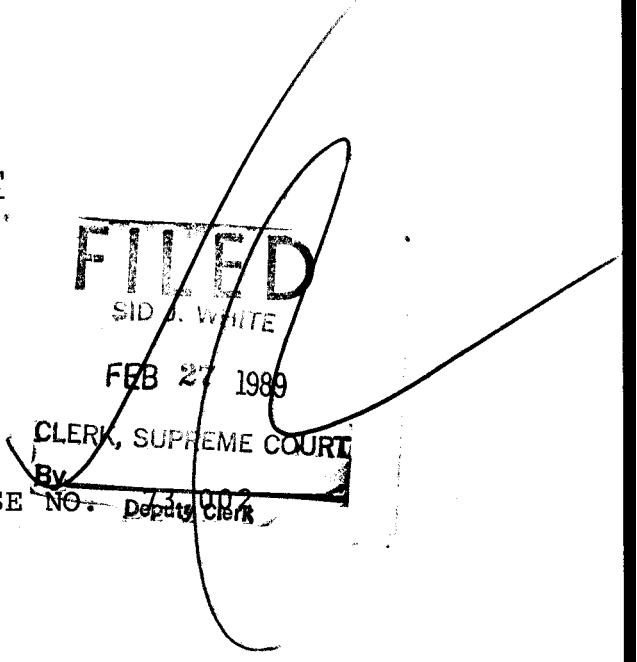
IN THE SUPREME COURT
STATE OF FLORIDA



DONALD HARPSTER, et. al,

Plaintiffs/Petitioners,

vs. CASE NO. 73,002

J.T.A., INC.,

Defendant/Respondent.
_____/

PETITIONERS' REPLY BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE

The Petitioners incorporate by reference, as though fully set forth herein, the Statement of the Case from their Brief on the Merits served under a certificate dated December 12, 1988. All symbols identified in the Petitioners' Brief on the Merits shall be used in this Reply Brief and all references in this brief to "App." shall refer to the Appendix of the Petitioners filed with their initial brief and "App.-R" shall refer to the Appendix to the Petitioners' Reply Brief on the Merits.

STATEMENT OF THE FACTS

The Petitioners incorporate by reference, as though fully set forth herein, their Statement of the Facts from their Brief on the Merits served under a certificate dated December 12, 1988.

ARGUMENT

I

LANCA HOMEOWNERS, INC., ET AL. V. LANTANA CASCADE OF PALM BEACH, LTD., ET AL., 13 F.L.W. 568 (FLA. SEPT. 22, 1988).

The Respondent and the Amici, The Florida Manufactured Housing Association, Inc. (FMHA) and Club Wildwood Mobile Home Village (Club Wildwood), argue that the instant case is not controlled by this Court's recent decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988), for the reasons that the new rule of procedure (Fla. R. Civ. P. 1.222) adopted in Lanca only concerns representative actions by mobile home owners' associations and even if applicable to the instant case, it would be unjust to apply such a rule retroactively. In addition, it is argued that in mobile home class actions such as the instant case procedural unconscionability or the absence of meaningful choice must be proven in each case. Their positions are without merit and do not accurately reflect the clear language and intent of the Lanca opinion.

It must first be emphasized that the Respondent and the Amicus, FMHA, by their very arguments, acknowledge that the Fifth District Court of Appeal erred in the instant case by holding that procedural unconscionability as a matter of law cannot be proven in a class action. They recognize that as the result of the Lanca decision mobile home owners may prosecute an unconscionable rent case as a class action. As identified above, they

attempt only to distinguish and limit the scope of this Court's decision in Lanca. The Amicus, Club Wildwood, on the other hand, apparently disagrees with FMHA and the Respondent, in support of whom it filed its brief. Club Wildwood argues that procedural unconscionability cannot be proven in a class action and attempts to equate the factual circumstances of mobile home unconscionable rent cases with fraud claims and further, cites the same authorities that were fully briefed, argued and rejected by this Court in Lanca (and which were cited by the Fifth District Court of Appeal in its opinion under review in the instant case). The Petitioners have discussed Kohl v. Bay Colony Condominium, Inc., 398 So.2d 865 (Fla. 4th D.C.A. 1981), Garrett v. Janiewski, 480 So.2d 1324 (Fla. 4th D.C.A. 1985), State of Florida v. DeAnza Corp., 416 So.2d 1173 (Fla. 5th D.C.A. 1982) and the other authorities cited in their Brief on the Merits and will not restate those arguments herein.

However, the Petitioners will respond to the argument that the inherent differences between individual mobile home owners make it impossible to assert their claims for unconscionable rent in a class action. This argument is merely a restatement of the Fifth District Court of Appeal's written opinion under review in the instant case. Its logic and the attempts to analogize the other types of claims and factual circumstances are defective because of the failure to recognize the very unique relationship that exists between the park owner and mobile home owners. It is suggested that it is unfair and unjust to categorize all mobile home owners as elderly, low income people

without any meaningful choice in the contractual relationship with the park owner, but they discuss only the "choice" available to the mobile home owner when he or she decides to first enter a mobile home park. The gravamen of an unconscionable rent case such as the instant case is that once the mobile home is "cemented" into a park the mobile home owner is at the mercy of the park owner. The grossly unequal bargaining position of the mobile home owner once his home is "cemented" in place establishes the lack of any "meaningful choice" when faced with a unilateral rent increase by the park owner. This Court, in Lanca, described the circumstances as follows:

> 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 meaningful choice" for these residents, who find the rent increased after their mobile homes have been affixed to the land, serve to meet the class action requirement of procedural unconscionability. See Thomas, 524 So.2d at 695 (Sharp, C.J. dissenting); Steinhardt; Kohl. 13 F.L.W. at 569 (App. 62).

This Court, in its earlier decisions in Stewart v. Green, 300 So. 2d 889 (Fla. 1974) and Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), specifically identified the unique circumstances of mobile home residency, including without limitation the permanence of location once the mobile home is located

in a park, the substantial expense involved in moving a mobile home once anchored in a park and the inability to find other mobile home parks that will accept a used mobile home.

An additional argument advanced in support of the Respondents' position is that the Lanca decision does not establish that procedural unconscionability exists as a matter of law for mobile home owners challenging an unconscionable rental increase by their park owner. The Petitioners disagree. In discussing the unique features of mobile home residency and the grossly unequal bargaining position of the mobile home owners, this Court, in Lanca, stated:

> The "absence of meaningful choice" for these residents, who find the rent increased after their mobile homes have become affixed to the land, serves to meet the class action requirement of procedural unconscionability. . . . 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.* 13 FLW at 569 (emphasis supplied).
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> [*To the extent that some of the class members may not occupy the same position, the court is always at liberty to designate subclasses. See Imperial Towers Condominium, Inc. v. Brown, 338 So.2d 1081 (Fla. 4th D.C.A. 1976).]

It is clear that the grossly unequal bargaining position of the mobile home owner vis-a-vis the park owner has little to do with the individual circumstances of education, net worth, etc., 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, the laborer of limited means or to the social security pensioner. Pearce, et al. v. Doral Mobile Home Villas, Inc., 521 So.2d 282, 284 (Fla. 2d D.C.A. 1988). Thus, the individual circumstances of each mobile home owner in an unconscionable rent action is not determinative of the issue of procedural unconscionability; rather, the very position of the mobile home owners relative to the park owner establish their "lack of a meaningful choice" as a matter of law.

The additional arguments raised by the Respondent and the Amici that the park owner's rights of due process would be abridged and establishing procedural unconscionability as a matter of law is in conflict with certain provisions of Chapter 723, Fla. Stat., are without merit. The park owner's rights of due process and its ability to fully present evidence on the issue of substantive unconscionability [under Section 723.033(2), Fla. Stat.] are fully protected and entirely consistent with this Court's decision in Lanca and Fla. R. Civ. P. 1.222.

The argument that the Lanca decision and the adoption of Fla. R. Civ. P. 1.222 intend to give automatic class standing only to mobile home owners' associations, not individual mobile home owners acting together, is also without merit and contrary to the express language of the Lanca opinion. The argument that rent disputes are not matters of shared interest and therefore, not the proper subject of a class action is contrary to this Court's holding in Lanca. Clearly, the intent of the Lanca decision is to provide the mobile home owners, regardless of whether

they are organized as an incorporated association or acting together as individual home owners, with an effective procedural format (i.e., a class action) to challenge unconscionable rents charged across the board by the park owner. 13 FLW at 569 (App. 62).

In Lanca, after adopting Fla. R. Civ. P. 1.222 and stating that the association can act as class representative, this Court holds that the Counterclaim for unconscionable rent can itself be maintained as a class action - without any limitations or restrictions that the individual mobile home owners acting together cannot maintain such an action. 13 F.L.W. at 569. In fact, in support of its conclusion that the "absence of meaningful choice" for mobile home owners serves to meet the class action requirement of procedural unconscionability, this Court cites cases, including Chief Judge Sharp's written dissent in Thomas v. Jones, 524 So.2d 693, 695 (Fla. 5th D.C.A. 1988), review pending, which involved individual home owners acting together as a class. 13 F.L.W. at 569. In light of this Court's clear expression of its intention in Lanca, the arguments raised in support of the Respondents' position are illogical.

In the instant case, it is uncontroverted that the Petitioners were all subject to the same unilateral, across the board rental increase by the Respondents, the rental increase was imposed after their initial rental agreement, and because they were all "cemented" into the park they faced the dilemma of either accepting the rental increase, selling their mobile homes or undertaking the considerable expense and burden of uprooting

and moving. See Petitioners' Statement of the Facts.

There can be no doubt that this Court, in Lanca, intended to provide individual mobile home owners with the ability to take action as a class to challenge unconscionable rents charged by the park owner. Although mobile home owners may, pursuant to Chapter 723, Florida Statutes, incorporate their homeowners association, it is not mandatory that they do so. There are many mobile home parks in the state without homeowners associations. If the individual home owners were not allowed to bring a class action, they would effectively be denied access to the courts since the individual home owners cannot afford the expenses of litigating against the financially superior park owner. Thus, it is vital that mobile home owners in parks without an incorporated association have the ability to bring class actions in unconscionable rent cases. In addition, it is also important that it be made clear that individual home owners can bring class actions in any matters of common interest so long as they meet the requirements of Fla. R. Civ. P. 1.220. In summary, on this point, although this Court in Lanca has clearly stated that in an unconscionable rent case, "the relationship of the parties" and the "absence of a meaningful choice" serve to meet the class action requirement of procedure and unconscionability, the Respondent argues that, in the instant case, under the same situation, action by individual home owners would not meet this requirement. Again, this contention is illogical. However, the Petitioners would respectfully suggest that the very fact that the Respondent would make this argument indicates the necessity of this Court

clarifying and confirming the individual home owners' right to bring class actions as discussed above.

In addition, the Respondents' contention that the Lanca decision cannot or should not be applied retroactively to decide the instant case is incorrect and without any basis in the law. See e.g. Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977).

II

THE TRIAL COURT DID NOT ERR AS ALLEGED BY THE RESPONDENT.

The Respondent's Answer Brief on the Merits, for all intents and purposes, ignores the issues raised by the Petitioners and merely restates in toto the issues and arguments contained in its Appellant's Initial Brief filed with the Fifth District Court of Appeal (App.-R 71). The Respondent incorrectly suggests in its Answer Brief herein that the Fifth District Court of Appeal found the trial court had erred on each of the issues raised and accordingly, reversed the trial court's Final Judgment, as amended. In fact, the appellate court, on October 20, 1987, 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 and rejecting each and every one of the arguments now raised by the Respondent in this Court. The per curiam decision was vacated by the Fifth District Court of Appeal solely because of its en banc opinion in Thomas v. Jones, 524 So.2d 693 (Fla. 5th D.C.A. 1988), holding that procedural unconscionability cannot be proven in a class action (App. 1-6).

The Petitioners urge this Court to exercise its discretion and summarily reject the new issues raised by the Respondent since the trial court's decisions were affirmed by the Fifth District Court of Appeal, they bear no relationship to the conflict of prior authorities upon which this Court accepted

jurisdiction and this Court accepted jurisdiction and dispensed with oral argument at least in part because of the limited issues presented and the Court's recent decision in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988), review pending.

In order to respond to the issues raised by the Respondent but to avoid an unnecessary restatement of its brief filed with the Fifth District Court of Appeal, the Petitioners have included a copy of their Answer Brief of Appellees in the Appendix and incorporate same by reference herein (App-R.72-151). This Court's decision in Lanca, supra, is controlling of the Respondent's arguments concerning the prosecution of the instant action as a class action. The decision in Lanca establishes, as a matter of law, the Petitioners' ability to maintain the instant cause as a class action. The Respondent's arguments must be rejected.

CONCLUSION

This Court's opinion in Lanca Homeowners, Inc., et al. v. Lantana Cascade of Palm Beach, Ltd., et al., 13 F.L.W. 568 (Fla. Sept. 22, 1988), is dispositive of the instant appeal and establishes that procedural unconscionability exists as a matter of law for individual mobile home owners acting together as a class in an unconscionable rent case.

For the reasons discussed in the Petitioners' briefs submitted in this cause, the arguments raised by the Respondents and the Amici, FMHA and Club Wildwood, are without merit and inapplicable to the instant case and the record on appeal. Therefore, the Fifth District Court of Appeal's opinion in the instant case holding that procedural unconscionability cannot be proven in a class action is incorrect and must be reversed with instructions to the appellate court to reinstate its Per Curiam Decision affirming the judgments of the trial court and its award of attorney's fees and costs to the Petitioners.

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 24th day of February, 1989, 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, Alan C. Sundberg, Esquire, Carlton,

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