IN THE SUPREME COURT
STATE OF FLORIDA

DONALD HARPSTER, etc.,

Plaintiffs/Petitioners,

vs. CASE NO. 73,002

J.T.A. Inc.,

Defendant/Respondent.
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PETITION FOR DISCRETIONARY REVIEW OF
OPINION FILED JUNE 23, 1988 BY THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF PETITIONERS ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners, DONALD HARPSTER, et al., seek to have reviewed the Opinion filed on June 23, 1988 by the Fifth District Court of Appeal. (App. 1-2).

In the brief, the parties shall be referred to by the position they occupy before this Court. The following symbols will be used for reference: "R" - record on appeal and "App" - the Appendix of the Petitioners.

This case involves a class action filed by the Petitioners, as representatives of the class of mobile home owners living in the Wheel Estates Mobile Home Park, against the Respondent (park owner) challenging the rental increase effective June 1, 1984 as unconscionable. (R 986-993; 1141-1147; 1282-1283). On March 15, 1985, the trial court entered an Order Determining and Approving Class Action. (R 1006-1011). After a non-jury trial, the trial court, on August 5, 1986, entered a Final Judgment in favor of the Petitioners holding that the rental increase was unconscionable and uneforceable and awarding the Petitioners their costs and a reasonable attorney's fee, the amount of which was deferred until a further hearing. (R 1337-1338). On September 19, 1986, the trial court entered an Amendment to the Final Judgment. (R 1575-1576). The Respondent filed an appeal (Appeal Case No. 86-1125) from the Final Judgment entered on August 5, 1986 and the Amendment to the Final Judgment entered on September 19, 1986. The Respondent filed a separate appeal from the trial court's Second Amendment to the Final Judgment and on October 16, 1987, the Fifth District Court of Appeal entered an Order consolidating the foregoing appeals "for future appellate purposes." (App. 7).

On October 20, 1987, the Fifth District Court of Appeal entered a per curiam panel decision affirming the Final Judgment, the Amendment to the Final Judgment and the Second Amendment to the Final Judgment of the trial court. (App. 8). On a rehearing and a two to one (2 - 1) vote with a written Dissent, the District Court of Appeal vacated its per curiam decision and substituted the written Opinion filed on June 23, 1988, which found that the issues in the consolidated appeals are controlled by the en banc opinion in Jones v. Thomas, 524 So.2d 693 (Fla. 5th D.C.A. 1988), which is before this Supreme Court on appeal as Case No. 72,563. (App. 3-6). The Petitioners' Motion for Rehearing and a Rehearing En Banc was denied by an order dated August 12, 1988. (App. 9).

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE, AND THE DECISION IN JONES V. THOMAS UPON WHICH IT IS BASED, DIRECTLY AND EXPRESSLY CONFLICT WITH THOSE DECISIONS HOLDING THAT PROCEDURAL UNCONSCIONABILITY IN MOBILE HOME CASES CAN BE ASSERTED AND PROVEN IN A CLASS ACTION.

SUMMARY OF ARGUMENT

This Court should invoke its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal in the instant case because by citing its en banc opinion in Jones, et al. v. Thomas, et al., which is before this Supreme Court as Case No. 72,563, the District Court of Appeal both announces a rule of law in conflict with a rule previously announced by other District Courts of Appeal and applies the rules of law pertaining to issues of unconscionable rent in mobile home cases to produce a different result in a case involving controlling facts substan-

tially similar to those in prior decisions of this Court and other District Courts of Appeal. In addition, the Fifth District Court of Appeal's decision is in error and the Petitioners maintain that it, along with the decision in Jones, et al. v. Thomas, et al., will be reversed on the merits.

ARGUMENT

Since the decision in the instant case is wholly dependent upon and incorporates the Fifth District Court of Appeal's Opinion in Jones, et al., v. Thomas, et al., the Petitioners have filed, contemporaneously with filing this brief, a Motion to Consolidate this appeal with Jones, et al. v. Thomas, et al., Case No. 72,563. If this Court's jurisdiction is invoked in Jones, et al. v. Thomas, et al., it must be invoked in the instant case as the issues are identical and the Fifth District Court of Appeal's decision is based exclusively on its Opinion in Jones, et al. v. Thomas, et al. The following discussion is dispositive of why this Court should invoke its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal in the instant case. Since both the majority opinion and the written Dissent in the instant case incorporate by reference the Fifth District Court of Appeal's Opinion filed in Jones, et al. v. Thomas, et al., the following discussion shall make references to the Opinion filed on March 31, 1988 and Chief Judge Sharp's written Dissent in Jones, et al. v. Thomas, et al.

The Fifth District Court of Appeal, in its Opinion filed on March 31, 1988, in Jones, et al. v. Thomas, et al., states that "[u]nder the current legal analysis, substantive and proce-

dural unconscionability must both be established to prevail in an unconscionability action." (Emphasis supplied.) (App. 4). Its decision establishes the procedural-substantive analysis as a rule of law in determining the issue of unconscionability. However, the decision in the instant case and Jones, et al. v. Thomas, et al., directly and expressly conflict with the Third District Court of Appeal's decision in Steinhardt v. Rudolph, 422 So.2d 884, 889 (Fla. 3d D.C.A. 1982), which held that the procedural-substantive analysis is only a general approach to unconscionability and is not a rule of law (emphasis supplied). The Third District Court of Appeal, in Steinhardt, cites other authorities and observes that the legal concept of unconscionability is so flexible and chameleon-like that it defies definition in a black letter rule of law, whether in procedural-substantive terms or otherwise. Id. at 890.

Chief Judge Sharp, in her written Dissent in Jones, et al. v. Thomas, et al., also establishes that the instant majority decision conflicts with the statement of the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th D.C.A. 1981), that "procedural unconscionability: does not necessarily apply to statutory causes of action, like this case (App. 6).

The Fifth District Court of Appeal's decisions in the instant case and in Jones, et al. v. Thomas, et al., find that "the requirements for procedural unconscionability are too personal, individualized, and subjective to be properly asserted in a class action" and concludes "that, as a matter of law, procedural unconscionability cannot be asserted in a class action." (App. 5). This expressly and directly conflicts with the recent

decision of the Fourth District Court of Appeal in Lantana Cascade of Palm Beach, Ltd., et al. v. Lanca Homeowners, Inc., et al., 516 So.2d 1074 (Fla. 4th D.C.A. 1987). In Lantana, the class of mobile home owners, through their incorporated association, filed a counterclaim seeking to have rents charged by the park owner declared unconscionable. (App. 18-30). The Fourth District Court of Appeal reversed the trial court's finding that the incorporated homeowners association was a proper class representative, but then stated:

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

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

In addition, the Petitioners most respectfully request that this Court consider that unless Jones, et al. v. Thomas, et al. and the instant case are reviewed and this Court's final decisions in the instant companion cases and Lantana, supra, are carefully considered and made uniform, there will be conflicting decisions of this Court on issues critical to all mobile home litigation.

Also, the Opinion filed on March 31, 1988 in Jones, et al. v. Thomas, et al. and the instant decision are at odds with

the earlier decision of the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, Inc., supra. By the express language of the written Dissent in Jones, et al. v. Thomas, et al., Chief Judge Sharp and Judge Daniel identify the conflict by citing Kohl and recognizing that a gross inequality of bargaining power negates the meaningfulness of choice and that procedural unconscionability can be established in a class action. (App. 6). Contrary to the apparent belief of the three majority judges in this case, Kohl does not hold that procedural unconscionability cannot be properly asserted and proven in a class action. 398 So.2d at 869. Although speculating that it may be difficult to prove procedural unconscionability in a class action, the Fourth District Court of Appeal admitted that it was not prepared to make such a finding. Id.

In addition to the conflicts with the foregoing authorities, the instant decision conflicts with the Third District Court of Appeal's decision in Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986). The trial court's Amended Final Judgment, in Ashling, certified the class of mobile home owners after finding the claims of each class member to be identical in amount, based on identical grounds and that class treatment was superior to the filing of 174 different repetitive legal actions. On appeal, the appellant's issue IV in the Brief of Appellant argued that the trial court erred in allowing the tenants of a mobile home park to proceed with a class action for unconscionable rent against the park owner. (App. 31-62). Although the Third District Court of Appeal did not directly speak to the issue of class action unconscionable rent cases in its published opinion,

it did find that "appellant's remaining points lack merit." Id. at 56.

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

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

Clearly, this appellate decision conflicts with the Fifth District Court of Appeal's pronouncement in Jones, et al. v. Thomas, et al., which is incorporated in the Opinion in the instant case, that since the financial condition, etc. of each mobile home owner is different, "the requirements for procedural unconscionablity are too personal, individualized, and subjective to be properly asserted in a class action." (App. 5).

The Petitioners maintain that the decisions of the Fifth District Court of Appeal in the instant case and in Jones, et al. v. Thomas, et al. are not only in direct conflict with the decisions of other District Courts of Appeal as discussed above, but expressly conflicts with and represents a radical departure from the policies enunciated and intended by this Court in Stewart v. Green, 300 So.2d 889 (Fla. 1974) and Palm Beach Mobile Homes,

Inc. v. Strong, 300 So.2d 881 (Fla. 1974) and the Legislature in enacting Chapter 723, Fla. Stat.

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

The Fourth District Court of Appeal, in Kohl v. Bay Colony Club Condominium, Inc., supra, recognized that the details of each tenant's experience and education may be relevant, but identified the basic concept of procedural unconscionability as "an absence of meaningful choice." 398 So.2d at 869. In enunciating the most widely accepted test for contractual unconscionability, the U. S. Court of Appeals, in Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445, 449 (D.C. App. 1965), explained: "[I]n many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power."

In fact, the trial court in Jones, et al. v. Thomas, et al., 16 Fla. Supp. 30 (Fla. 9th Cir. Ct. 1986), in quoting this Court's decisions in Stewart and Palm Beach Mobile Homes, observed

that "[t]he Florida Supreme Court appears to recognize that, almost as a matter of law, a mobile home owner shows procedural unconscionability because the burden of moving his mobile home or buying another one in another park leaves him with an absence of meaningful choice when faced with an unconscionable rental agreement." See Jones v. Thomas, 16 Fla. Supp. 2d 30 (Fla. 9th Cir. Ct. 1986). The gravamen of the issue of procedural unconscionability in mobile home cases is that the grossly unequal bargaining position of the mobile home owner negates any "meaningful choice" and therefore, it is unnecessary to delve into the individualized circumstances of each member of the class as the instant decision would require. (App. 6; Sharp, W. CJ., dissenting). The failure of the Fifth District Court of Appeal to recognize the grossly unequal bargaining position of the mobile home owner when faced with an unconscionable rent is in direct conflict with the policies and concerns stated by this Court in Stewart v. Green, supra, and Palm Beach Mobile Homes, Inc. v. Strong, supra, and the foregoing authorities.

If not reversed by this Court, the inevitable result of the Fifth District Court of Appeal's decision will be that the elderly mobile home owners, on fixed incomes, will not be able to afford to litigate their claims against an abusive park owner charging unconscionable rents and this will serve to aggravate the very conditions of "economic servitude" discussed by this Court in Stewart v. Green, supra and Palm Beach Mobile Homes, Inc. v. Strong, supra.

CONCLUSION

The Opinion filed on June 23, 1988 by the Fifth District

Court of Appeal, which is based exclusively on its en banc opinion in Jones, et al. v. Thomas, et al., Case No. 72,563, is in direct and express conflict with the decisions of the District Courts of Appeal and this Supreme Court set forth in this Brief.

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

Respectfully submitted this 12th day of September, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been provided by U.S. Mail, postage prepaid, this 12th day of September, 1988, to Johnie A. McLeod, Esquire, Attorney for Defendants/Respondents, of McLeod, McLeod & McLeod, Post Office Drawer 950, Apopka, Florida 32703.

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