IN THE SUPREME COURT
STATE OF FLORIDA

DONALD HARPSTER, etc.,

Plaintiffs/Petitioners,

v. CASE NO. 73,002

J.T.A., INC.,

Defendant/Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE

The Defendant/Respondent agrees that the Statement of the Case and the Facts as alleged by Petitioners is admitted by the Respondent.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

SUMMARY OF ARGUMENT

This Court should not invoke its discretionary jurisdiction to review the en banc decision of the Fifth District Court of Appeal in the instant case because the decision is not in direct or express conflict with a decision of the Supreme Court or of any other majority decision of a District Court of Appeal on the same issue of law. The cases cited by the Petitioners do not deal with the issue of bringing a class action for unconscionable lot rent in a mobile home park.

ARGUMENT

The issue presented in this case is whether a claim of unconscionability was maintainable as a class action pursuant to Florida Rule of Civil Procedure 1.220. The Fifth District Court of Appeal en banc reversed following the legal analysis for unconscionability that has been utilized by almost every District Court of Appeal in this state. B. J. Pearce v. Doral Mobile Home Villas, Inc., 521 So. 2d 282 (Fla. 2d DCA 1988); Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 3rd DCA 1982); Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA, cert. denied) 492 So. 2d 1333 (Fla. 1986); State v. D'Anza Corporation, 416 So. 2d 1173 (Fla. 5th DCA 1982).

Essentially, Petitioner is asking this Court to review the

Fifth District Court of Appeal's decision because it was a divided decision. The Petitioner, has not cited a single case which meets the necessary criteria of applying for review on grounds of direct conflict of decision as announced in Reaves v. State of Florida, 385 So. 2d 829 (Fla. 1986). In Reaves, the Court in denying discretionary jurisdiction granted by Article V., Section 3(b)(3) of the Constitution, stated:

> "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."

485 So. 2d at 830. (Emphasis supplied) See also Dept. of Health v. National Adoption Counseling Services, Inc., 498 So. 2d 888 (Fla. 1986).

The Petitioner first argues that the decision by the Fifth District Court of Appeal in the instant case conflicts directly with the Third District Court of Appeal's decision in Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 3rd DCA 1982). The conflicts cited by the Petitioner between this case and in the decision of the Third District Court of Appeal in Steinhardt v. Rudolph, apparently arise from the Third District's analysis common law unconscionable doctrines and UCC provisions contained in §672.302, Fla. Stat., (1981). The Court analyzed the earlier common law definition of an unconscionable contract and contrasted that with the more modern "balancing approach" to the unconscionability question and explained the two pronged test for unconscionability, as follows:

> Procedural unconscionability focuses on those factors surrounding the entering of the contract which add up

> to an absence of meaningful choice on the part of one of the parties to the contract as to the terms therein; substantive unconscionability, on the other hand focuses directly on those terms of the contract itself which amount to an outrageous degree of unfairness to the same contracting party.

Steinhardt v. Rudolph, 422 So. 2d at 889. The Third District Court of Appeal noted that the procedural-substantive analysis is only a general approach to the unconscionability question and is not a rule of law. Id. at 889-890. However, the Court concluded that it regarded the procedural-substantive analysis as generally helpful and applied it in that case. Id. at 890.

While the Third District Court of Appeal applied the procedural-substantive analysis to a common law unconscionable attack on a recreational lease in a condominium, this case involves a statutory cause of action under §723.033, Florida Statutes, for unconscionability of a lot rental agreement in a mobile home park. The two cases are in no way analogous. Thus, examining the four corners of the majorities' opinion in Steinhardt, as required by Reaves, there appears to be no express and direct conflict with it and the decision by the Fifth District Court of Appeal in the instant case as it relates to class actions brought by mobile home owners.

Next, the Petitioner asserts that the decision of the Fifth District Court of Appeal in the instant case is directly and expressly in conflict with the recent decision of Fourth District Court of Appeal in Lantana Cascade of Palm Beach, Ltd., et al. v. Lanca Home Owners, Inc., et al., 516 So. 2d 1074 (Fla. 4th DCA 1987). Unlike the conflict asserted between this case and Steinhardt v. Rudolph, the Petitioner asserts that the conflict

between the instant case and the Lantana Cascade case exists in that, in the instant case, the Fifth District Court of Appeal determined that "the requirements for procedural unconscionability are too personal, individualized and subjective to be properly asserted in the class action" and concludes "that, as a matter of law, procedural unconscionability cannot be asserted in the class action."

The appeal in the Lantana Cascades case, however, was from an order certifying Lanca Mobile Home Owners, Inc., a mobile home owners association created pursuant to Chapter 723, Florida Statutes, as the class representative of all the mobile home owners within the Lantana Cascade Mobile Home Park. The Fourth District Court of Appeal in that case found that the statute which the trial court relied upon to give standing to the home owners was unconstitutional. 516 So. 2d 1075. While the court also affirmed the trial court's finding that the counter claim , except for specified portions, could be maintained as a class action, 516 So. 2d at 1075, the issue of whether home owners as individuals could allege procedural unconscionability in a class action was not addressed on appeal.

Petitioner argues, that the decision in Lantana alone, establishes the jurisdiction of this Court. However, this Court has already determined that the jurisdiction of the Supreme Court on a petition for review will depend on whether the conflict between decisions below is express and direct--not whether the conflict is inherent or implied. Dept. of Health and Rehabilitative Services v. National Adoption Counseling Services,

Inc., 498 So. 2d 888 (Fla. 1986). Because the issues in the Lantana case are different from those in the instant case, and Reaves, supra, requires direct conflict with facts contained within the four corners of the Lantana decision, Petitioners attempt to establish jurisdiction based on any alleged conflict in Lantana must fail. The Lantana case is currently on appeal before this court as Case No. 71,767.

Next, the Petitioner cites a conflict with the Fourth District Court of Appeal's Opinion in Kohl v. Bay Colony Club Condominium, Inc., 398 So. 2d 865 (Fla. 4th DCA, 1981). The Kohl case, however, dealt with allegations of common law unconscionability in condominium recreation lease. The Court in Kohl in explaining procedural unconscionability, stated:

> To meet the threshold test of adequacy the allegations of procedural unconscionability must clearly demonstrate the absence of meaningful choice on the part of the Plaintiff. Ordinarily this requires an examination into a myriad of details including the Plaintiff's experience and education and the sales practices that were employed by the Defendant or his predecessor-assignor. However, the basis concept is "an absence of meaningful choice." While we foresee monumental obstacles of proof of such an allegation (which is a legal conclusion only) in a class action setting, we are not prepared to hold that allegations of the Amended Complaint are per se and insufficient. We note that we are not called upon here to determine evidentiary questions.

398 So. 2d at 869. (Emphasis supplied).

Clearly, this language cited from Kohl does not put forth an express or direct conflict with the decision in the instant case. Moreover, the Fourth District Court of Appeal, in Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA 1985), explained their

holding in Kohl v. Bay Colony Club Condominium, supra, as follows:

> We held in Kohl that the prerequisites for procedural unconscionability are too individualized to permit a class action. Further, as stated by the Court in State v. D'Annza, 416 So. 2d 1173, at 1175 (Fla. 5th DCA 1982): "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 range of contracts merely containing similar terms between various person.

480 So. 2d at 1327.

It is clear that the Fourth District Court of Appeal requires a Plaintiff to plead and prove the individualized circumstances of that party with respect to the contract that is entered into to demonstrate a "absence of meaningful choice" by that party when he entered into a contract. That is exactly what the Fifth District Court of Appeal has stated in the instant case.

Next, the Petitioner cites to the Third District Court of Appeal's decision in Ashling Enterprises, Inc. v. Browning, 487 So. 2d 56 (Fla. 3rd DCA 1986). The opinion by the Third District Court of Appeal does not address the issue of whether or not the unconscionable rent action could properly be brought as a class action. The Petitioner points to the brief of the Appellant in that case as arguing that the trial court erred in allowing the tenants of a mobile home park to proceed with a class action. However, as the Supreme Court of Florida stated in Reaves, supra, the only facts relevant to the Court's decision to accept or reject petitions for review of decision of District Court of Appeal on ground of direct conflict of decision, are those facts

contained within the four corners of the majority decision. 485 So. 2d 830. (Emphasis supplied). Neither dissenting opinion nor the record itself may be used to establish jurisdiction. Id.

Next, the Petitioners allege that there is conflict between the instant case and B. J. Pearce, et al. v. Doral Mobile Home Villas, Inc., 521 So. 2d 282 (Fla. 2d DCA 1988). This case involved an appeal from an order granting discovery of each of the tenants financial position in the park. the action was not brought as a class action and the Second District Court of Appeal has never ruled on that point. The Second District in that case, however, did analyze the discovery request based upon the procedural-substantive analysis. the Second District Court of Appeal in reviewing the procedural prong of the test stated:

> First, the tenants/plaintiff must demonstrate the existence of "procedural unconscionability," elsewhere defined as "an absence of meaningful choice." Among the criteria which may be considered in reaching this determination are the parties' age, level of education, business acumen, and relative bargaining power. (citations omitted)

521 So. 2d 283. There is simply no conflict between the instant case and B. J. Pearce v. Doral Mobile Home Villas, Inc., because Pearce is not a class action case. What is at issue in Pearce is simply relevant inquiry into the factors which make up procedural unconscionability.

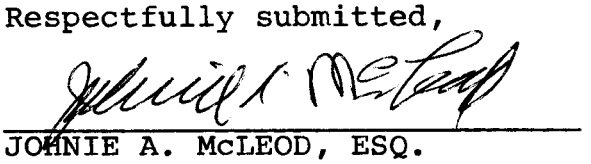
Finally, the Petitioner attempts to demonstrate a conflict between the decisions of this Court in Stewart v. Green, 300 So. 2d 889 (Fla. 1974) and Palm Beach, Inc. v. Strong, 300 So. 2d 881 (Fla. 1974). Neither of those cases dealt with unconscionable

mobile home lot rents. Rather, those cases dealt with changes to the remedy of eviction in a mobile home park.

CONCLUSION

Absent an express and direct conflict on the same question of law, Petitioner's brief for review fails to meet the test as set forth in Reaves. Respondent respectfully recommends that the Supreme Court decline to exercise discretionary review jurisdiction in this cause.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief has been furnished by U. S. Mail, postage prepaid, this 29th day of September, 1988, to Lee Jay Colling, Esq. and Douglas B. Beattie, Esq., of Colling & Beattie, P. A., Suite 500, NCNB Bank Building, Orlando, FL 32801, attorneys for Petitioners.

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