IN THE SUPREME COURT
STATE OF FLORIDA

JENNIE HARRIS, et. al.

Petitioner,

v.

MARTIN REGENCY, LTD, A Florida Limited Partnership,

Respondent.

Case NO. 75,097

BRIEF OF AMICUS CURIAE
FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC.

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Manufactured Housing Association, Inc., (hereinafter to be referred to as FMHA), adopts the statement of the facts as stated by the Petitioner, except as follows:

Petitioner alleges that 723.081, 723.083 and 723.071(2) Fla. Stat. (1985) are pertinent to this case. The FMHA argues that the provisions relating to zoning and to the sale of mobile home parks are irrelevant to this case for two reasons: First, the mobile home park has not been rezoned or offered for sale; therefore these sections do not apply. Second, the Fourth District Court of Appeal was correct in its holding that these sections were not properly before the trial court and as such could not be decided upon. That being the case, this Court is also precluded from reviewing those issues.

The FMHA would also add that the park owner extended the eviction date to May 1, 1987 (R-27). During this extension, the Respondent assisted over 90% of the tenants in the park to move and to secure other accommodations (R-14). This litigation pertains to seven residents who refused assistance and have opposed this eviction from the outset.

SUMMARY OF ARGUMENT

The construction of 723.061(1)(d), as urged by the 'ark Owner is based upon the statute's clear and inambiguous language, the court's opinion in Brown v. Powell, and the problem to be corrected by the act in its historical context. Thus, the Notice of Eviction delivered to the Residents by the Park Owner is in compliance with statutory and case law. To hold otherwise would lead to ridiculous and absurd results.

In addition, the trial court correctly entered summary judgment for the park owner because 723.061(1)(d), Fla. Stat., does not require the park owner to specify what will be the nature of the projected change of use of the land.

The notices in the case at bar were legally sufficient because they tracked the language of the statute, and informed the Residents of the Owners' intent to vacate the land and to no longer operate it as a mobile home park.

In the remarkably similar case of Brown v. Powell, 531 So.2d 731 (Fla. 4th DCA 1988), the Fourth District Court reached the same identical conclusion as the trial court in this case and further stated that "there does not appear to be any valid reason for requiring the mobile home park owner to specify the actual change in use in the

eviction notice." 531 So.2d at 735. Petitioners have not put forth any valid reasons to overturn this court's holding in Brown.

Finally, the trial court and the district court correctly ruled that there are no genuine issues of fact that would preclude an order of summary judgment. Petitioners arguments to the contrary are without merit in that they too have moved for summary judgment at the trial court level on the specific issue of law ruled upon by the trial court. In addition, on appeal to the Fourth District Court of Appeal the Petitioners have requested a summary judgment to be entered by this Court on the same undisputed issues of fact and the same specific issue of law.

POINT I

BOTH THE TRIAL AND DISTRICT COURTS CORRECTLY HELD THAT THE CONVERSION OF LAND FROM USE AS A MOBILE HOME PARK TO NO USE CONSTITUTES A "CHANGE IN USE" UNDER SECTION 723.061(1)(d), F.S. (1985).

This appeal involves the issue of whether a mobile home park owner has the right to evict the tenants of the park in order to sell the property as vacant land. Point I presented by the Petitioner is the question certified to this court by the Fourth District Court of Appeal:

> IS THE CONVERSION OF LAND COMPRISING A MOBILE HOME PARK FROM USE AS A MOBILE HOME PARK TO VACANT LAND, OR TO NO USE, A "CHANGE IN USE," WITHIN THE CONTEMPLATION

OF SECTION 723.061(1)(d), FLORIDA STATUTES, (1985).

The Petitioner in their argument to this court, cobbles together from the history of the Mobile Home Act and the Petitioner's limited view of the policies to be effectuated by that Act, an amendment to the statute to require park owners to sell their park to the residents.

This case is not about judicial amendment of the Mobile Home Act, nor about what ought to be the law. What it is about is the construction of a section of the Mobile Home Act that sets forth unequivocally the grounds for evicting mobile home park tenants. That section is set forth in relevant part below:

> 723.061 Eviction, grounds, proceedings -
>
> (1) A mobile home park owner may evict a mobile home owner or a mobile home only on one or more of the grounds provided in this section.
>
> (a) Nonpayment of rent....
>
> (b) Conviction of a violation of federal or state law or local ordinance....
>
> (c) Violation of a park rule or regulation, the rental agreement, or this chapter....
>
> (d) Change in use of the land comprising the mobile home park, or the portion thereof from which mobile homes are to be evicted, from mobile home lot rentals to some other use, provided all tenants affected are given at least 6 months' notice, or longer if provided for in a valid rental agreement, of the

projected change of use an of their need to secure other accommodations.[1]

(e) Failure to the purchaser of a mobile home situated in the mobile home park to be qualified as, and to obtain approval to become, a tenant, if such approval is required by a properly promulgated rule.
(emphasis added)

The intent of the legislature in creating this section of the statute has been before this court and at the Fourth District Court of Appeal in a number of cases beginning almost from the date of adoption in 1972 to the present. Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974); Stewart v. Green, 300 So.2d 889 (Fla. 1974); Crown Diversified Industries, Inc. v. Watt, 415 So.2d 803 (Fla. 4th DCA 1982); Brown v. Powell, 531 So.2d 731 (Fla. 4th DCA 1988); and Harris v. Martin Regency, Ltd., 14 F.L.W. 2352 (Fla. 4th DCA October 13, 1989).

When the legislature first limited the park owner's right to evict a tenant except for certain grounds, this court recognized that the "hybrid" landlord-tenant relationship of the park owner and the mobile home owner tenant was sufficiently different from other types of

[1] The six months' notice was changed to twelve months effective July 1, 1986. See Ch. 86-162, 11, Laws of Fla. The notices here were sent on August 30, 1985, so the 6-month period applies.

landlord-tenant relationships to justify the legislation. Stewart v. Green, 300 So.2d 889, (Fla. 1974).

However, the statute adopted in 1972, 83.271, Fla. Stat., did not allow a park owner to evict a tenant for a change in the use of the mobile home park. The grounds for eviction under the 1972 statute included only eviction for:

> (1) non payment of rent
>
> (2) conviction of a violation of a federal state law or local ordinance, which may be deemed detrimental to other health, safety, and welfare of other park tenants, or
>
> (3) violation of park rules and regulation.
>
> 83.271, Fla. Stat. (1972).

However, in 1973 the legislature added a fourth ground for eviction:

> "(d) Change in use of land comprising the mobile home park or a portion thereof on which a mobile home to be evicted is located from mobile home lot rentals to some other use, provided all tenants affected are given at least ninety (90) days' notice, or longer if provided for in a valid lease, of the projected change of use and of their need to secure other accommodations."
>
> 83.69,(1)(d), Fla. Stat. (1973)(the statute was renumbered in 1973 from 83.271 to 83.69).

This court, in Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), noted that it had serious concerns that the 1972 statute might be constitutionally defective because it could have the effect of permanently depriving a park owner from changing the use of his land from mobile home park to some other use. Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d at 887. However this court also noted that the newly amended statute in 1973, which allowed eviction for a change in land use, made the issue moot.

Although the Petitioner in this case make a novel argument, that leaving land vacant or fallow is not a 'use", the distinction is more semantical than either Logical or reasonable. The argument that someone has to be actively doing something on the property in order to 'use" it begs the question. The statute merely requires a "[c]hange in the use of the property.. .from mobile home Lot rentals to some other use". 723.061(1)(d), Fla. Stat. (1985). (emphasis added). It is the change from mobile home lot rentals to some other use that is important, not what the future use of the property is. If the park owner does not intend to operate the property as a mobile home park, he may evict the tenants under 723.061(1)(d), Fla. Stat.

Furthermore, the proposition advanced by the Petitioners does not lead to either a reasonable or logical result. The Petitioners would apparently allow eviction of all mobile home tenants for any "use" at all. Under their argument a park owner could give the tenants notice that he decided to plant wildflowers on the vacant property and that would be a "use" sufficient to allow eviction. However, the Petitioners argue that changing the use of the property to a vacant lot is repugnant to the very essence of the Mobile Home Act. The counsel for the Petitioners carries their clients' objectives further than either the law or logic allow.

Finally, it should be apparent that the protections for mobile home owners which the Petitioners argue apply to eviction of tenants simply do not exist. In the case of rezoning of park property set forth in 723.081 and 723.083, Fla. Stat., the local government has an obligation for actions it takes which will result in eviction of mobile home tenants. The park owner simply must notify the tenants of any prospectus rezoning. Similarly the provision allowing a mobile home association to be notified of the park owner's intention to offer the park for sale concern the sale of the mobile home park as a mobile home park. 723.071, 723.072, Fla. Stat. (1985). These "protections" do not extend to limit the

park owner's right to change the use of his land from a mobile home park to some other use. Nor do they limit the park owner's right to sell the property for its highest and best use once vacated.

This court should rely upon the plain meaning of the terms used in the statute and not upon the broad policy argument advanced by the Petitioners.

The Petitioners have argued in various points in their Brief a number of positions, for example, that the park owner needed to tell them what future use the property would be put to, and asserted if they knew what use they would have vacated the premises. (R55-56.) They have also asserted that it was "bad faith" on the part of the park owner to not tell the tenants what the future use would be. (R54-55) Petitioner's Brief 7. The tenants also assert that they have a right to purchase the park before an owner can evict for a change in use. Petitioner's Brief 10.

Although all of these are interesting, and even ingenious arguments, they do not address the fundamental question: Does a mobile home park owner have the right to evict his tenants and sell the vacant land? The answer to this question is certainly an unequivocal yes.

POINT II

THE TRIAL AND THE DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE NOTICE OF EVICTION WAS PROPER, THEREFORE PETITIONERS ARE NOT ENTITLED TO SUMMARY JUDGMENT.

Respondent, in a good faith effort to comply with the plain meaning of 723.061 1)(d), delivered to the Petitioners the following notice of the projected change in use of land:

> For many extenuating circumstances, including the decrepit condition of the "A" park, the very high cost of making minor repairs to the water and sewer facilities, and the probability of further restrictive legislation at the state level imposed on owners of mobile home park, I must regretfully advise you that I wish to vacate the Regency Mobile Home Park. Florida law, in particular, Section 723.061(1)(d), F.S., requires that a six (6) month notice be given to residents of the Park. The six months will expire from the date stated above. Please consider this as your notice of the projected change in use of the land comprising the mobile home park. During the next few months you will need to secure other accommodations. Mrs. Rarrieck and I will be available to assist with this task. Depending on the requirements imposed by the Department of Environmental Regulation, it is possible this six month time period may be extended.

In their brief, the Petitioners argue that the park owner had not been truthful about his intent in the notice of eviction. In response, the FMHA argues that the only necessary requirement in the notice is the ground for eviction, which was properly set forth by the park owner. Section 723.061(1)(d) F.S. does not require the park owner

to pinpoint exactly what the land was going to be used for, so long as it is not a mobile home park. Brown v. Powell, at 735.

Respondent's notice of eviction clearly does two things: (1) it informs the homeowners that the park owner is changing the use of the property to some other use; and (2) it gives the homeowners 6 months notice of eviction. Under 723.061(1)(d) and under Brown, this notice was proper for an eviction of the Petitioners from the property due to a change in land use, thus summary judgment was properly rendered for Respondents.

At issue in Brown was the interpretation of 723.061(1)(d), Fla. Stat. (1985) and whether it required a notification to the tenants of the future use of the property. The trial court in Brown v. Powell had held, inter alia, that the park owner's notice of evictions were defective under 723.061, Fla. Stat. (1985), because the notices failed to state the specific nature of the projected change of the use of the land comprising the mobile home park. Id. at 732. The trial court certified the following question as one of great public importance to the Fourth District Court of Appeal:

> Whether 723.061(1)(d), Florida Statutes (1985), requires the owner of a mobile home park, in their notices of eviction, to specify what the

nature of the projected change of use of the land will be ...

531 So.2d at 732.

The Fourth District Court of Appeal answered the question in the negative and expressed an identical rationale to that found in the trial judge's summary judgement order in this case. The District Court settled the issue as follows:

> Clearly the statute does not expressly require the mobile home park owners to specify in the notices of eviction what the nature of the projected change of use of the land will be. Furthermore, there does not appear to be any valid reason for requiring the mobile home park owner to specify the actual change in use in the eviction notice. (emphasis added).
>
> 531 So.2d at 735.

The legislative history of the Act, and its subsequent construction by the Fourth District Court of Appeal and this court demonstrate a recognition by the legislature and the judiciary of the constitutional right of the park owner to change the use of his property. This recognition is consistent with the construction urged by the FMHA.

The Foley test, in Foley v. State, 50 So.2d 179 (Fla. 1951) requires this Court to examine the language of the title of the Act passed by the legislature, i.e., the title to Senate Bill 553 (Chapter 73-182, Laws of Florida), which reads: "amending 83.271(1), Florida

Statutes, 1972 Supplement, by a fourth ground for eviction, requiring notice of ground for eviction." (emphasis added). Because the title to an act is required under Art. 111, 6, Fla. Const. (1968), to briefly express the subject of the act, it is mandatory that the title "give notice to the act's contents and moreover, not mislead the public or the legislature as to the scope of the act." Ison v. Zimmerman, 373 So.2d 431 (Fla. 1979). It is apparent from the language of the title to Senate Bill 553 (Chapter Law 73-182), as well as from the language used in the act itself, that the Legislature only intended the Notice of Eviction to state the ground for eviction, i.e., the projected change in the use of the land. The Fourth District Court of Appeal stated the same in Brown v. Powell, supra.

The final prong of the Foley test requires this Court to examine the state of the law already in existence bearing on this subject. As stated in the discussion of the history of 723.061(1)(d), Fla. Stat., the Legislature first provided grounds for the eviction of tenants from a mobile home park in 1972. Before 1972, a mobile home owner could be evicted by a park owner for any reason. However, by the following year, the Legislature realized it had encroached on the constitutional rights of the land owners to use their land for some purpose other than a

mobile home park, and added the fourth ground for eviction. Palm Beach Mobile Homes, Inc., supra.

Finally, based upon the language of the statute, it is clear that the construction of the statute urged by the Respondent is proper and is the only reasonable construction. There is simply no reason why the evicted resident needs to know what the future use of the property will be.

The Fourth District Court of Appeal in Crown Diversified Industries, Inc. 415 So.2d 803 (Fla. 4th DCA 1982), recognized this dilemma in a case challenging the change in the land use of a mobile home park because there had been no rezoning of the property. In that case, the trial court held that a mobile home park owner was barred from making any improvements to its property involving displacement of mobile home lots unless the park owner's land was rezoned from its present use as a mobile home park to some other use. The Fourth District Court of Appeal rejected that holding finding that such a construction of the statute "could lead to several absurd results which we do not believe were intended by the legislature." Id. at 805.

This court should also reject the Petitioners' interpretation of 723.061(1)(d), the legislative intent behind Chapter 73-182, Laws of Florida which created this

provision, as well as the prior decisions of this court in Palm Beach Mobile Homes, Inc. v. Strong, and the Fourth District Court of Appeal in Crown Diversified Industries v. Watt, 415 So.2d 803 (Fla. 4th DCA 1982), which protected the right of the park owner to change the use of his property from a mobile home park to some other use. This court should respond, as the Fourth District Court did in Brown, by holding that a mobile home park owner is required to notify affected tenants of the projected change in use of the land comprising the mobile home park, but is not required by law to state the specific nature of the projected change of use. Brown at 735.

The Petitioners argue that the park owner's intent is relevant because intent was established as an affirmative defense which was allegedly not negated by the trial court in its grant of summary judgment for the Respondent. However, the order of summary judgment specifically stated that summary judgment be granted "conditioned on the land in question not to be used again for a mobile home park or anything related thereto." This condition obviated the need to determine if there was an issue of good faith. Crown Diversified Industries at 806.

Similarly, the Fourth District Court of Appeal correctly recognized the Petitioner's attempt to contend that a question of fact exists concerning the park owner's

good faith intentions was without merit, and held that the issue was not properly before it on appeal. Harris v. Martin Regency Ltd. at 1161. Therefore, this court should not review the issue of Respondent's good faith intent. Confederation of Canada Life Ins. v. Vega Y Arminan, 144 So.2d 805 (Fla. 1962). Furthermore, Petitioner's Motion for Summary Judgment alleged that based on the undisputed facts they were entitled to summary judgment. A movant for summary judgment may not assert that there is no genuine issue of fact and then on appeal take the contrary position that there was a material issue of fact on the same question. Wilson v. Milligan, 147 So.2d 618 (Fla. 2d DCA 1962). By making a motion for summary judgment, the movant has conceded that the record is complete and that there are no issues of material fact to be resolved. Scavella v. School Board of Dade County, 363 So.2d 1095 Fla. 1987).

Moreover, the Respondent's actions were taken in good aith, as shown by the notice of eviction which tracks the anguage of 723.061(1)(d). His intent was to change the se of the land from mobile home park to vacant property, s is his constitutional ri ht as a property owner under rticle I, 2, Fla. Const. (1968). He properly notified he Petitioners of the change in use as required by 723.061(1)(d).

Furthermore, in an effort to accommodate the petitioners, the park owner extended the eviction date to lay 1, 1987 (R-27). During this extension the park owner assisted over 90% of the tenants in the park to move and to secure other accommodations (R-14).

POINT III

SUMMARY JUDGMENT WAS CORRECTLY ENTERED BY THE TRIAL COURT; THEREFORE THE ISSUE OF ALLEGED BREACH OF GOOD FAITH IS NOT PROPERLY BEFORE THIS COURT.

The trial court correctly entered summary judgment for the Respondent. The Florida Rules of Civil Procedure require that the judgment be made where there is no genuine issue of fact and that the movant is entitled to summary judgment as a matter of law. Rule 1.510 Fla. R. Civ. P. (1989). In the summary judgment opinion, Circuit Judge Marc A. Cianca stated that he relied on counsels' arguments, the memoranda of law, the pleadings and the law surrounding Chapter 723, Fla. Stat. (R-383).

Petitioner's argument before Judge Cianca was as follows:

> "The issues before this Court are, No. 1, whether the Plaintiff is changing the use of the land from mobile home lot rentals to some other use within the meaning of that subsection; and if so, No. 2 whether the park owner gave the homeowners proper notice of the projected change in use of land."

(Transcript of proceedings for summary judgment, p. 7 1/1/9/88). No argument was made alleging good faith, or any issue involving affirmative defenses. Similarly, Petitioner's Motion for Summary Judgment lists seven grounds on which summary judgment can be based, with no mention of any affirmative defenses. The Petitioner did not at that time preserve any facts that were in good faith controverted, as is required by Rule 1.510(d), Florida Rules of Civil Procedure; therefore Judge Cianca properly ruled on the issues presented him in finding that there was no genuine issue of material fact existing.

On review, the Fourth District Court of Appeal correctly found that:

> "Appellants raise this issue [of good faith] for the first time on appeal. Since the trial court did not have the issue of appellee's alleged breach of the statutory duties of good faith and fair dealings before it, this issue is not properly before us on appeal."
>
> Harris at 1161.

Similarly, this court has held that it is not privileged to consider and decide issues which were not properly before the District Court of Appeal. Confederation of Canada Life Insurance Co. v. Vega Y Arminan, 144 So.2d 805 (Fla. 1962). It is clear that the issue of alleged bad faith was not before the District Court. This Court's jurisdiction is limited not to the

certified question, but to the decision itself; the issue of faith was not a part of the District Court's decision, and therefore it follows that this court should not review the issue of bad faith. Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

The issue in Zirin was whether the Florida Supreme Court's jurisdiction is limited to the question certified. This Court reasoned that a decision encompassed the opinion and judgment, and is regarded as determinative of the case. "It is not the question of great public interest that we are concerned with but the decision that passes upon such a question. Id at 596; see also Mariani v. Schleman, 94 So.2d 829 (Fla. 1957).

In Petitioners' Initial Brief, it is correctly contended that a plaintiff moving for summary judgment must disprove the legal insufficiency of affirmative defenses filed by a defendant before the plaintiff is entitled to summary judgment. However, the Petitioner has failed to specify affirmative defenses of bad faith in the Motion for Summary Judgment in compliance with Rule 1.510(c), Florida Rules of Civil Procedure; therefore the issue cannot be relied upon in support of judgment on appeal, because the issue was never properly before the trial court. Epperson v. Dixie Insurance Co., 461 So.2d 172 (Fla. 1st DCA 1984).

In Epperson, the court found that because the motion for summary judgment did not specify grounds relating to a reciprocal agreement in an automobile liability case, that ground could not be relied on in support of judgment on sppeal because the issue was never properly before the trial court. Id. at 175.

It is in the interest of judicial efficiency and fairness that this court should not review arguments not properly before it. Forcing the Respondent to spend his time and resources on an issue that was not properly argued to the trial court is unfair, especially at the highest appellate level. Respondent has successfully argued the merits of this case in two lower courts. Petitioners may not move for summary judgment on a specific question, and after losing on appeal try to take a contrary position. Wilson v. Milligan, supra; Scavella, supra.

Lastly, Petitioners allege that the park owner made no record showing that he was changing the use of the land. The FMHA would point to the notice of eviction which clearly stated, "Please consider this as your notice of the projected change in use of the land comprising the mobile home park". Affidavits, depositions and transcripts are not required, nor necessary to evict

tenants under 726.061(1)(d), nor are they required or necessary to prevail on summary judgment.

POINT IV

THE AWARD OF APPELLATE ATTORNEY'S FEES TO THE OWNER SHOULD BE AFFIRMED.

The order of the Fourth District Court of Appeal awarding attorney's fees to the Respondent pursuant to the prevailing party fee statute under 723.068, Fla. Stat (1985) should be affirmed. If the Respondent prevails in this suit then he is mandatorily entitled to reasonable attorneys' fees. Vidibor v. Adams, 509 So.2d 973 (Fla. 5th DCA 1987).

CONCLUSION

The statute allowing for an eviction due to a change in land use and prescribing a notice of eviction should not be read to require a park owner to notify the evicted resident of the specific nature of the future use of the property. This Court should uphold the district court's affirmance of the trial court's final summary judgment and award of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to RUSSELL S. BOHN of Edna L. Caruso, P.A., Suite 4-B/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; JOANNA MARTIN, 300 Colorado Avenue, Suite 202, Stuart, Florida 34994; THOMAS A. MUNKITTRICK, 4020 Portsmouth Road, Largo, Florida 34641 and by Hand Deliver to BOB L. HARRIS, Haben & Culpepper, P.A., 306 North Monroe Street, Tallahassee, FL 32301 on this 19th day of February, 1990.

DAVID D. EASTMAN