. Bay Colony Club Condominium, Inc., supra.

The facts at hand cannot show procedural unconscionability and the Petitioners have not alleged that they exist and must show in each member's case that they have a contract upon which to sue. As to substantive unconscionability , the terms of the contract must be unreasonable and unfair. The contract term concerned with here is simply that increase in the monthly rental fee proposed by the landlord and refused by tenants. (Emphasis supplied)

In conclusion, for the court to decide the single issue of contractual unconscionability as to an increase in the rental fee such facts as, but not limited to price--value disparity, rental increases that are excessive as to the cost of living, whether there is an agreement to pay, sound financial necessity, and fair market value, must be reviewed. These facts must apply to each tenant within the class, both as to procedural unconscionability and as to the substantive unconscionability of the terms themselves, if a contract exits. (Emphasis supplied)

The burden of proof by the Petitioners is not one for the class as a whole, but to each tenant on both substantive and procedural unconscionability; and where there is a failure to prove both in each tenant's case, the Petitioners have failed as to that unit of the class.

Lanca Homemakers, Inc. et. al. v. Lantana Cascade of Palm Beach, Ltd., et. al., 516 So. 2d 1074 (Fla. 1988) - 13 FLW 568 (Fla. Sept. 22, 1988).

See attached brief of Amicus Curiae of the Florida Manufacturing Housing Association, Inc., filed in Case No. 72,563, Rebert Jones v. Arthur Thomas, dated 11/26/88, (Appendix 2)

and

see attached brief of Club Wildwood Mobile Home Village filed in Case No. 72,563, Jones v. Thomas, dated 11/29/88 (Appendix 3).

VIII.

THE DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT AS IT ERRED IN ALLOWING THE COMPLAINT TO BE AMENDED ON THE 3RD DAY OF THE SIX DAY TRIAL

Florida Rules of Civil Procedure, Rule 1.190 and Rule 1.610.

Transcript of Hearing dated September 19, (18), 1986, pages 7 through 18.

Florida Rules of Civil Procedure, 1.440(c).

Bennett v. Continental Chemical, Inc., 492 So. 2d 724 (Fla. (Fla. 1 D.C.A. 1986).

Broussard v. Broussard, 506 So. 2d 463 (Fla. 2 D.C.A. 1987).

IX.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT REVERSED THE TRIAL COURT AS IT ERRED IN GRANTING AN INJUNCTION TO PREVENT THE RESPONDENT/APPELLEE FROM PROCEEDING IN COUNTY COURT FOR EVICTION IN THAT THE AMENDED COMPLAINT WAS NOT VERIFIED.

Neither the Complaint nor the Amended Complaint nor the amendment to the Amended Complaint was verified. See Florida Rules of Civil Procedure 1.190 and 1.610.

The trial court issued an injunction to prevent the landlord from proceeding in the County Court in Orange County, Florida, to continue eviction proceedings.

X.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT REVERSED THE TRIAL COURT WHEN IT ERRED IN CREATING A LEASE BETWEEN THE LANDLORD AND TENANT CONTRARY TO CHAPTER 83-760, § 1 AND 2.

The trial court had to find that the parties had a rental agreement effective June 1at, 1984, although there was no meeting of the minds between the parties as the rent increase was an offer by the landlord which was refused by the tenants to increase the rent in the amount of $50.00 per lot.

L. Luria & Son, Inc. v. Edward B. Fingerman, et al., 497 So. 2d 682 (Fla. 3 DCA, 1986).

Mr. and Mrs. Dale Appel, et al. v. John Scott, et al., 479 So. 2d 800.

State v. DeAnza Corp., supra.

CONCLUSION

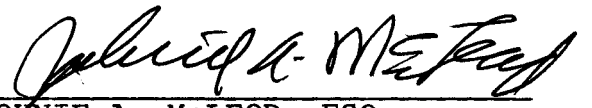
While the Florida Legislature is passing legislation to cut down on the costs to have determined what the landlord should charge and what the tenant should pay as rent in a mobile home park, the trial court, later the court of appeals, and now the Florida Supreme Court is being asked to differentiate between substantive and procedural unconscionability of an agreement. This is being done at a great expense to the owners of the parks and the tenants in the parks.

The Supreme Court has ruled that rent control is unconstitutional, except under certain circumstances, of which this is not one, and how much latitude the trial court has in determining <u>if rent collected or to be collected</u> is unconscionable.

This is a statutory proceeding and the statute sets out the rights of the landlord and tenant. Chapter 83 was the law effective on June 1, 1984. The trial court should not have tried the case considered pursuant to Chapter 723 or it should have considered all of Florida Statutes Chapter 723. If this court reverses the 5th D.C.A. it is saying that 55 sections of Florida Statutes Chapter 723 are not applicable except for Chapter 723.033 and 723.068.

Unconscionability can be a defense on any agreement, it doesn't have to be statutory, but first there must be an agreement.

The order of the Fifth District Court of Appeals should be affirmed.



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APPENDIX

(1) Provisions of Part III, Chapter 83, as may now be found in Chapter 723.

(2) Amicus Curiae Brief of the Florida Manufactured Housing Association, Inc. dated 11/26/88 filed in Case No. 72,563, Supreme Court of Florida, Rebert Jones v. Arthur Thomas.

(3) Amicus Curiae Brief of the Club Wildwood Mobile Home Village filed in Case No. 72,563, Supreme Court of Florida, Rebert Jones v. Arthur Thomas.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been provided by U. S. Mail, postage prepaid, this 5th day of January, 1989, to Lee Jay Colling, Esquire, of Colling & Beattie, P. A., Suite 500, NCNB National Bank Building, 250 N. Orange Avenue, Orlando, FL 32801, and Douglas B. Beattie, Esquire, of Colling & Beattie, P. A., Suite 500, NCNB National Bank Building, 250 North Orange Avenue, Orlando, Florida 32801, Attorneys for Petitioners/Appellants; and John T. Allen, Jr. Esq. and Christopher P. Jayson, Esq., of John T. Allen, Jr., Esq., 4508 Central Avenue, St. Petersburg, FL 33711.

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