IN THE SUPREME COURT OF FLORIDA

JENNIE HARRIS, et al.,

Petitioners,

vs.

CASE NO. 75,097

MARTIN REGENCY, LTD.,
a Florida Limited Partnership,

Respondent.

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

In this brief, the Respondent, MARTIN REGENCY, LTD., (Plaintiff at the trial level and Appellee at the District Court of Appeal for the Fourth District), will be referred to as the "Park Owner", while the Petitioners, JENNIE HARRIS, et al., (Defendants at the trial level and Appellants at the District Court of Appeal for the Fourth District), will be referred to as the "Homeowners".

Citations to the record on appeal will be made by the letter "R" and the appropriate page number.

STATEMENT OF THE CASE

The Park Owner accepts the statement of the case as set forth in HOMEOWNERS' initial brief.

STATEMENT OF THE FACTS

The Park Owner accepts the statement of facts set forth in the Homeowners initial brief as the allegations upon which summary judgment was entered. To the extent the Homeowners' statement contains argument, the Park Owner does not accept it.

SUMMARY OF ARGUMENT

This case involves evictions from a mobile home park pursuant to, Section 723.061(1)(d), Florida Statutes (1985) ("the change in use section"). The Homeowners challenged the Park Owner's right to evict. Both parties moved for summary judgment, representing that

no material facts were in dispute. The trial court ruled in favor of the Park Owner, and granted summary judgment. An appeal followed. The District Court of Appeal for the Fourth District affirmed the order of the trial court, but certified to this Court the question of whether eviction for change in use of the land under Section 723.061(1)(d) can include a change from use as a mobile home park to vacant land or to no use.

The plain and logical meaning of the statute allows eviction for change in use to vacant land or to no use. If a particular use is being made on one's property, and then that use ceases to exist, the use of the property has obviously changed. The Park Owner does not want to operate the mobile home park any longer. The change in use section provides the only means to terminate use of the land as a mobile home park.

The legislative history of Section 723.061(1)(d) demonstrates that the Legislature understood that the change in use section was necessary to correct the constitutional infirmity of the prior mobile home eviction law. The prior law gave mobile home park residents a perpetual tenancy and thus deprived park owners of their constitutionally protected property rights. These property rights include the right to discontinue any use being made of one's property.

The Homeowners would have this Court apply an unreasonable interpretation to the statute. Their interpretation would lead to absurd results and unreasonable consequences, not intended by the Legislature.

The Homeowners assert that summary judgment was improperly entered, because questions of material fact remain unresolved. However, the Homeowners' material allegations have not been disputed. Both parties sought summary judgment on the same facts, leaving to the trial court a leaal question as to the application of the law to those facts.

ARGUMENT

POINT ONE

THE CONVERSION OF LAND COMPRISING A MOBILE HOME PARK FROM USE AS A MOBILE HOME PARK TO VACANT LAND, OR TO NO USE, IS A "CHANGE IN USE" WITHIN THE CONTEMPLATION OF SECTION 723.061(1)(d), FLORIDA STATUTES (1985)

The notice of eviction in this case was delivered pursuant to Section 723.061(1)(d), Florida Statutes, which provides:

> 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 for in this section.
>
> * * *
>
> (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 in use and of their need to secure other accommodations.

The question put to this Court by the District Court of Appeal

for the Fourth District, Jennie Harris et al. V. Martin Resency Ltd., 550 So.2d 1160 (Fla. 4th DCA 1989), (Appendix "A") is whether an owner of a mobile home park can evict his tenants pursuant to Section 723.061(1)(d) when he proposes to change the use of his land to vacant land or to no use. The trial court, the District Court of Appeal for the Fourth District, and the Park Owner believe the answer is affirmative.

A. THE PLAIN MEANING OF THE STATUTE MAKES A CHANGE FROM MOBILE HOME PARK USE TO VACANT LAND OR TO NO USE A CHANGE IN USE OF THE LAND.

The plain and logical meaning of the section is that eviction is authorized if a particular use is being made on land, and then that use will cease to exist. That is a change in the use of the land. It is as simple as that.

Common sense dictates that terminating the mobile home park use changes the use of the land. Is the land a mobile home park now? Yes. Once the homes are removed and the land is vacant, will it still be a mobile home park? No. Does the removal of the homes change how the property is being used? Of course it does. Is it a reasonable and logical conclusion then that a chanse in the use of the land has taken place? Obviously.

B. BOTH THE TRIAL COURT *AND* LOWER APPELLATE COURT HOLDINGS *ARE* CONSISTENT WITH THE LEGISLATIVE INTENT AND HISTORY OF THE STATUTE.

The basis for affirming the trial court's decision to grant the Park Owner's motion for summary judgment can be found in the legislative intent and history of the statute. In statutory construction, legislative intent is the polestar by which the courts must be guided. A court should, where possible, consider a statute's history, the evils to be corrected, the intent of the legislature, the subject regulated, and the object to be obtained. Utica Mutual Construction V. Jones, 408 So.2d 769 (Fla. 2nd DCA 1982). When doubt exists as to the meaning of the statute, the purpose for which it was enacted is of primary importance in its interpretation. United Bonding Inc. Company V. Tussle, 216 So.2d 80 (Fla. 3rd DCA 1968). It is proper for the legislative history of an act to be investigated for purposes of ascertaining and applying legislative intent. Forehand V. Manly, 2 So.2d 864 (Fla. 1941).

The change in use section was added by the Florida Legislature in 1973. Legislative history indicates that the purpose of the section was to correct a constitutional defect in the law that had been passed the year before.

The 1972 Legislature limited the grounds for eviction for mobile homeowners to three specified reasons: non-payment of rent, failure to comply with park rules, and, the commission by a tenant of a crime which endangered the community. Ch. 72-28, Sec. 1, Laws of Fla. For the first time a park owner could not unilaterally evict a tenant. The new law required some wrongful act or omission on the part of the mobile homeowner.

The unintended but obvious result of the limitations on eviction enacted in 1972 was to grant to mobile homeowners a perpetual tenancy on the land of park owners. Permanently depriving a landowner of his ability to change the use of his land violates his property rights guaranteed by Article 1, Section 2 of the Florida Constitution. This Court, in Palm Beach Mobile Homes, Inc. v. Stronq, 300 So.2d 881 (Fla. 1974), confirmed this proposition:

> "Although we find that Section 83.271, Florida Statutes, (now known as 723.061) is constitutionally valid, we are fully cognizant that a contention might be made that the act is invalid because it would have the effect of permanently depriving the owner of the land upon which a mobile home park is located for all times of the management in the use of his land for other purposes than a mobile home park. This would ordinarily raise serious doubts as to the constitutionality vel non of the act; however, that question has become moot in that the 1973 Legislature has cured the defects by enacting into law the [change in use section].
>
> Stronq, 300 So.2d at 887.

This Court reached the same conclusion in Stewart v. Green, 300 So.2d 889 (Fla. 1974), wherein Justice Roberts, specially concurring, stated:

> "Recognizing the perpetual occupancy rights on another's property cannot, consistent with the constitution, be granted by law, we must construe the act in such a manner as to preserve its purpose while operating within the framework of the Constitution of Florida and of the Constitution of the United States".
>
> Stewart, 300 So.2d at 894.

To cure this constitutional defect, the 1973 Legislature added the change in use section. At a meeting of the House Business Regulation Subcommittee, on May 8, 1973, the author of the change in use section, Representative Allen Becker, explained the intent of the proposed legislation to the Subcommittee. A transcript of this same discussion was presented to the trial court. (R 373-374)

Representative Allen Becker:

"Next is Section (d). This adds a fourth ground for eviction. It's a new way in which the landlord can evict the tenant. The example of where this would occur, and we have had several examples down in Dade County and one case the state wanted to put a road the new expressway down through South Dade and it went right through a mobile home park and we managed to keep the people there for quite a number of months on the existing law saying the state didn't have the right to because that wasn't the grounds for eviction. A change in use. The same thing happened where a car dealer wanted to take over a mobile home park and make into a used car lot. We have another one in Broward County where a bank wanted to expand it and we are faced with this although this added change really wouldn't be to the benefit of any tenants who was in the way of some change in use, I think it would enhance the constitutionality of the statute and it is probably a good amendment to have in there."

Chairman Bill Andrews:

"You're going to run head on into Mr. Whitson though, who wants to say that once you let them in a mobile home park, that can't change for a hundred years."

Representative Curt Kiser:

"That came from a problem we had in Pinellas where the shopping center needed to expand into a park and that was one of the arguments made in front of the zoning board was they were trying to change the zoning. The bill that was written last year permitted the perpetual lease and like Allen, I worried at that time that the bill might have been challenged and knocked unconstitutional

because of that and this would give us more constitutional status by providing a means to terminate the land as a mobile home Dark. That's only fair if a guy wants to change the use." (Emphasis supplied)

Representative Allen Becker:

When somebody sells or is building something else and in fairness even though we used the bill against them in the past, it is only fair to give them this right and also will preserve the bill." (Emphasis supplied)

There are four points which are evident from the discussion by the Subcommittee. First, the Legislature meant to resolve the unconstitutionality of granting to mobile homeowners a perpetual tenancy on the land of park owners. Second, when Representative Becker commented on the right of park owners to change the use of land in order to sell if he obviously contemplated that the property could be sold following termination of the mobile home park use. Third, several different proposed new uses were mentioned which could result in the land being vacant and not in use for some period of time. Fourth, there was a complete absence from the discussion of any concern regarding notification to the tenants of the nature of the proposed future use of the land or any restrictions on future uses.

The Homeowners cite to this Court's decisions in Stewart v. Green and Palm Beach Mobile Homes, Inc. v. Strong, supra, for the proposition that mobile homeowners are afforded greater protections by the nature of their choice of living accommodations and that circumvention of those protections is prohibited. The Park Owner agrees. However, when a change of use is proposed, the special

protection afforded to mobile home tenants is their statutory right to an unusually long advance notice of their eviction. This notice requirement is not applicable to the other four grounds for eviction, each of which presently has a much shorter notice period. At the time the Park Owner delivered the eviction notice to the Homeowners, the statutory notice period was 6 months. In 1986, the notice period was increased to one year, and for the first time, park owners were required to compensate displaced tenants. The Park Owner complied with the applicable notice requirement.

The evidenced intent of the Legislature in adding the change in use section was to say: "Okay Mr. Park Owner, if you no longer want to operate a mobile home park. If you want to change the use. If you want to close it down. That's fine. You do not have to remain a mobile home park owner in perpetuity. But be aware, we are going to require a lengthy written notice. And you are not allowed to evict only undesirable tenants and then re-open the Park." The balance struck by the Legislature in enacting the change in use section was to codify park owners' constitutional right to cease being park owners, and to provide substantial advance notice to their tenants to reduce the hardships associated with moving. There is no evidence to suggest that the Legislature intended to grant to homeowners a right to second guess a park owner's proposed change in use, so long as the property would not be used as a mobile home park. That was the precise conclusion of both the trial court and the District Court of Appeal.

C. THE HOMEOWNERS' INTERPRETATION OF THE STATUTE WOULD LEAD TO ABSURD RESULTS *AND* UNREASONABLE CONSEQUENCES NOT INTENDED BY THE LEGISLATURE.

The Homeowners argue to this Court that a mobile home park owner may not evict under the change in use section unless he identifies the new use to be made of the property and immediately commences the new use upon termination of use as a mobile home park. Such an interpretation would lead to absurd results and unreasonable consequences not intended by the Legislature.

If the homeowners are correct that a change in use does not include a change to vacant land or no use, when does the change to a new use have to take place? Could the land remain vacant for even a day following eviction? For a month? A year? With a six month notice requirement could the homeowners wait until the 181st day and then refuse to move since the use of the land had not yet changed?

What if the notice specified a change to single family dwellings, but after the mobile homes were moved, the land was used for multi-family dwellings? Would the evicted residents have a cause of action against the park owner for violating the change in use section? Would the homeowners then be able to force the park owner to re-open the park?

What if the notice specified a change in use to a shopping center, and between the time of the notice and the date the mobile homes are moved, a brand new shopping center is built across the street? Would the park owner be forced to construct a shopping

center regardless of what the marketplace will bear? Would the owner be able to construct a different use for the property? Would the residents that have already moved because of the eviction notice have a cause of action against the park owner for violating the change in use section? Would the residents be able to return to the park at the owner's expense? Would a new notice have to be delivered with a new specified use?

What if following the death of the owner, the park is inherited by a distant relative? If the relative has no interest or experience in owning or operating a mobile home park, must he operate the park anyway? Is the relative forced to sell the park? Can he issue eviction notices under the change in use section and retain the land in the family? If he does choose to no longer operate the park, must he specify a new use in the notice and commence the new use immediately? Can he be forced to operate a business on his new land?

What if the park owner specified a use in his notice, was prepared to commence that new use, however, following eviction of the residents, his financing falls through? Would the owner be forced to commence the new use with his own limited funds? Could he allow the land to remain vacant while he attempted to work out his difficulties? If so, how long? If the land were to remain vacant, would the residents be entitled to return to the park until the new use commences?

The application of the Homeowners' interpretation to such real-world circumstances would result in absurd and unreasonable

consequences not intended by the Legislature. The Park Owner asserts that these absurd results and unreasonable consequences can only be avoided if a change in use includes a change to vacant land or to no use.

POINT TWO

IN ORDER TO GUARANTEE THE PARK OWNERS' CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS, A CHANGE IN USE OF THE LAND MUST INCLUDE A CHANGE TO VACANT LAND OR TO NO USE

If this Court were to find that the change in use section does not permit the park owner to change the use of the land from mobile home park use to vacant land or to no use, then the statute would be unconstitutional as violative of Article I, Section 2, of the Florida Constitution.

Article I, Section 2, of the Florida Constitution, in relevant part, provides:

> Basic rights -- All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property:

Among its several protections, this constitutional provision guarantees all natural persons the right to possess and protect property. An individual's right to devote his real estate to any legitimate use is protected. Miller V. MacGill, 297 So.2d 573 (Fla. 1st DCA 1974). Liberty of contract and the right to use

one's property as one wills are fundamental constitutional guarantees. Robinson v. Florida Dry Cleaning and Laundry Board, 194 So. 269 (Fla. 1940); Corn v. State, 332 So.2d 4 (Fla. 1976). The exercise of legislative power and discrimination must not infringe upon or impair fundamental rights of property. L. Maxcy Inc. v. Mayo, 139 So. 121 (Fla. 1932).

In the context of the Florida Mobile Home Act, Chapter 723, this Court has specifically held that the rights and protections afforded to mobile home tenants can not impair or deprive park owners of their constitutionally protected property rights. The decisions in Strong and Stewart, supra, made clear that park owners retain the right to manage and use their land for other purposes than a mobile home park, and to be free from a perpetual tenancy.

The park owner's right to make use of his property includes the right to make no use of the land. The Homeowners assert that a park owner may sell the park to his tenants, evict the tenants if he immediately commences a new use of the land, or continue operating the park, but he is prohibited by the statute from making no use of his land. The statute does not state such a prohibition and it would violate the constitution if it did.

Most land is zoned for a particular use or uses. However, a property owner does not violate his zoning classification when his land is vacant and not in use. Under the Homeowners' interpretation of the change in use section, this would no longer be true for mobile home park owners. Unlike all other landowners, park owners would be prohibited from discontinuing use of their

land. In fact, the Homeowner's interpretation requires a park owner to rezone his land as the only means to discontinue it use. Since a park owner's request to rezone the land might not be granted by local government, the only option left to the Park Owner under the Homeowners' interpretation would be a perpetual tenancy or a forced sale, both of which would be unconstitutional. The Park Owner does not want to operate a mobile home park any longer. The change in use section provides the only means to terminate use of the land as a mobile home park.

POINT THREE

ISSUES OF GOOD FAITH *AND* BREACH OF STATUTORY OBLIGATION WERE NOT PRESERVED FOR APPEAL *AND* ARE THEREFOR NOT PROPERLY BEFORE THIS COURT

In the Statement of Facts set forth by the Homeowners, and in Point II of their argument, the Homeowners attempt to have this Court rule on issues of fact relating to good faith and breach of statutory obligation. Such matters were not preserved for appeal and therefor should not be considered by this Court. The District Court of Appeal in this case has specifically held:

> "Finally, appellants contend that a question of fact exists concerning whether appellee intended in good faith to change to use of the land from mobile home lot rentals to some other use pursuant to Section 723.061(1)(d). Appellants claim appellee intended to circumvent the requirements of Section 723.071, Florida Statutes (1985), which mandate that a park owner seeking to sell a park give the residents a right of first refusal. Appellants raise this issue for the first time on appeal. Since the trial court did not have the issue of appellee's allesed

> breach of the statutory duties of good faith and fair dealings before it, this issue is not properly before us on appeal." (Emphasis supplied)
>
> Harris, 550 So.2d at 1161.

Following the District Court's decision, the Homeowners sought rehearing, arguing to the District Court that it misapprehended the good faith issue and overlooked the fact that the issue was raised in the trial court and so was properly before them. The District Court was thus given an opportunity to consider whether it had overlooked these issues. It denied the Homeowners motion. Now, in Point II of their brief the Homeowners are asking this Court to rule on the good faith issue for the first time.

This Court has maintained that issues not raised at the trial court, with the exception of questions of facial constitutionality, will not be considered for the first time on appeal.

> "The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction to review the district court's 'decision'. Art. V, Section 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented." (Emphasis supplied).
>
> Tillman v. State, 471 So.2d 32, 34 (Fla. 1985).

Since no other issues were properly preserved for appeal, only the certified question should be considered by this Court.

Both the Park Owner and Homeowners moved for summary judgment,

representing to the trial court that there were no disputed issues of material fact on the eviction issue. At hearing, on the motions for summary judgment, the trial court sought confirmation from counsel for the respective parties that no material facts were in dispute and the matter was ripe for summary judgment:

> **THE COURT:** All right. It's an interesting case and we are talking solely about issues of summary judgment.
>
> **MS. MARTIN:** Yes, your Honor. (For the Homeowners)
>
> **THE COURT:** For both sides. Plaintiff says, "There is no issue of fact there. I can evict." Right?
>
> **MR. HARRIS:** That's right.
>
> **THE COURT:** You say, "No. They haven't done what they are supposed to. They didn't comply with the law. They haven't done it, so we want a summary judgment.
>
> **MS. MARTIN:** Yes, Your Honor.
>
> (R 1 - 25)

Summary judgment can be granted when affirmative defenses are raised, where each side argues a lack of genuine issues of material fact. Holl v. Talcott, 191 So.2d 40 (Fla. 1966) In Holl, a case cited by the Homeowners, summary judgment was granted and then reversed. However, the judgment was reversed solely because the non-moving party had maintained throuahout the proceedings, unlike the Homeowners in this case, that his affirmative defenses raised factual matters which remained in dispute at the time of the entry of summary judgment.

In their initial brief, the Homeowners cite to Howdeshell v. The First National Bank of Clearwater, 369 So.2d 432, 433 (Fla. 2nd

DCA 1979) for the proposition that the prevailing party in a motion for summary judgment must prove the legal insufficiency of the affirmative defenses raised by the losing party in order to obtain summary judgment. This would be true in a case where one party moved for summary judgment, arguing a lack of genuine issues of material fact, while the other side maintained that facts were in dispute. That is not the case here. Both parties represented to the trial court that no facts in dispute remained.

> Only after it has been conclusively shown that the party moved against cannot offer proof to support his position on the genuine and material issues in the cause should his right to trial be foreclosed.
>
> Holl, 191 So.2d at 47.

See also, Roland v. Gold Coast Savings and Loan Association, 528 So.2d 111 (Fla. 4th DCA 1988).

The Homeowners cannot have it both ways. They cannot on the one hand represent to the trial court that there are no disputed issues of material fact and then upon entry of a judgment against them, argue to the appellate court that factual matters remain unresolved. All issues were resolved once the trial court ruled on the questions of whether the notice had to specify a use and whether a change to vacant land or to no use was a change in use.

POINT FOUR

THERE ARE NO OUTSTANDING QUESTIONS OF MATERIAL FACT WHICH WOULD PRECLUDE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE PARK OWNER.

In the event this Court reverses the holding of the Fourth District Court of Appeal, and chooses to consider the other issues raised by the Homeowners outside the certified question, the Park Owner submits that there are no unresolved questions of material fact. The alleged issues of good faith and breach of statutory obligation are not affirmative defenses. Each alleged affirmative defense raised issues of law, which have already been resolved by the trial court and District Court of Appeal. The affirmative defenses do not involve disputed factual matters which would prohibit entry of a judgment.

It has been held that summary judgment may still be awarded if the affirmative defenses raised by a party constitute nothing more than "paper issues". In the decision of Reflex, N.V. V. The UMET Trust, 336 So.2d 473 (Fla. 3rd DCA 1976), the Third District Court was faced with a similar situation. The trial court had granted summary judgment in the face of affirmative defenses raised by the losing party. The court held:

> While it is true that it is necessary for Plaintiff to show that affirmative defenses have no basis in fact in order to be entitled to a summary judgment, this does not mean that by the raising of purely paper issues the Defendant can forestall the granting of relief to the Plaintiff where the pleadings and evidentiary matters before the trial court

> show that the defenses are without substance in fact or in law.
>
> Reflex, N.V., 336 So.2d at 474-475.

See also, Howdeshell, supra, and Cady V. Chevy Chase Savings and Loan, Inc., 528 So.2d 136, 137 (Fla. 4th DCA 1988).

An affirmative defense is one that admits a cause of action, but attempts to avoid liability by new allegations, which of themselves would make a judgment prohibitive. An affirmative defense pleads factual matters, which if true, raise legal defenses to a judgment. Fla. Jur. 2d, Pleadinas, Section 159. That is not the case here.

While it is true a properly plead affirmative defense can act to preclude the entry of summary judgment, when the non-moving party merely labels his allegations as affirmative defenses, summary judgment is not precluded. In this case the **Homeowners** did not raise disputed factual matters in their affirmative defenses which would preclude summary judgment from being entered. An examination of each affirmative defense raised by the **Homeowners** will establish this point.

The first affirmative defense was lack of authorized grounds for eviction. (R 53, 71, 89, 107 and 125) This alleged defense does not raise disputed factual matters which would act as a defense to a judgment. The defense raises the legal question of whether "extenuating circumstances" or a park owner's "wish to vacate" the park are grounds for eviction. **"Extenuating** circumstances" and **"wish** to vacate" were terms used in the **Park**

Owners eviction notice. (R 29) The trial court and District Court resolved that legal question in their decisions when they held that the notice was sufficient and that a change to vacant land or to no use is a change in use of the land. The trial court stated:

> This Court finds the "Notice to Vacate" tracking Section 723.037, Florida Statutes, to meet leaal muster. It informs the defendants of the Plaintiff's intent to vacate the lane (sic), no longer holding the land to mobile park use. Adequate notice was given with the inclusion that one (1) year was given to find other accommodations.
>
> An interpretation of Chapter 723.061 (a)(d) and 723.06(3), Florida Statutes, by this Court finds the Plaintiff's have met the statutory intent. The Court resolves the semantical issue on what constitutes a "change of use". If the land is no longer going to be used as a mobile home park and in effect becomes vacant land, to be put into some other commercial use or no use at all this constitutes a change of use. To pinpoint exactly what the land is going to be used for is not critical, so long as it is not a mobile home park. This interpretation falls well within the legislative intent in passing the legislation in question here. To do otherwise could initiate a constitutional problem or create an unreasonable result or consequence for the property owner. The mobile home park owner is required to follow certain procedures also, such as that proper and reasonable notice shall be provided the tenant in order to avoid the grievous abuses to mobile home owners which the legislature also sought to accomplish in this legislation. Chapter 723, Florida Statutes as it now exists and existed at the filing of this action is a bona fide and successful effort to balance the rights of both sides in this dispute. That is certainly this Court's interpretation and opinion of Chapter 723, Florida Statutes, and the portions thereof impacting on this case. (Emphasis supplied)
>
> (R 384, Appendix "B")

In the District Court's decision, Harris, supra, the Court stated:

> We disagree with appellant's argument that the notices were deficient because they did not state the nature of

the projected change in the use of the land.

* * *

"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."

* * *

We also hold that the trial court did not err when it concluded that converting the land comprising the mobile home park from use a mobile home park to vacant land, or to no use, constitutes a "change in use", within the contemplation of Section 723.061(1)(d).

Harris, 560 So.2d at 1160.

(See also Brown v. Powell, 531 So.2d 731 (Fla. 4th DCA 1988) (Appendix "C")

The second affirmative defense raised by the homeowners was bad faith. (R 53, 71, 89, 107 and 125) This defense raises the question of whether the Park Owner had plans to change the use of the land at the time the notice was delivered. This alleged defense does not involve disputed factual matters which would preclude entry of a judgment. The defense raises a legal question resolved by both the trial court and the District Court of Appeal when each ruled that a change in use includes a change to vacant land or to no use.

The third affirmative defense raised by the Homeowners was also bad faith. (R 54, 72, 90, 108 and 126) The difference from the second defense was the addition of "at all times material hereto", meaning the Park Owner has no plans to change the use of

the land. Again, the defense does not involve disputed factual matters, but only raises the legal question of whether a change in use includes a change to vacant land or to no use at all. That legal question has been resolved.

The fourth affirmative defense raised by the Homeowners was estoppel and breach of duty of good faith. (R 54, 72, 90, 108 and 126) The Homeowners asserted that they do not have to move "in the absence of a change in use of the land", and that the Park Owner refuses to inform them of the future use. Again, this defense does not involve disputed factual matters, but only raises the legal questions of whether a notice must specify the future use, and whether a change in use includes a change to vacant land or to no use. These legal questions were resolved by the trial court and District Court of Appeal.

The fifth affirmative defense raised by the Homeowners was also estoppel and breach of duty of good faith. (R 55, 73, 91, 109 and 127) The same arguments are made as in defense number four, however, a list of statements made by the Park Owner are included. Again, the alleged defense does not involve disputed factual matters, but only raises the legal questions of whether a notice should specify the future use, and whether a change in use includes a change to vacant land or to no use. These legal questions have been resolved.

The sixth affirmative defense raised by the Homeowners was breach of duty imposed by relation of trust and confidence. (R 56, 74, 92, 110 and 128) This alleged defense does not raise disputed

factual matters which would preclude entry of a judgment. The defense involve the legal questions of whether the notice must specify the future use and whether a change in use includes a change to vacant land or to no use. That legal question has been resolved by both the trial court and the District Court of Appeal.

By labeling their allegations as affirmative defenses, the Homeowners are trying to convert legal issues into issues of disputed material fact. This point becomes most evident when the Homeowners admit in Point II of their initial brief, that if they had been successful in obtaining summary judgment, their affirmative defenses would have vanished. That is correct. The reason is because the affirmative defenses do not involve factual matters that are in dispute, but rather, raise only legal issues which were properly resolved by summary judgment.

POINT FIVE

THE PARK OWNER HAS COMPLIED WITH THE REQUIREMENTS IMPOSED BY CHAPTER 723, THE FLORIDA MOBILE HOME ACT

In Point II of their initial brief, the Homeowners argue that Chapter 723 requires park owners to respect residents' rights, and that he must give them a chance to buy the land. That is absolutely not correct.

The provision governing the sale of mobile home parks is Section 723.071, Florida Statutes. The statute provides for two separate and distinct circumstances where mobile homeowners, through their association, must be considered in the sale of mobile

home parks. First, if the park owner "offers" the park for sale to the public, then the mobile homeowners are granted a right of first refusal. They are to be advised of the material terms and conditions of the sale and must execute a contract with the park owner within 45 days or lose that right.

Second, if the park owner receives a bona fide offer which he intends to consider or make a counteroffer to, he must notify the homeowners' association that he has received an offer. He must then reveal the price and material terms and conditions upon which he would consider selling the park. The park owner is under no obligation to sell to the homeowners and is free at any time to execute a contract for sale of the park. Under this circumstance, the mobile homeowners do not have a right of first refusal.

The statute is unambiguous. Nothing in the statute requires a park owner to give mobile homeowners a chance to buy the park when he is only considering the sale of the park as one of his options. The park owner must first offer the park for sale before a sale to the mobile homeowners has to be contemplated. The park has not been offered for sale.

Further, the Park Owner has no reason or cause to evade the requirements of Section 723.071, as the Homeowners allege. There is no incentive to avoid the right of first refusal if, as the statute requires, the mobile homeowners must meet the price and terms and conditions of the mobile home park owner. It does not matter who the land is sold to, either the Homeowners, or to another entity, the terms of sale would be the same.

The Homeowners also assert that the Park Owner is attempting to circumvent Section 723.083, relating to a change in zoning. That is not true. This case involves a change in use of the land, and not a change in zoning. This section is not relevant to these proceedings.

CONCLUSION

On the basis of the preceding argument, Respondent respectfully requests this Court to affirm the Opinion of the District Court of Appeal for the Fourth District in this case and further, requests this Court to quash the Stay of Proceedings previously entered.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been 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 Delivery to DAVID EASTMAN at 318 North Monroe Street, Tallahassee, Florida 32301 on this 19th, day of February, 1990.

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