1-6-89

IN THE SUPREME COURT
STATE OF FLORIDA

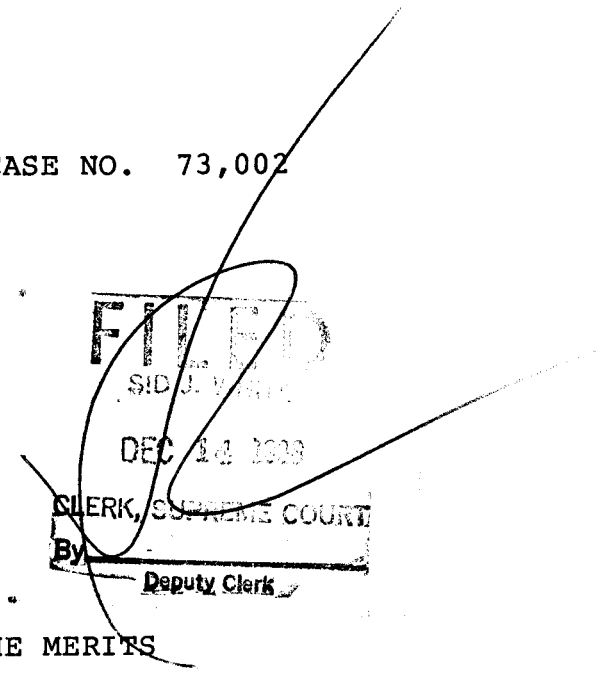
DONALD HARPSTER, et. al,

Plaintiffs/Petitioners,

vs. CASE NO. 73,002

J.T.A., INC.,

Defendant/Respondent.
_____/



PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

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).

The Petitioners were the original Plaintiffs in the trial court and the Appellees before the District Court of Appeal. The Respondent, J.T.A., Inc., was the original Defendant in the trial court and the Appellant before the District Court of Appeal. In this 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.

"T" - trial transcript

"App" - the Appendix of the Petitioners

"PX" - Petitioners' trial exhibit

This case involves a class action filed by the Petitioners, as representatives of the class of mobile home owners living in Wheel Estates Mobile Manor, against the Respondent (park owner) challenging the rental increase effective June 1, 1984 as unconscionable under Chapter 83, Part III, Fla. Stat. (R 986-993; 1141-1447; 1282-1283). On March 15, 1985, the trial court entered an Order Determining and Approving Class Action (R 1006-1011; App. 10-11). After earlier ruling from the bench, the trial court on August 5, 1986, entered an Order granting the Petitioners' Motion to Amend Plaintiffs' Amended Complaint, which operated as an amendment to Petitioners' Amended Complaint filed

on March 28, 1986 (R 1141-1147; 1282-1283). The amendment to Petitioners' Amended Complaint restated their claims under Chapter 723, Fla. Stat., which had replaced Chapter 83, Part III, Fla. Stat. (repealed) (R 1284-1290).

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 unenforceable 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 August 15, 1986, the Respondent filed a Motion for Retrial (R 1339-1340). The trial court denied the motion by its Order entered on September 18, 1986 (R 1344). 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. 86-1825) 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 (Appeal Case No. 87-1302) from the trial court's Second Amendment to the Final Judgment, which awarded the Petitioners' attorney's fees and additional costs, 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 by 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 Thomas v. Jones, 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 the District Court of Appeal's Order dated August 12, 1988. (App. 9).

On August 31, 1988, the Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction with the Clerk of the Fifth District Court of Appeal. After consideration of the briefs filed on jurisdiction, this Court, on November 16, 1988, entered an Order Accepting Jurisdiction and Dispensing with Oral Argument.

STATEMENT OF FACTS

On April 30, 1984, the Respondent purchased "Wheel Estates" (R 11), a mobile home park consisting of 53 spaces (R 84). The mobile home park is located on Highway 441 (also known as "Orange Blossom Trail") in Orlando, Orange County, Florida and borders a small lake (PX 35). The prior owner, Larry Barnes, had owned the park since November, 1978 (R 83). He was familiar with the operating costs, maintenance and income for the park (R 84). While the park was owned by Mr. Barnes, he offered written leases to the tenants but only three or four had signed them (R 85-86). The other tenants had oral leases and did abide by the rules and regulations of the park and pay the amount of the current rent without having a written lease (R 86).

During 1983, the tenants in "Wheel Estates" paid $91.00 per month for a non-seawall lot and $96.00 per month for a seawall lot (R 102). For the calendar year beginning January 1, 1984, the rent was increased by $7.00 per month so that a non-seawall lot cost $98.00 per month and a seawall lot cost $103.00 per month (R 102). On May 11, 1984, just 11 days after it purchased "Wheel Estates," the Respondent delivered a written notice of rent increase together with a proposed lease and rules and regulations to the tenants (R 24, 354, 548, 563, 577). The $50.00 per month increase in rent was to be effective June 1, 1984 and would have made the rent for a non-seawall lot $148.00 per month and for a seawall lot $153.00 per month. The Respondent's attorney, in a letter dated June 1, 1984, explained to the tenants that the $50.00 increase in rent was due to the large

downpayment and purchase price paid for the park by the Respondent, as well as an increase in taxes, insurance and other cost increases for the maintenance and management of the park (PX 14). The records and financial documents, however, show that the actual costs of maintaining and operating the park decreased slightly from 1983 to 1984 (R 482-483, PX 63). The overwhelming majority of the tenants would not sign the proposed leases (R 576-577, AB 2).

At the time of the rent increase, the majority of the tenants living in "Wheel Estates" were over the age of 55 years and retired (R 119, 224, 250, 349). The sole source of income for many tenants was social security (R 362, 558, 573). The mobile homes owned by the tenants and located in "Wheel Estates" were older, used mobile homes that, in many instances, had porches and permanent improvements added to them making them immobile (R 224-225, 350-351, 799-800). When presented with the rent increase, the tenants could not move their mobile homes not only because of the problems in physically moving the homes, but also because there was no other park which would accept them (R 456-462, 319, 548, 952-953). Further, the tenants could not sell their mobile homes while situated in "Wheel Estates" because of the proposed rent increase (R 309-316, 362-363). The tenants in the mobile home park were a "captive audience" (R 457-463, 799-800).

When the Respondent purchased the park, it was an adult park with the following amenities available to the tenants as part of the lot rental: city water and sewer, garbage pickup, a recreation hall, a laundry area (open on three sides) with two

washers and one dryer, one shuffleboard court, a boat ramp and full time managers on site (R 254-255, 437-444). The recreation hall was small and had limited furniture (R 254). It was not air conditioned or heated, which made it unusable in the summer or winter (R 441-442, 809, 811). It did not have a kitchen or a restroom (R 291-292). The washing machines and dryer and the laundry area were dirty and rusty (R 356, 442, 533-534) and did not work properly at times (R 356-357). The shuffleboard court was not lighted (R 255). The boat ramp was overgrown with weeds and trees (R 255, 439) and there was a drop-off at the end which made it impossible to use with a trailer (R 256, 439-440). The park is located next to Orange House, a halfway house for juveniles. The tenants in "Wheel Estates" are often harassed by the inmates and disturbed by the noise and profanity (R 437, 544-545, 562-563). Effective when the Respondent purchased the park, the managers became part-time and were not available from approximately 6:30 a.m. to approximately 4:30 p.m. during the week and from approximately 6:30 a.m. to approximately 2:00 p.m. on Saturdays (R 603-604, 606, 655, 656, 677). Further, from the time of the rent increase through June 30, 1985, the overall condition of the park was not good. The roads were not in good condition (R 438). There were not enough street lights and some were blocked by overgrown trees (R 438-439). The seawall created a hazard and was dangerous (R 351-353, 440-441).

As of June 1, 1984, other comparable mobile home parks in the area with similar amenities were charging less rent per month than the $98.00 and $103.00 charged at "Wheel Estates" when

the Respondent purchased the park (PX 54, PX 61). The one park in the area charging rent of $150.00 per month was clearly superior to "Wheel Estates" in amenities offered to the tenants and in its overall condition (R 324-328, 451-454). Also, an analysis using the Consumer Price Index when applied to the rent at "Wheel Estates" would have yielded a monthly rent as of June 1, 1984 of $94.00 for non-seawall lots and $101.00 for seawall lots (R 485-486). Petitioners' expert, Dr. Thomas D. Curtis, could find no legitimate financial basis for the $50.00 per month rent increase and as the result of his analysis, concluded that the rent increase was greatly out of line with comparable parks in the area as of June 1, 1984 and was unconscionable (R 482-484, 484-485, 951, PX 54). Dr. Curtis also concluded that as of June 1, 1984 a reasonable lot rental at "Wheel Estates" would have been $95.00 to $100.00 per month for non-seawall lots and $100.00 to $105.00 per month for seawall lots (R 485). The prior owner of the park characterized the $50.00 rent increase by the Respondent as "outrageous" (R 138). The certified public accountant initially retained by the Respondent to set up its books while operating the park (R 150, 154) stated that the rent increase of $50.00 as of June 1, 1984 was "unreasonable" (R 172). Even the expert retained by the Respondent characterized a $50.00 a month increase in rent as "incredible" (R 869). The Respondent's expert offered an opinion that the fair market rental value of the lots in "Wheel Estates" as of June 1, 1984 were $120.00 per month for non-seawall lots and $125.00 per month for seawall lots (R 770).

The Petitioners, with no viable alternatives, filed their class action Complaint against the Respondent challenging the $50.00 per month rent increase as being unconscionable (R 986-993).

SUMMARY OF ARGUMENT

I

The Supreme Court's Opinion in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under a certificate dated October 6, 1988) holds that given the special relationship which exists between a park owner and mobile home owners, the grossly inferior bargaining power of the mobile home owners and the unique features of mobile home residency, a unilateral rent increase imposed across-the-board by the park owner leaves the mobile home owners with the "absence of meaningful choice" necessary to meet the class action requirement of procedural unconscionability as a matter of law. The Lanca decision, once final, is absolutely on point with the case sub judice and finally dispositive of the issue on appeal.

The policies and principles enunciated in Lanca were first recognized by the Supreme 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). There, this Court acknowledged the grossly inferior bargaining position of the mobile home owners vis-a-vis the park owner and their absence of meaningful choice since the mobile home owners can neither find available space in other parks to move their mobile homes nor afford the expenses of same. The basic concept of procedural unconscionability has been identified in Florida as "an absence of meaningful choice." Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th

D.C.A. 1981). In deciding issues of contractual unconscionability, courts have long recognized that in many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. See e.g. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (DC App. 1965).

The Fifth District Court of Appeal's decision in the case sub judice directly conflicts with the foregoing authorities and represents a radical departure from the policies and principles stated therein. In the instant case, procedural unconscionability exists as a matter of law because of the Petitioners' absence of meaningful choice and can be proven in a class action.

II

The Fifth District Court of Appeal, by relying on its en banc opinion in Thomas v. Jones, 524 So.2d 693 (Fla. 5th D.C.A. 1988) (pending before this Supreme Court as Case No. 72,563), establishes the procedural-substantive analysis as a rule of law in determining the issue of unconscionability. This departure from existing law which holds that the procedural-substantive analysis is only a general approach to unconscionability is unwise and unfounded. See generally, Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982); Kohl, supra.

ARGUMENT

The majority Opinion and the written Dissent in the instant case are based exclusively on and both incorporate by reference the Fifth District Court of Appeal's en banc Opinion in Thomas v. Jones, 524 So.2d 693 (Fla. 5th D.C.A. 1988). There, the District Court of Appeal held that :

(1) "[u]nder the current legal analysis, substantive and procedural unconscionability must both be established to prevail in an unconscionability action." Id. at 694; and

(2) " . . . as a matter of law, procedural unconscionability cannot be asserted in a class action." Id. at 695. The Fifth District Court of Appeal's decision in Thomas v. Jones is pending before this Court as Case No. 72,563. The Petitioners invite the Court's review and consideration of the arguments presented in that appeal.

I

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT, AS A MATTER OF LAW, PROCEDURAL UNCONSCIONABILITY CANNOT BE ASSERTED IN A CLASS ACTION.

The Supreme Court has decided the very issue on appeal in its recent decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under a certificate dated October 6, 1988). This Court's Opinion in pertinent part, provides:

Section 723.033(2), Florida Statutes (1985), which provides a cause of action for unconscionable rental agreements states:

> When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its meaning and purpose, the relationship of the parties, and other relevant factors to aid the court in making the determination.

The key here is "the relationship of the parties." Where a rent increase by a park owner is a unilateral act, imposed across the board on all tenants and imposed after the initial rental agreement has been entered into, park residents have little choice but to accept the increase. They must accept it or, in many cases, sell their homes or undertake the considerable expense and burden of uprooting and moving. The "absence of a meaningful choice" for these residents, who find the rent increased after their mobile homes have been affixed to the land, serves to meet the class action requirement of procedural unconscionability. See Thomas, 524 So.2d at 695 (Sharp, C.J. dissenting); Steinhardt; Kohl. As a rule, the relationship that exists between park owner and resident clearly outweighs any other factor in determining the effect of the increase on individual residents. This circumstance is shared equally by each member of the park. Thus, the alleged unconscionability of such an increase lends itself to proof in the class action format. Id. at 569.

The trial court, in the case sub judice, found that all of the class members were subject to the same rental increase and were provided the same services and amenities and entered an order determining that the claims of the representative Petitioners were to be maintained as a class action. (R 1006-1011; App. 10-11). In addition, the record on appeal is replete with evidence that the Petitioners lacked any "meaningful choice" when faced with

the unilateral rental increase by the Respondents. See Petitioners' Statement of the Facts. The Lanca decision, once final, is absolutely dispositive of the instant issue on appeal.

As this Court in Lanca, supra, recognized, the gravamen of a mobile home unconscionable rent dispute stems from the unique relationship that exists between the park owner and mobile home owners and the grossly unequal bargaining positioning of the mobile home owner once he "cements" his mobile home into a mobile home park. It is clear that once the mobile home is "cemented" in place, the mobile home owner is at the mercy of the park owner. This unequal bargaining power and the recognition that the threat of requiring a mobile home owner to move is so economically onerous that the Legislature's enactment of the Florida Mobile Home Act, now Chapter 723, Fla. Stat., was described by the Fifth District Court of Appeal as the mobile home owners "Bill of Rights." See Lemon v. Aspen Emerald Lakes Associates, Ltd., 446 So.2d 177, 180 f.n. 2 (Fla. 5th D.C.A. 1984).

In fact, once a mobile home is placed in a park it has a permanence of location. Its wheels and hitch are removed, it is placed on a concrete base, tied down in accordance with state laws and joined with the available electrical and water connections. Generally, once a mobile home is located in a park permanent attachments are added such as a cabana, garage, porch, shed or additional rooms. These permanent structures often are lost if the mobile home is moved. In addition, it is both expensive and difficult to move a mobile home. This situation is further aggravated by the existence of "closed parks" which

refuse to allow older mobile homes into their park and require the prospective tenant to purchase a new one or exact a high entrance fee for the privilege of bringing the older mobile home into the park. The mobile home owners are generally older people in the lower income brackets. The reality, therefore, is that even if the mobile home owners can find another park to move to, it is not economically feasible for them to move their mobile homes since if they are forced to do so they will lose virtually their entire investment.

Although equally applicable to the instant case, the foregoing facts and opinions are not from the trial transcript or record on appeal in the case sub judice. Rather, they represent the specific findings of this Supreme 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). In Stewart, this Court upheld the statute limiting grounds for evictions in mobile home parks and stated:

> The object of the statute is to ameliorate and correct as far as possible by exercise of the police power what the Legislature has found to be evils inimical to the public welfare in the subject considered. Protection of mobile home owners from grievous abuse by their landlords, or mobile home park owners, was found by the Legislature to be essential.
>
> As documented by the 1970 report of Professor Cubberly for the State Department of Community Affairs, and reaffirmed by the Governor's 1974 Mobile Home Task Force, we note that most people who live in mobile homes usually spend several thousands of dollars to purchase a home, usually from a mobile home park owner or an associated dealer. Most mobile home owners find they must also rent the lot on which their

mobile home is to be placed from their mobile home dealer or his associate. In most instances, they become month-to-month tenants, subject to being evicted on fifteen days notice, although their "home," with its wheels and hitch removed, appears to have permanence of location, being tied down on the lot as state law requires and being undergirded with a poured cement base. A great catch in the eviction removal process, as the Governor's Task Force noted, is that often under modern conditions there is no ready place for an evicted mobile home owner to go due to a shortage of mobile home spaces in many areas of the state.

There has developed because of space shortage what is known as the "closed park," from whose owners a prospective tenant must either buy a new mobile home in order to get in, although he may already own his "used" or "removed" home from a park from which he had to move"; or the park owner may accept the "used" or "removed" home in his park only upon payment of a high entrance fee.

A "mobile" home is not actually mobile, and even an owner who does not encounter "closed park" problems often finds it is quite expensive to remove a home and relocate it because of the incidental costs of labor and materials and towing once the home has been "cemented" onto a lot.

If mobile home park owners are allowed unregulated and uncontrolled power to evict mobile home tenants, a form of economic servitude ensues rendering tenants subject to oppressive treatment in their relation with park owners and the latters' overriding economic advantage over tenants.

Regulatory laws that apply to the old tin-can tourists and their easily movable trailers and even those applicable nowadays to rental apartments are inadequate for the regulation of mobile homes under conditions prevailing today. The Legislature finally recognized by Section 83.69 that a hybrid type of property relationship exists between the mobile home owner and the park owner and that the relationship is not simply one of landowner and tenant. Each has basic property rights which must reciprocally accommodate and

> harmonize. Separate and distinct mobile home laws are necessary to define the relationships and protect the interests of the persons involved. (Emphasis supplied) Id. at 892, 893.

The procedural-substantive analysis of unconscionability generally has been employed by the courts in Florida in deciding unconscionable rent issues in mobile home cases. See the Petitioners' Argument in Issue II. In order to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability. See Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865, 868 (Fla. 4th D.C.A. 1981). The trial court's finding of substantive unconscionability in the case sub judice, as confirmed by the Fifth District Court of Appeal, is not at issue before this Court and will not be discussed. The instant issue is whether, as a matter of law, procedural unconscionability can be asserted in a class action.

The Fourth District Court of Appeal in Kohl, 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." Id. 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 (DC App. 1965), stated:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in

> a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. (Emphasis supplied). Id. at 449.

As stated by Sharp, C.J. in her dissenting opinion in Thomas v. Jones, supra, which was cited with approval by this Court in Lanca, supra,

> In the context of a claim by tenants in a mobile home park that the park owner is seeking to charge unconscionably high rents through a rent increase, I do not think the class action suit should fail because of a lack of proof of "procedural unconscionability" on the part of the individual tenants. Procedural unconscionability is a technical, and not clearly defined requirement for the common law cause of action relating to relief from onerous contract terms. See discussion in Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865 (Fla. 4th DCA); review denied, 408 So.2d 1094 (Fla. 1981). As the court stated in Kohl, that doctrine does not necessarily apply to statutory causes of action, like this one.
>
> Furthermore, procedural unconscionability may be established in a class action context, where the circumstances of each member of the class demonstrate "the absence of meaningful choice" on the part of each member. I do not think it necessary to delve into the individualized circumstances of each member of the class where the meaningfulness of the choice is negated by a gross inequality of bargaining power. Kohl, 398 So.2d at 868. In this case it was established that the plaintiffs were mobile home lot renters who when faced with an outrageous demand for increased rent, have no "meaningful choice" due to their common circumstances. Kohl, 398 So.2d at 869. They cannot freely move out of the park because their mobile

> homes are not truly "mobile." To avoid the enormous expense and disruption of moving, they are forced to pay unconscionable rents.

The trial courts in this State have recognized the unique circumstances of mobile home residency and lack of meaningful choice on the part of mobile home owners when faced with a unilateral across the board rent increase. In the very articulate opinion written by the trial judge in Jones v. Thomas, 16 Fla. Supp.2d 30 (Fla. 9th Cir. Ct. Osceola County, 1986), he explains that the Plaintiffs' evidence sufficiently established the requisite "quantum" of procedural unconscionability and observed:

> The 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 Palm Beach Mobile Home, Inc. v. Strong, 300 So.2d 881 (Fla. 1974); Stewart v. Green, 300 So.2d 889 (Fla. 1974).

In Offner v. Keller Park Investors, 19 Fla. Supp. 2d 140 (Fla. 6th Cir. Ct. Pasco Cty., 1986), the trial court discussed the disparate bargaining power and the mobile home owners' options as follows:

> The facts set out above establish procedural unconscionability because of the absence of any meaningful choice on the part of the mobile home owners, together with terms and benefits unreasonably favorable to the partnership and the management company. Kohl v. Bay Colony Club Condominium, 398 So.2d 865 (Fla. 4th D.C.A. 1981), petition for review denied, 408 So.2d 1049 (Fla. 1981); Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982). The mobile home

> owners find themselves bound by the bargain they never made. They have no voice in the matter of rents. The mobile homes, if not the owners themselves, are captives of the partnership and the management company. The owners have three choices: (1) pay the rent no matter how high it is set, (2) sell their mobile home at less than their actual value, (3) move the homes at possibly a greater loss than from a sale. Id. at 143.

In its en banc opinion in Thomas v. Jones, supra, the Fifth District Court of Appeal stated that procedural unconscionability "speaks to the individualized circumstances surrounding each contracting party at the time the contract is entered into" and held that "because of the basic differences between people, the requirements for procedural unconscionability are too personal, individualized, and subjective to be properly asserted in a class action." (App. 5). The District Court of Appeal erred. It failed to recognize the unique circumstances of mobile home residency and that the meaningfulness of the choice of each member of the class is negated by a gross inequality of bargaining power. In addition, the authorities cited by it in support of its decision either can be easily distinguished from the instant case or do not provide authority for the principles advanced.

In K. D. Lewis Enterprises Corp. v. Smith, 445 So.2d 1032 (Fla. 5th D.C.A. 1984), the tenants living in different apartments were attempting a class action for damages which admittedly differed from apartment to apartment, individual to individual. Clearly, a class action could not be maintained under that factual situation. In the instant case, however, the unilateral

rent increase in question was imposed across the board on all residents. The decision in K. D. Lewis can easily be distinguished and is not controlling of the instant facts.

Similarly, the Fifth District Court of Appeal's reliance on its decision in State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th D.C.A. 1982), is misplaced. The DeAnza decision does not hold that mobile home owners cannot meet the requirements of a class action under Florida Rules of Civil Procedure 1.220. Further, the subject case is distinguishable from DeAnza, because the DeAnza case turned on the adequacy of the allegations of the complaint to establish "procedural unconscionability" whereas the subject case went to trial and the circumstances of "no meaningful choice" were alleged and proved. See the Dissent by Sharp, C.J. in Thomas, supra. In addition, the general comment that individual circumstances surrounding each contracting party at the time of contracting cannot be established as a general proposition for a whole range of contracts merely containing similar terms between various persons is not specifically applicable to the question presented in the case sub judice, namely whether the grossly inferior bargaining position of the mobile home tenants in Friendly Adult Estates negated the meaningfulness of their choice when faced with the unilateral rent increase imposed across the board by the Respondents.

The Fifth District Court of Appeal, in the instant case, also cites Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th D.C.A. 1985), in support of its conclusion that procedural unconscionability cannot be proven in a class action. The statement of the

Fourth District Court of Appeal in Garrett that the "prerequisites for procedural unconscionability are too individualized to permit a class action" is dictum. The Petitioners wish to emphasize to this Court that the basis for the appellate court's statement in Garrett was a misinterpretation of the holding in Kohl v. Bay Colony Club Condominium, Inc., supra. In Kohl, the appellate court stated:

> Finally we address the question of pleading and proving procedural unconscionability. To meet the threshold test of adequacy 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 plaintiff's experience and education and the sales practices that were employed by the defendant or his predecessor-assignor. However, the basic 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 the allegations of the amended complaint are per se insufficient. We note that we are not called upon here to determine evidentiary questions. (Emphasis supplied). 398 So.2d at 869.

Thus, the Garrett decision provides no precedential value to a consideration of the instant issue on appeal and is not controlling in this case.

In Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 FLW 568 (Fla. Sept. 22, 1988) (on rehearing served under certificate dated October 6, 1988), discussed previously, 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). Although The Fourth District Court of Appeal, in Lanca, reversed the trial court's finding that the incorporated homeowners association was a proper class representative, it 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). 516 So.2d at 1075.

Another case which must be considered in deciding the instant issue is Ashling Enterprises, Inc. v. Browning, 487 So.2d 56 (Fla. 3d D.C.A. 1986). In Ashling, the trial court's Amended Final Judgment 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 lacked merit." 487 So.2d at 56.

In its decision in Thomas v. Jones, supra, the Fifth District Court of Appeal opines that the manner in which a particular contracting party's age, education, intelligence, financial position, business experience, etc. affects that party's

bargaining position, and whether such factors permit the party to have a "meaningful choice," vary from individual to individual. (App. 4-5). In Pierce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282 (Fla. 2d D.C.A. 1988), the Second District Court of Appeal responded to a park owner's argument that the financial wherewithall 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.

After reviewing the foregoing authorities and specifically, the Supreme Court's decisions in Lanca, supra, Stewart v. Green, supra, and Palm Beach Mobile Home, Inc. v. Strong, supra, it is clear that the Fifth District Court of Appeal failed to properly consider the special relationship that exists between the park owner and the mobile home owners and the gross inequality of bargaining power that negates any meaningfulness of choice on the part of the mobile home residents. In a factual situation such as in the instant case, there is procedural unconscionability as a matter of law and a class action provides an effective forum to hear and decide the issues of common interest applicable to all members of the class.

Of course, if this Court reverses the Fifth District Court of Appeal's decision in Thomas v. Jones, supra, pending

before this Court as Case No. 72,563, its decision will be dispositive of this appeal as the opinion filed in the instant case was based entirely on the appellate court's opinion in Thomas v. Jones, supra.

II

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN ESTABLISHING THE PROCEDURAL-SUBSTANTIVE ANALYSIS AS A RULE OF LAW IN DETERMINING THE ISSUE OF UNCONSCIONABILITY.

The Fifth District Court of Appeal, in its Opinion filed in Thomas v. Jones, 524 So.2d 693 (Fla. 5th D.C.A. 1988), states that "[u]nder the current legal analysis, substantive and procedural unconscionability must both be established to prevail in an unconscionability action." (Emphasis supplied) (App. 4). Its decision in Thomas v. Jones, as incorporated by reference in the opinion filed on June 23, 1988 in the instant case, establishes the procedural-substantive analysis as a rule of law in determining the issue of unconscionability. In this respect, the appellate court erred.

A definitive discussion of the analysis for finding unconscionability under Florida contracts law can be found in Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d D.C.A. 1982). Although recognizing that most modern courts do take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability, the Third District Court of Appeal, in Steinhardt, stated that "this procedural-substantive analysis is, however, only a general approach to the unconscionability question and is not a rule of law." (Emphasis supplied) Id. at 889. In citing other authorities, the Third District Court of Appeal 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.

In addition, the Fourth District Court of Appeal in Kohl v. Bay Colony Club Condominium, 398 So.2d 865 (Fla. 4th D.C.A. 1981), observed that procedural unconscionability is a technical, and not a clearly defined requirement for the common law cause of action relating to relief from onerous contract terms. As the appellate court stated in Kohl, procedural unconscionability does not necessarily apply to statutory causes of action, like this one. See also the Dissent by Sharp, C.J. (App. 5-6).

The procedural-substantive analysis simply should not be adopted as a rigid rule of law in determining the issue of unconscionability in mobile home cases in Florida.

CONCLUSION

The Fifth District Court of Appeal erred in Thomas v. Jones, 524 So.2d 693 (Fla. 5th D.C.A. 1988), by (1) holding that, as a matter of law, procedural unconscionability cannot be proven in a class action and (2) establishing the procedural-substantive analysis to unconscionability as a rule of law. Since its decision in the instant case was wholly dependent upon and incorporated by reference the appellate court's opinion in Thomas v. Jones, it erred in the case sub judice for the same reasons.

If individual unconscionable rent actions must be maintained by mobile home owners throughout this State, as required by the decision under review, the increased amount of time and additional costs to be expended by the Courts and the litigants would be devastating to the administration of justice in this State. In addition, the requirement of individual actions would effectively eliminate any economically viable forum for the generally older, lower income mobile home owners to protect their interests against unilateral, unconscionable rent increases by their park owner. The special relationship that exists between the park owner and the mobile home owners and the grossly inferior bargaining power on the part of the mobile home owner once he "cements" his mobile home into a park dictate that "procedural unconscionability" exists as a matter of law and the mobile home unconscionable rent action can be maintained as a class action.

For the reasons discussed in this Brief, the Fifth District Court of Appeal's majority Opinion filed on June 23,

1988 should be reversed without further proceedings.

Respectfully submitted this 12th day of December, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief and Appendix have been provided by U.S. Mail, postage prepaid, this 12th day of December, 1988, to Johnie A. McLeod, Esquire, of McLeod, McLeod & McLeod, Post Office Drawer 950, Apopka, Florida 32703 and John T. Allen, Jr., Esquire and Christopher P. Jayson, Esquire, of John T. Allen, Jr., Esquire, 4508 Central Avenue, St. Petersburg, Florida 33711.

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