IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

JENNIE HARRIS, et al.,

Petitioners,

v. CASE NO. **75,097**

MARTIN REGENCY, LTD., a Florida Limited Partnership,

Respondent. /

INITIAL BRIEF OF PETITIONERS

JOANNA R. MARTIN, ESQ.
300 Colorado Avenue
Suite 202
Stuart, Florida **34994**
and
Russell S. Bohn, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL **33401**
(407) 686-8010
Attorneys for Petitioners

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PREFACE

Petitioners (Appellants in the Fourth District Court of Appeal) were the Defendants, and Respondent (Appellee in the Fourth District) was the Plaintiff in five eviction actions originally brought in the County Court, and later consolidated and transferred to the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. In this brief, Petitioners will be referred to as the Defendants or the Homeowners. Respondent will be referred to as the Plaintiff, Park Owner, or by proper name. The symbol "R" will denote the Record-on-Appeal. All emphasis in this brief is supplied by Petitioners, unless otherwise indicated.

STATEMENT OF THE CASE

Plaintiff filed five separate complaints for eviction against Defendants in the county court in and for Martin County, Florida (R26-45). [Two of the complaints were later amended only to include additional parties (R217-18,279-82).] The Defendants filed separate and identical answers, with affirmative defenses and counterclaims (R51-140,294-311).[1] [Count I of the counterclaims was eventually amended by agreement of the parties (R219-268, 330).] The Defendants filed motions to consolidate

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[1]/There are six separate answers in the Record, all of which are identical except for the names of the Defendants in each (R51-68,69-87,87-104,105-22,123-40,294-311). For ease of reference, record references to the allegations in the Answers will be to only the first answer (R51-68).

the actions (R141-145), and to transfer the cases to the circuit court because the damages sought in the counterclaims exceeded the jurisdiction of the county court (R146-155). Plaintiff filed its answers to the counterclaims (R156-170), requested separate trials on the counterclaims (R181-190), and objected to transfer to the circuit court (R196-205).

The cases were eventually consolidated (R312-314), and transferred to the circuit court (R315). Thereafter, Plaintiff and Defendants filed motions for summary judgment (R316, 325-28; 317-321). The summary judgment motions were heard on January 19, 1988 (R1-25), after which Plaintiff (R357-374), and Defendants (R342-356, 375-82) filed memoranda of law. Defendants also filed a motion to supplement the record (R331-337), which was granted (R386).

Summary Judgment was entered in favor of Plaintiff (R383-385). Defendants moved for rehearing and vacation of the Summary Judgment (R387-398), to which Plaintiff responded (R400-423). Rehearing was denied (R424), and Defendants appealed to the Fourth District Court of Appeal (R425), which affirmed, but certified a question to this Court (R425). HARRIS v. MARTIN REGENCY, LTD., 550 So.2d 1160 (Fla. 4th DCA 1989). It also granted Plaintiff's motion for prevailing party attorney's fees pursuant to 8723.068, Fla. Stat. (1985).

STATEMENT OF THE FACTS

The Florida Mobile Home Act

This case involves the interpretation of several of the inter-related provisions of the Florida Mobile Home Act ("Act"), Chapter 723, Fla. Stat. (1985), especially the section of the Act which limits the grounds on which a mobile home park owner is permitted to evict the residents of the park. The eviction statute, S723.061, Fla. Stat. (1985) reads in pertinent part as follows:

> **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 and of their need to secure other accommodations.
> (e) Failure of 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.

The provisions governing mobile home lot rental agreements specify that no rental agreement can provide for eviction on any ground other than those presented in S723.061. See §§723.031 and 723.032, Fla. Stat. (1985).

Other pertinent provisions of the Act, which are presented more fully in the Argument portion of this brief, include §§723.081 and 723.083, ~~Fla~~. ~~Stat~~. (1985), which protect park residents in the case of a change in zoning. They require that the homeowners' association must be given notice of any application for a change in the zoning of the park, and also contain the following important limitation:

> No agency of municipal, local, county or state government shall approve any application for rezoning, or take any other official action, which would result in the removal or relocation of mobile home owners residing in a mobile home park without first determining that adequate mobile home parks or other suitable facilities exist for the relocation of the mobile home owners.

Among other important provisions of the Act is S723.071, Fla. Stat. (1985), which provides that if a park owner offers a park for sale, he must notify the homeowners and give them the right to purchase it if they meet his price, terms and conditions. §723.071(1)(a-c). Further, under §723.071(2), if a park owner receives an offer to purchase the park which he intends to consider, he also must notify the homeowners, disclose the price and terms on which he would consider selling the park, and must consider any offer made by the homeowners. Under S723.074, Fla. Stat. (1985), if the park owner owns recreational facilities serving the mobile home subdivision, those facilities cannot be sold without first giving the homeowners the right to purchase them. Further, S723.022, ~~Fla~~. ~~Stat~~. (1985) deals with a park owner's general obligations, including that common areas and utility systems must be maintained in operating condition.

Finally, underlying all of the provisions of Ch. 723 is S723.021, which creates a statutory obligation of good faith and fair dealings, as follows:

> Every rental agreement or duty within this chapter imposes an obligation of good faith and fair dealings in its performance or enforcement.

The Facts of this Case

The facts of this case began in December 1984, when Martin Regency, Ltd. (hereafter "Park Owner") purchased the Regency Mobile Home Park (R58). James A. Kern (hereafter "Kern") is the general partner of Martin Regency, Ltd., a Miami based limited partnership, and at all relevant times directed and controlled the management of the park since its purchase (R51-52, 57-58). Soon after purchasing the park, Kern called a meeting of the mobile home residents, and announced that he was not experienced in running mobile home parks, that he represented a partnership which buys and sells land at a profit, and that he intended to sell the park and not to operate it as a mobile home park (R58).

On or about August 30, 1985, in his capacity as general partner, Kern served on all of the park residents identical eviction notices, which read as follows:

> 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 parks, 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 the 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. Rareieck 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. (R28).

A number of the residents did not vacate, and on February 3, 1986, Kern sent the following letter to the tenants' association:

> I am writing you as the attorney for the Regency Mobile Home Park Tenant's (sic) Association. You are aware that I wrote each tenant on August 30, 1985, advising them that I wish to vacate the park. I understand that those who have left the park or who plan to leave the park shortly number about 16. The six-month period I gave the tenants in which to leave expires at the end of February, 1986.
>
> It appears that you and the officers of the Tenant's (sic) Association have approached me in good faith for the purpose of extending the date at which all tenants must leave the property and for negotiating whatever concessions you can for your clients. It is my understanding that these negotiations will not drag on. Accordingly, you may advise the tenants that I won't be unreasonable or malicious in enforcing a deadline and suddenly inform the tenants that they must leave immediately. (R67).

The letter was written on stationary carrying Kern's name as "Registered Real Estate Broker" (R67). The Complaints for Eviction state that the eviction date was extended until May 1, 1987, and that on or about that date, the remaining residents received the following notice from Kern on behalf of the Park Owner:

> YOU ARE HEREBY NOTIFIED that within five (5) days of your receipt of this notice, you

> are to remove yourself(ves), your possessions, your mobile home and all appurtenances to the mobile home from the premises of Regency Mobile Home Park, 3005 No. Federal Highway, Jensen Beach, Florida. Failure to do so will result in a complaint for eviction being filed against you in the appropriate jurisdiction.
>
> As you are aware, a notice of eviction was delivered to you on or about August, 1985. This notice provided for an eviction date on or about February, 1986. This eviction date was informally extended to May 1, 1987 (R29).

The Homeowners who are Defendants in this action are the last five families out of the approximately ninety-five families who resided in the park when the original eviction notices were sent. They filed answers, along with seven affirmative defenses (R53-57). In those defenses, the Homeowners alleged that the "extenuating circumstances" listed in the eviction notices, and the Park Owner's "wish to vacate" the park, are not among the exclusive grounds for eviction authorized by §723.061. (1985) (R53). They also alleged that the Park Owner acted in bad faith at the time it issued the eviction notices, because it had no plans to change the use of the property within the meaning of §723.061(1)(d) (R53). The Homeowners had demanded that the Park Owner disclose the nature of any projected change in use, but were refused (R54-55). They alleged that the only responses which they received at different times included the following: "I have no plans, I just want to resell it [the land comprising the park] at a profit." (R55). The Homeowners maintained that they remained on the premises instead of voluntarily vacating because of the Park Owner's refusal to disclose the change.

Among their defenses, the Homeowners also maintained that the Park Owner had breached its duty of good faith, and that if it was in fact changing the use of the land, it had a duty to disclose that use to the Homeowners so that they would know that they needed to comply with the eviction notices (R56), and that had there been disclosure, they would have vacated the premises in order to avoid the eviction proceeding (R55-56). They also alleged that since July 1, 1985, the Park Owner was required to provide the residents with a prospectus pursuant to §723.012(12), ~~Fla~~. ~~Stat~~. (1985), which must contain a detailed description of any definite future plans which a park owner has for changes in the use of the land comprising the park. The Park Owner failed to provide the prospectus, which would have informed the Homeowners whether there was in fact any bona fide plan to change the use of the land, thereby obviating this lawsuit (R57).

In amended Count I of their counterclaims, the Homeowners alleged that from the time of the meeting with them in December 1984, Kern repeated that there were no plans to change the use of the park, but that he represented a partnership whose business it was to buy and sell land at a profit, and that that was what he intended to do (R57-61,229-236). The Homeowners alleged that if the park was sold to an entity which had bona fide plans to change the use of the land within the meaning of §723.061(1)(d), the buyer would be entitled to evict them only if they were given a new one-year's notice of eviction, and if certain costs now specified in §723.061(2), Fla. Stat. (Supp. 1986), were paid.

Further, the Homeowners alleged that the current zoning on one portion of the park is non-conforming mobile home use established prior to **1958,** and the zoning on the remaining portions of the park is for a trailer park. The Homeowners alleged that if the Park Owner is able to rid itself of them prior to seeking a change in rezoning, then it would not be required to demonstrate to the zoning authority that adequate mobile home parks or other suitable facilities exist for their relocation as required by **S723.083 (R229-30).** Thus, clearing the park prior to sale would enable the Park Owner to realize a higher price in the sale, since the buyer would not have to meet those responsibilities either **(R230).**

In Count II of the counterclaims, the Homeowners pointed out that they are senior citizens, and that they have been subjected to bullying, threatening and intimidating statements and actions, including the following: on or about May 1, **1987,** terminating the services of the park manager; commencing December **24, 1984,** reducing and then ceasing entirely all maintenance of the common areas of the park in violation of the statutory obligation to maintain such common areas; in early May **1987,** removing the washing machines and dryers from the park laundry; commencing in **1985,** refusing to repair the park's water system; as of May 1, **1987,** termination of the maintenance of the park's water and sewer system **(R63).** The Homeowners alleged that their age and economic status rendered them peculiarly susceptible to threats of eviction, and that their lives had been disrupted at a time of

their lives when they did not wish to have to fight, but to live in peace and harmony (R63-64).

In memoranda submitted before the entry of summary judgment, the Homeowners also pointed out that under $723.071, a mobile home park owner who intends to sell the park is required to notify the officers of the home owners' association, stating the price and terms of sale, and affording them a right of first refusal to purchase the park. They repeatedly argued that vacating the park was not only not among the exclusive grounds for eviction, but enabled a park owner to evade the right of first refusal by emptying out the park and then reselling the vacant land, contrary to the obvious intent of §723.071 to protect the homeowners (R348,380-81,395).

After the hearing on the summary judgment motions (R1-25), the Homeowners were granted leave to supplement the record with affidavits (R331-37, 383-85). The affidavit of Roger Hill, a staff writer for a local newspaper, stated (R333-34):

> On April 17, 1987, I telephoned JAMES A. KERN at the following telephone number 305/595-3930. During this telephone conversation between MR. KERN and me, MR. KERN made the following statements:
>
> I asked MR. KERN if he had specific plans for the Regency Park property. MR. KERN answered, I would have to say no. I simply want to vacate the park. They can't require me to stay in business. "I'm not a developer. I've never developed a thing." MR. KERN also told me during this same conversation, that he buys and sells land for investment, and that he could forsee [sic] selling the park in the next month or year.
>
> On September 24, 1987, I again spoke with MR. KERN over the telephone, at the same

telephone number. I asked MR. KERN if he had sold the park and he said that he had not signed a contract, but that he had had inquires. He also said, "I'm free to sell and anyone is free to buy." MR. KERN also told me that he had paid $3.50 a square foot for the land, and that during last Spring [Spring of **19871,** he got an appraisal showing that the land was worth **$7.00** a square foot.

The affidavit of Jay Knohl stated (R335):

> During or about July **1986,** I went to Regency Mobile Home Park in Jensen Beach, Florida.
>
> I went to the park because I had heard that mobile homes were being sold by the homeowners for prices substantially lower than their fair market value, and I wanted to buy a home at a good price.
>
> I went to the mobile home park office and spoke with the manager. She told me that I could buy the homes that were left in the park for very little money because the park owner bought the park with the idea to dispossess all the tenants and resell the land because it was located next to the new mall making the land very valuable.

The affidavit of Howard E. Googe, Jr., Esq. stated (R336-37):

> During **1985-1986,** my firm represented the homeowners, at Regency Mobile Home Park located in Jensen Beach, Martin County, Florida.
>
> * * * *
>
> In connection with my representation of the homeowners, I had several conversations with Mr. James A. Kern, prior to his being represented by counsel regarding the evictions.
>
> During one such conversation, I specifically asked Mr. Kern, "Exactly what change in the use of the property do you intend to make?" Mr. Kern's response to that question was that he had no plans for changes in the property at that time. He also said he was not a mobile home park operator and that it was his job to buy and sell property.

> On or about March **13, 1986**, I had lunch at Huckleberry's with Mr. Harris, Mr. Kern and two representative of the homeowners association. Again, I specifically asked Mr. Kern what he intended to change the use of the land to. Mr. Kern again said that he had no plans at that time.
>
> During other conversations with Mr. Kern, he again told me that he had no plans for changes in the property; and that at some point down the line, he planned to sell the property. He also told me that at his first meeting with the homeowners, he was very "up front" with them and that he had told them that he's not a park operator and that he intended to sell the property in the future.

In the Summary Judgment, Judge Marc A. Cianca ruled that there were no genuine issues of material fact, and that the case turned on legal interpretation of the provisions of Chapter **723**, ~~Fla~~. ~~Stat~~. He ruled that the eviction notices were sufficient because they tracked the statute, and informed the Homeowners of the Park Owner's intent to vacate the land and no longer hold it to use as a mobile home park **(R383).** The judge also resolved what he termed a "semantical issue on what constitutes a 'change of use,'" as follows:

> 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. **(R384).**

The summary judgment was granted "conditioned on the land in question not being used again for a mobile home park or anything

related thereto, and that the defendants currently residing on the plaintiff's land be given until March 1, 1989 to vacate the property." (R384).

On appeal, the Fourth District affirmed the Summary Judgment. HARRIS V. MARTIN REGENCY, LTD., 550 So.2d 1160 (Fla. 4th DCA 1989). Relying on its prior opinion in BROWN V. POWELL, 531 So.2d 731 (Fla. 4th DCA 1988), it held that an eviction notice need not specify the actual change in use. The court also held that the trial court did not error in concluding that "converting the land comprising the mobile home park from use as 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), Florida Statutes (1985), but certified that question to this Court. Id. at 1161. Finally, the court did not reach the issue of whether the Park Owner had breached the statutory duty of good faith and fair dealings, because it determined that this issue had not been presented to the trial court. Id.

This proceeding follows.

Preservation

The following portion of this brief will be repetitive of a number of the facts already recited in this Statement, but this recitation of arguments made in the trial court is necessary because of the Fourth District's determination that the issue of the Park Owner's breach of the statutory duty of good faith and fair dealings had not been preserved for appeal.

The Homeowners raised the issue of bad faith repeatedly in this case, right from the very beginning of the litigation. First, in their Answers to the Complaints for Eviction, the Homeowners incorporated into each of their defenses and counterclaims (R51-53), the allegation that the Park Owner had a statutory obligation to act toward the Homeowners fairly and in good faith pursuant to S723.021, ~~Fla~~. ~~Stat~~. (1985). They also alleged that the Park Owner had a duty to permit the Homeowners to peacefully enjoy the premises in the absence of one of the grounds for eviction set forth in S723.061, Fla. Stat. (1985).

Their first defense stated that the notices of eviction did not present a ground for eviction authorized under §723.061, since the Park Owner's "wish to vacate" the park was not among the grounds enumerated in the statute, nor were the "many extenuating circumstances" such as the decrepit condition of the park, the cost of making minor repairs to the water and sewer facilities, and the probability of future restrictive legislation among the authorized grounds (R53). The second and third defenses alleged that the Park Owner had acted in bad faith toward the Homeowners because at the time the notices of eviction were issued and at all other times, it had no plans to change the use of the land, and because the motivating purpose of the issuance of the notices of eviction was to evict the Homeowners even though the Park Owner had no lawful ground to do so (R53-54).

The fourth, fifth and sixth defenses alleged that the Homeowners could not be required to vacate in the absence of a

change in the use of the land within the meaning of §723.061(1)(d), Fla. Stat. (1985), and that the Park Owner had breached the duty of good faith by persistently refusing to disclose to the Homeowners what the new use would be. They alleged that in response to their demands that the Park Owner disclose the new use, Kern would respond at different times as follows:

> "I don't know, maybe a pasture";
>
> "That's a lawyer question"; or,
>
> "I have no plans, I just want to resell it [the land comprising the park] at a profit."

The Homeowners alleged that had the Park Owner disclosed a change in use within the meaning of §723.061(1)(d), they would have vacated the premises, but because it refused to disclose any change, they believed that it had no such ground for eviction, and accordingly remained on the premises instead of voluntarily vacating (R54-56). Finally, the Homeowners alleged that the Park Owner had a duty to disclose the new use to the Homeowners *so* that they would know that they should voluntarily vacate the park, but if it was not changing the use, then the Park Owner had a duty not to misrepresent to the Homeowners that it was (R54-57).

In amended Count I of their counterclaims, the Homeowners alleged that soon after purchasing the mobile home park in December 1984, Kern called a meeting of the Homeowners and announced that he was not experienced in running mobile home parks, that he represented a partnership which buys and sells

land at a profit, and that he intended to sell the park, not to operate it as a mobile home park. At various other times he repeated these assertions, and that he had no plans to change the use of the park, but just intended to resell it at a profit. The Homeowners alleged that an intent to sell the land is not one of the exclusive, statutory grounds allowed for eviction, and that eviction on that basis was a violation of the statutory duty of good faith (R58,60).

Further, the Homeowners alleged that the entire park is zoned for mobile home use, and that S723.083, Fla. Stat. (1985), permits no government agency to approve any application for rezoning or to take any action which would result in the removal of the Homeowners without first determining that adequate mobile home parks or other suitable facilities exist for their relocation. They alleged that if the Park Owner was able to rid itself of them prior to seeking a change in zoning, then it would not be required to demonstrate to the zoning authority that adequate mobile home parks or other suitable facilities exist for their relocation. Thus, clearing the park prior to sale would enable the Park Owner to realize a higher price in the sale, since the buyer would not have to meet those responsibilities either (R229-30). The Homeowners sought damages for abuse of process, alleging that the Park Owner devised the guise of an eviction based on a change in use of the land purely in order to maximize the profit from and to facilitate the contemplated sale of the park by removing the Homeowners without meeting the

responsibilities of Chapter **723,** including the zoning provisions of **§723.083 (R58-60).**

In Count II of the counterclaims, the Homeowners alleged that the Park Owner had breached the duty of good faith by embarking on a concerted course of action designed to coerce, harass and intimidate them into leaving the park even though he had no legal right to demand that they vacate. They also alleged that the notices of eviction falsely represented that the Park Owner was changing the use of the land, when no change in use was contemplated, and that Kern on behalf of the Park Owner made bullying, and intimidating statements to the Homeowners at various meetings, such as:

> "My attorney says I can do what I want with the property."
>
> "I have no legal or moral obligation to do anything for you."
>
> "If you go to Court, my attorney will beat you. We just won one case, and I've got another in the works and I'm going to win that too". **(R62).**

The Homeowners further alleged that Kern authorized the park manager to tell them that he would cut their water and sewer service off, and have the Sheriff padlock their homes and "move them out onto the street" if they did not leave voluntarily **(R63).** Further, the Park Owner began to close down park operations and terminate services, including maintenance on the common areas, and termination of maintenance of the park's water and sewer system **(R63).** Finally, the Homeowners alleged that because they are senior citizens of very modest means, their age

and economic status rendered them particularly susceptible to threats of eviction, and that their lives had been disrupted at a time in their lives when they did not wish to have to fight, but to live in peace and harmony (R63-64).

Again, the good faith obligation was presented in the introduction to all of the defenses and counterclaims as the basis for all of them (R52).

Before the summary judgment hearing, the Homeowners submitted a memorandum of law (R342-49), which explained the history and meaning of the Act. At the conclusion they asserted that the Park Owner had failed to disclose its plans for a land use change for the reason that it had no plans to change the use of the land, and stated the following regarding the Park Owner's alleged wish to close the park:

> If it wants to "close the park" so that it can effect a change in use of the land, then it should have disclosed the projected change! On the other hand, if it wants to evict everybody, for some other reason, under fraudulent representations of a change in the land use, then it is attempting to circumvent the positive protections provided to the home owners by Section 723.061, F.S. (R348).

They also argued that the right of first refusal in $723.071 demonstrates the legislative intent to protect mobile homeowners even when a park is sold (R348).

At the beginning of the hearing on the summary judgment motions which had been filed by both parties, the judge announced that there would not be as much time available as had been originally scheduled because he had to start a trial (R3). Thus, at various points during the hearing, he stated that he would not

rule quickly on the matter, but would consider the submissions presented by both sides (R3,5,8). Further, he stated that in order to preclude the need for further hearings he requested counsel for the Park Owner to submit a memorandum in response to the one already submitted by the Homeowners, and would permit counsel for the Homeowners to submit a rebuttal (R5,13,21,23-24).

Before judgment was entered, counsel for the Homeowners had filed (and sought leave to file, which was granted) three affidavits attesting to Kern's off-the-record statements that he planned to sell the park, that his job was to buy and sell property and, in fact, that he had "bought the park with the idea to dispossess all the tenants and resell the land because it was located next to the new mall making the land very valuable" (R331-37,383-85). Those affidavits were before the court before the entry of summary judgment, and supported the Homeowners' own contentions in their fifth and sixth affirmative defenses, as well as elsewhere in their pleadings, where they stated that the Kern had told them that he intended to sell the property, and had bought it for that purpose.

The Homeowners argued at paragraph 7 of the memorandum which they filed in response to the Park Owner's memorandum before the entry of judgment, pursuant to the invitation of the trial judge, that if the Park Owner intended to change the use of the land, it should have disclosed the new use, and its failure to do so leads to the conclusion that it had no such plans (R377). At paragraph 23, they asserted that a park owner may not circumvent §§723.061(1) and 723.071, the provisions governing eviction and

right of first refusal, by evicting everyone and then reselling the vacant land. They asserted the following in that memorandum:

> A park owner may not circumvent Sections 723.061(1) and 723.071, F.S., by evicting everybody and then reselling the vacant land. The Legislature never intended to allow land speculators to come in an buy up parks, evict all the home owners and their homes, resell the then vacant land and take their profits and run (R380-81).

Most importantly, in the same memorandum, the Homeowners argued that even if the court somehow found that the Park Owner was changing the use of the land within the meaning of the statute, the Park Owner still would not be entitled to summary judgment because it had not factually or legally refuted the Homeowners' affirmative defenses, and was therefore precluded from obtaining summary judgment in its favor (R380-81).

After summary judgment was entered, the Homeowners filed their motion for rehearing (R387-98), again arguing that summary judgment could not be entered while affirmative defenses were still outstanding (R388), that the Park Owner's statements about plans to resell the land were inconsistent with the claim that it was changing its use when Kern had said that he had no plans to change the use (R389) and with its obligation to act in good faith (R390), that its real intent was simply to resell the park at a profit (R391,397), and that an intent to resell the land was not an authorized ground for eviction under the statute under the guise of the "change in use" subsection (R392-94). Near the end of the motion, they again addressed the right of first refusal in

S723.071 (R395), and asserted that if vacating the park was deemed to be a change in use,

> then park owners could easily circumvent not only Section 723.061(1)(d), F.S., but also 723.071, F.S., by emptying out the park and then reselling the then empty land. Defendants' FIFTH and SIXTH defenses allege that this is exactly what Plaintiff told them it would do! (R397)

Any doubt about whether the trial judge considered the motion for rehearing was erased by the judge's own letter to counsel for the Park Owner, appearing at page 399 of the record, stating that he had received the Homeowners' motion for rehearing and memorandum, and inviting counsel for the Park Owner to submit a memorandum in response. Finally, consistent with what he had said throughout the hearing, at the beginning of the Summary Judgment itself, the judge stated that he had "reviewed the respective memorandum [sic] of law submitted by counsel," and then made his ruling.

POINTS ON APPEAL

POINT I

CONVERSION OF LAND COMPRISING A MOBILE HOME PARK FROM USE AS A MOBILE HOME PARK TO VACANT LAND, OR TO NO USE, IS NOT A "CHANGE IN USE OF THE LAND" WHICH WILL ALLOW EVICTION OF THE HOMEOWNERS UNDER §723.061(1)(d), FLA. STAT. (1985).

POINT II

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN ENTERED IN FAVOR OF THE PARK OWNER BECAUSE, EVEN IF A CHANGE TO NON-USE IS PERMITTED BY THE STATUTE, THE PARK OWNER HERE HAD NOT BEEN TRUTHFUL ABOUT HIS INTENT, BECAUSE HIS REAL INTENT WAS NOT TO CHANGE THE USE OF THE LAND, BUT TO SELL IT AS SOON AS POSSIBLE.

POINT III

THE HOMEOWNERS ARE ENTITLED TO SUMMARY JUDGMENT ON THE EVICTION COMPLAINTS.

POINT IV

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

SUMMARY OF ARGUMENT

Point I. The trial court erred in granting summary judgment for the Park Owner, because §723.061(1)(d) does not permit eviction in order to vacate the park. The plain language of the statute is that eviction is permitted to change the use of the land to some other use. The primary basis for statutory construction is the plain meaning of the words employed in the statute. Here, the meaning of the word "use" cannot possibly also mean "no use," since the inclusion of one thing implies the exclusion of another, and because that construction places both a positive and a negative meaning in one word. Moreover, interpreting the statute to permit eviction for a change from use to no use invites abuses which would deny mobile home park residents all of the protections the statute provides them in the event the park is sold, or rezoning is sought. A statute must be read as a whole, and Chapter 723 has meaning, and its most

important provisions work, only if this Court determines that the Legislature meant precisely what it said when it permitted eviction only for a "change in use... to some other use.... "

Point 11. Summary judgment should not have been entered in favor of the Park Owner because even if a change to no use is permitted by the statute, the Park Owner here had not been truthful about its intent because its real intent was not to change the use of the land, but to sell it. A violation of the statutory duty to exercise good faith is an affirmative defense to an eviction under Chapter 723, and the Homeowners made an unrebutted record showing of the Park Owner's violation of the good faith requirement. At the very least, outstanding questions of material fact regarding the good faith issues raised in the affirmative defenses remain unresolved, and should have precluded the entry of summary judgment.

Point 111. If the Homeowners are correct on the issue of the interpretation of the eviction statute, they are entitled to the entry of summary judgment in their favor, since the notices of eviction will be rendered invalid.

Point IV. The award of appellate attorney's fees to the Park Owner should be quashed, along with the Fourth District's Opinion.

ARGUMENT

POINT I

CONVERSION OF LAND COMPRISING A MOBILE HOME PARK FROM USE AS A MOBILE HOME PARK TO VACANT LAND, OR TO NO USE, IS NOT A "CHANGE IN USE OF THE LAND" WHICH WILL ALLOW EVICTION OF THE HOMEOWNERS UNDER §723.061(1)(d), FLA. STAT. (1985).

This appeal presents the question of whether Florida law permits a land speculator to purchase a mobile home park for the purpose of turning out the residents and selling the land at a profit. The first issue in this case, certified by the Fourth District, is whether clearing out the residents of a park in order to let the land sit vacant is permitted by the mobile home statute, Chapter 723, Fla. Stat. (1985), which allows only five grounds for evicting mobile home park residents, one of which is for a "change in use of the land...." In other words, does a "change in use" also include a change to no use? The other issues in the case, discussed under Point II of this brief, involve the question of whether a park owner is permitted to evict the residents claiming that he is changing the use of the land, when in fact he is simply emptying the park in order to sell it and evade the provisions of Chapter 723 which would otherwise govern and protect the residents.[2]

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[2]/This Court has held that its jurisdiction to consider issues other than those upon which jurisdiction is based should be exercised when the other issues have been properly briefed and argued and are dispositive of the case. SAVOIE v. STATE, 422 So.2d 308, 312 (Fla. 1982). See also DANIA JAI-ALI PALACE, INC. v. SYKES, 450 So.2d 1114, 1122 (Fla. 1984).

Background of the Florida Mobile Home Act

The groundwork for decision in this case was established by this Court in two decisions which upheld the constitutionality of the statute regulating mobile home park evictions, S723.061, Fla. Stat. (1985), formerly S83.271, Fla. Stat. (Supp. 1972). In upholding the statute's constitutionality, this 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), determined that, because of the unique nature of mobile home ownership, the Legislature properly recognized that mobile home park residents merited special statutory protection.

As the Homeowners argued (R343), in STEWART, this Court stated that regulatory laws which applied to easily-movable tourist trailers and "to rental apartments are inadequate for the regulation of mobile homes. ..." The Court explained that park owners are distinguished from other landlords because, while their tenants rent the area of land on which the mobile home sits, the home itself is privately owned by the tenant who "by requirement of statute or ordinance ordinarily must locate his home in a park." Thus, in STEWART, this Court approved the Legislature's recognition 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 land owner and tenant. Each has basic property rights which must reciprocally accommodate and harmonize.

Id. at 892. Unlike in an ordinary tenancy, in this context there are property rights on both sides, and the park owner "rents

small lots to individual homeowners as distinguished from the landlord who rents apartments comprising a few rooms in a landlord-owned building...." Id.

Moreover, this Court recognized that a "mobile home is not actually mobile.... " Id. In STRONG, this Court discussed the trouble and expense in moving a mobile home[3]; and observed that

> [t]o a large degree, mobile homes ar occupied by people in the lower incom brackets who cannot spend several hundre dollars at the mere whim of a lessor park.

300 So.2d at **886.** Further, "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." STEWART, supra at **891.**

Before the legislation was enacted in **1972,** mobile home residents were usually month-to-month tenants, subject to being evicted on 15 days' notice. One abuse which arose and was discussed in STEWART derived from the existence of the "closed park." A prospective tenant had to either buy a new mobile home from the park owner in order to get in, even though he may have owned one already, or the park owner might accept the "used" home in his park only upon payment of a higher entrance fee. Further,

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[3]/[T]he wheels are generally removed, they are anchored to the ground,...connections with electricity, water and sewerage are made, awnings are frequently attached, and to a large degree they lose their mobility except, unless, and until the wheels are restored, disruption of electrical, water, and sewer connections is had and a certain amount of dismantling and crating is had, all at a substantial expense of the owner of the mobile home....

since the number of home sales was limited by the number of lots in a park, in order to increase the number of sales, park owners would evict present tenants in order to make room for more home sales. 300 So.2d at 891-892. This Court recognized the public policy of the State of Florida underlying the new legislation as follows:

> 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 abuses by their landlords, or mobile home park owners, was found by the Legislature to be essential.
>
> * * * *
>
> 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 relations with park owners and the latters' overriding economic advantage over tenants.

STEWART, supra, at 891-892.

The Statutory Scheme

The protection of mobile home park residents from abuses by park owners is provided by the inter-related provisions of the Florida Mobile Home Act, as set forth in the version of the statute which applies to this case, Chapter 723, Fla. Stat. (1985). The provisions of the Act are numerous, and the following are those which are most relevant to this case.

Underlying all sections of Chapter **723** is **S723.021,** which creates a statutory obligation of good faith and fair dealings. It reads as follows:

> Every rental agreement or duty within this chapter imposes an obligation of good faith and fair dealings in its performance or enforcement.

Every portion of the statute must be read in light of that mandate.

First, the provisions most directly at issue in this case are those governing evictions in **8723.061,** Fla. Stat. **(1985).** Five grounds for eviction are presented, which read in pertinent part as follows:

> **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 and of their need to secure other accommodations[4].

[4]/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.

> (e) Failure of 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.

Provisions governing mobile home lot rental agreements specify that no rental agreement can provide for eviction on any ground other than those presented in S723.061. See gS723.031 and 723.032, Fla. Stat. **(1985).**

Park residents are also protected if the park is sold. Under S723.071, Fla. Stat. **(1985),** if a park owner offers a park for sale, he must notify the homeowners and give them the right to purchase the park if they meet his price, terms and conditions. If he thereafter offers the park at a lower price than that originally specified, the homeowners must be given the opportunity to meet that new price. §723.071(1)(a-c). Further, under §723.071(2), if a park owner receives a bona fide offer to purchase the park which he intends to consider, he must notify the homeowners that he has received that offer, and he must disclose to them the price and material terms and conditions upon which he would consider selling the park, and must consider any offer made by the homeowners.

The statute also protects park residents in the case of a change in zoning. Under Sg723.081 and 723.083, Fla. Stat. **(1985),** the homeowners' association must be given notice of any application for a change in the zoning of the park, and no government agency

> shall approve any application for rezoning, or take any other official action, which would result in the removal or relocation of

> mobile home owners residing in a mobile home park without first determining that adequate mobile home parks or other suitable facilities exist for the relocation of the mobile home owners.

Finally, S723.022, Fla. Stat. (1985) deals with a park owner's general obligations, including that common areas must be maintained, that access to the common areas be provided, and that utility connections and systems for which the park owner is responsible be kept in proper operating condition.

The Certified Question -- Does Use Equal No use?

The Fourth District held that the trial court did not err when it concluded that converting the land comprising the mobile home park from use as a mobile home park to vacant land, or to no use, constitutes a "change in use" within the contemplation of §723.061(1)(d). The Homeowners maintain that this was error based both on the plain language of the statute and the intent of the Legislature in adopting it, because it enables a park owner to evade the protections provided the residents if the land is rezoned or sold, and essentially dismembers Chapter 723.

First, 5723.061 lists five grounds for eviction, and the first sentence of the statute specifies that they are the "only" grounds. Consistent with that intent, the Legislature also provided that no rental agreement could provide for eviction on any other ground but those in S723.061. See §723.031(8), Fla. Stat. (1985). The courts, including this Court in STEWART, have been unanimous in holding that the grounds for eviction stated by the statute are exclusive. See, e.g., STEWART, supra, at 893;

ARTINO v. CUTLER, 439 So.2d 304, 306 (Fla. 2d DCA 1983), rev. denied, 450 So.2d 486 (Fla. 1984); PETERSON v. CROWN DIVERSIFIED INDUSTRIES, CORP., 429 So.2d 713, 715 (Fla. 4th DCA 1983), rev. denied, 440 So.2d 351 (Fla. 1983); DONOVAN v. ENVIRONS PALM BEACH, 309 So.2d 561, 562 (Fla. 4th DCA 1975) (R343-44).

The best indication of the intent of a statute is the language itself, and where a statute does not specifically define words of common usage, they must be given their plain and ordinary meaning (R345). SOUTHEASTERN FISHERIES ASSOC., INC. v. DEPT. OF NATURAL RESOURCES, 453 So.2d 1351, 1353 (Fla. 1984). Here, the pertinent part of S723.061 allows eviction to accommodate a "[c]hange in the use of the land.. .to some other use.. .." In the instant case, the Park Owner's wish to vacate the park stated in the eviction notices is not one of the exclusive grounds allowed for eviction, since the statute exclusively allows only a change from one use to another use.

A vacant lot, by definition, is not in use. BLACK'S LAW DICTIONARY (4th ed. rev.) defines "vacant" as: "Empty; unoccupied....It implies entire abandonment, non-occupancy for any purpose." If the Legislature intended the phrase "change in use" to include a change to vacancy or no use, it would have said so. Indeed, the well-established principle of statutory construction in Florida is that the mention of one thing implies the exclusion of another. TOWER HOUSE CONDOMINIUM, INC. v. MILLMAN, 475 So.2d 674, 676 (Fla. 1985). The plain language of the statute in this case, given its ordinary meaning, does not include both a positive and a negative in the same word. The

Legislature specifically stated a "change in use...to some other use" and not to no use (R397). The primacy of the language employed in a statute was most recently stressed by this Court in THE SHELBY MUTUAL INS. CO. OF SHELBY, OHIO V. SMITH, 15 FLW S15 (Fla. Jan. 11, 1990).

Moreover, even if there is any ambiguity here, this interpretation, and the reasoning behind it, is the only one which comports with the clear legislative intent of Chapter 723, which is manifestly intended to protect mobile home owners from the arbitrary loss of their homes (R348). It is fundamental that legislative intent is the polestar by which a court must be guided in interpreting a statute, and legislative intent involves consideration of the act as a whole, the evil to be corrected, its language, its history, and the state of the law already in existence bearing on the subject. STATE V. WEBB, 398 So.2d 820, 824 (Fla. 1981). If use equals no use in this statute, Chapter 723 is gutted.

First, the heart of the issue might be reached by asking why a park owner cannot simply decide that he no longer wishes to run a mobile home park, clear the land, and just let it sit indefinitely. The answer is because the Homeowners also have property rights (R378). The STEWART and STRONG cases teach that unlike in an ordinary tenancy, here there is a "hybrid type of property relationship" between the park owner and the mobile home owner, both of whose basic property rights must be reciprocally accommodated and harmonized. In STEWART, this Court recognized that home ownership "is an important aspect of family life,"

which due to economic realities is made possible for some people by the purchase of a mobile home. 300 So.2d at 892. A mobile home park is not a parking lot; it is a neighborhood. A park owner cannot simply vacate the park because he is tired of it, anymore than a city can just condemn and bulldoze a neighborhood of homes without proving public purpose and necessity, just because it is tired of it.

However, part of the reciprocal accommodation of rights is that the statute does not force a park owner to operate a mobile home park forever. In the instant case, the Park Owner has argued at various junctures that the change in use provision was inserted into the eviction statute in order to avoid its being found unconstitutional, since otherwise, as this Court stated in STRONG, "it would have the effect of permanently depriving the owner of the land.. .[of] the use of his land for other purposes than a mobile home park." 300 So.2d at 887. However, this does not counter the Homeowners' position in this case. A park owner does not surrender perpetual occupancy rights to others, and as a land owner is entitled to a bona fide change in the use of the land, if proper notice is given. But if he is going to sell the property, regardless of to whom he sells it, the fact of the sale itself is a decision to relinquish his ownership rights and, therefore, the statute requires him to respect the residents' rights, and give them a chance to buy the land.

Thus, due to the "hybrid type of property relationship," the statutory scheme reciprocally accommodates and harmonizes the property rights of the park owner and the property rights of the

park residents. It respects the property rights of the park owner by allowing him to sell the land, or to continue to own it, but to change its use. It also respects the property rights of the residents by giving them a chance to buy the land if the park owner decides to relinquish ownership, and by not allowing the residents to be displaced if the land is not otherwise going to be used.

The statute has this symmetry and logic to it only if it means exactly what it says -- that the word "use" means use, and not no use. Allowing residents to be thrown out even though the property will not be used is absolutely inconsistent with the legislative intent to protect mobile home residents, because then they would be at the mercy of the mercurial whim of a park owner who is simply tired of them, and wants a vacant lot in their place. This would return the state of the law to pre-Chapter 723 days, when as the Court explained in STEWART, mobile home residents could be evicted "for no reason except the park owner's desire to be rid of them." 300 So.2d at 892.

The relationship involved is not simply one of landlord and tenant, nor is it a tenancy like any other, since there are basic property rights on both sides. Id. The moral of the STEWART case is that when a park owner either builds or buys a mobile home park, he must know that when he decided to do so, he thereby voluntarily surrendered some of the flexibility of an ordinary landowner. Once the residents are in place, his land has become a neighborhood, and his rights are not unfettered. As the Homeowners argued here, when the Park Owner bought Regency Park,

it also bought the governing statute (R380). If a park owner can evict the residents to change the park from use to no use, then he is no different then any other landlord, he has not given up any flexibility at all, and the residents are at his mercy.

Moreover, defining use to include no use opens the statute to abuse by a dishonest owner which totally abrogates the important benefits of Chapter 723. If an owner can evict everyone simply to vacate the land, and not to change its use, when his real intention is to vacate the park in order to sell it, he can evade all of the other protections which the legislation provides the residents. By evicting them before offering the land for sale, the owner can evade the right of first refusal provided in S723.071, since the residents will have already been cleared out (R348,381,395). If a dishonest owner can evict the residents based on an alleged change to no use, then he can obtain rezoning of the property more easily, by evading the protection of S723.081 which requires notice to the homeowners, and the important protection of S723.083, which allows no government agency to approve an application for rezoning without a demonstration that adequate mobile home parks or other suitable facilities exist for the relocation of the mobile home owners.

As the Homeowners in the instant case alleged in their first counterclaim as amended, the current zoning of the Regency Park, under two separate classifications, is only for mobile home use. As they argued (R229-30), allowing eviction and a later sale without compliance with these statutes permits the Park Owner, or

any new buyer, to obtain rezoning more easily, for the obvious reason that the Homeowners will have already been removed and $723.083 will have been evaded. Of course, this would enhance the sale price of the land, either because it has already been rezoned, or because a new buyer will not face the impediments to rezoning posed by SS723.081 and 723.083.

The worst scenario, which is presented by the facts of this case, is that construing the statute to allow eviction for alleged no use permits roving land speculators to buy mobile home parks, clear out the residents without affording them any of the safeguards regarding sale or rezoning, and then sell the land for development at a greatly enhanced price, when selling it was the hidden purpose for buying it in the first place. This totally shatters the statutory obligation of good faith and fair dealings imposed by S723.021 on the performance of every "duty within this chapter...."

Permitting land speculators to swoop like vultures on any attractively-located mobile home park is utterly inconsistent with the manifest intent of the Legislature to protect persons such as the Homeowners in this case (R380). It means two things. First, Chapter 723 might as well be torn out of the Florida Statutes, since it would be rendered meaningless. Second, if what has happened in the instant case is permissible, then there is no reason why predatory real estate interests could not clear out any mobile home park in the state simply by claiming a change in the use of the land to no use, and evicting. That is why this case has importance beyond the boundaries of Regency Park.

There is no real difference between what has happened here and the "closed park" problem described in the STEWART case, except that this scenario is even worse. In the "closed park" scam, a park owner would evict a resident just to resell the lot. Here, the Park Owner seeks to evict all the residents in order to resell the entire park. Statutes must be read in pari materia, and all parts of an act should be read together to achieve a consistent whole. E.E. MARSHALL v. HOLLYWOOD, INC., 224 So.2d 743, 749 (Fla. 4th DCA 1969). Chapter 723 has meaning, and its most important provisions work, only if this Court determines that the Legislature meant precisely what it said when it permitted eviction only for a "change in use...to some other use.. .."

POINT II

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN ENTERED IN FAVOR OF THE PARK OWNER BECAUSE, EVEN IF A CHANGE TO NON-USE IS PERMITTED BY THE STATUTE, THE PARK OWNER HERE HAD NOT BEEN TRUTHFUL ABOUT ITS INTENT, BECAUSE ITS REAL INTENT WAS NOT TO CHANGE THE USE OF THE LAND, BUT TO SELL IT.

The Homeowners raised a variety of issues in the trial court, but made two main contentions. The first was that an intent to vacate a park is not within the exclusive grounds for eviction specified by the statute. That was the legal issue which the trial court addressed in the Summary Judgment, and which has been certified to this Court.

The Homeowners' second main contention presents an independent ground for reversal not reached by the Fourth

District. That is, even if a change to no use is permitted by the statute, the Park Owner here had not been truthful about its intent because its real intent was not to change the use of the land, but to sell it, since it is a land speculator and had bought the park for that very reason. The Fourth District erroneously held that this good faith issue was not properly before it because it had not been presented to the trial court. The preservation issue will be argued later under this Point, and the Homeowners will first discuss the merits of the issue.

The Merits

As the Homeowners argued below (R381,388), it is well-established that a plaintiff moving for summary judgment must disprove or establish the legal insufficiency of affirmative defenses filed by a defendant before the plaintiff may be entitled to summary judgment. As stated in HOWDESHELL v. FIRST NATIONAL BANK OF CLEARWATER, 369 So.2d 432, 433 (Fla. 2d DCA 1979):

> In order for a plaintiff to obtain a summary judgment when the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish the legal insufficiency of the defenses [citations omitted]. Appellee made no attempt to disprove the defenses.... Without any evidentiary submission by Appellee to refute the affirmative defenses, Appellants had no duty to submit any evidence in support of its defenses.

Accordingly, because the appellee in HOWDESHELL had not refuted the defenses by evidence, and because the legal insufficiency of

the the defenses was not demonstrated, the appellate court reversed the trial court's entry of summary judgment.

The Homeowners in the instant case raised seven affirmative defenses, and they asserted that not one of them had been addressed by the Park Owner either by way of factual refutation or legal insufficiency (R381). Affirmative defenses may not simply be ignored by a plaintiff moving for summary judgment or by a court entertaining such a motion. As stated in 49 Fla. Jur. 2d, "Summary Judgment" S31 at 453:

> When moving for summary judgment in cases in which there are affirmative defenses on file, a plaintiff must do more than merely establish the case made by his complaint; he must also show the insufficiency, inapplicability, or falsity of the affirmative defenses on file.

(Footnote omitted.) The Fourth District itself succinctly stated the rule in CUFFERI v. ROYAL PALM DEVELOPMENT CO., INC., 516 So.2d 983, 984 (Fla. 4th DCA 1988), as follows:

> A summary judgment should not be granted when there are issues of fact raised by affirmative defense which have not been effectively factually challenged and refuted.

Underlying the affirmative defenses raised by the Homeowners in the instant case are allegations of breach of the statutory duty of good faith and fair dealings mandated by S723.021. The essence of the first three affirmative defenses was that the Park Owner had acted in bad faith at the time the notices of eviction were issued and at all material times because it had no plans to change the use of the land, and sought eviction without lawful grounds to do so (R53-54). The fourth defense alleged bad faith

in the Park Owner's persistent refusal to tell the Homeowners what the new use of the park land would be. Accordingly, the Homeowners believed that the Park Owner had no such ground for eviction and remained on the premises instead of leaving voluntarily (R54-55). The fifth and sixth defenses alleged breach of good faith because the Park Owner's own statements (via Kern) to the Homeowners indicated that it had no plans for a change in use, and that it in fact planned to resell the land at a profit (R55-57). In those defenses, the Homeowners set forth the Park Owner's responses to their demands that it disclose the nature of the alleged change in use, as follows:

> "I don't know, maybe a pasture";
>
> "That's a lawyer question"; or,
>
> "I have no plans, I just want to resell it [the land comprising the park] at a profit." (R55,56).

The type of allegations raised by the Homeowners clearly cons itute affirmative defenses to eviction actions under Chapter 723. The Fourth District *so* recognized in CROWN DIVERSIFIED INDUSTRIES v. WATT, 415 So.2d 803, 806 (Fla. 4th DCA 1982), where it stated:

> We are in agreement with appellees that the legislature intended to grant broad rights to mobile home park occupants to be free from unreasonable evictions. Indeed, we attach much significance to the fact that no allegations of fraud or bad faith have been lodged by appellees against appellant. In our view, proof of bad faith on the part of the park owner would constitute a valid defense to any attempt to remove tenants from existing mobile home lots and could serve as the basis for an independent cause of action by tenants wrongfully evicted through

> fraudulent representations of contemplated improvements by the park owner.

(Footnotes omitted.) The Park Owner's statements quoted in the affirmative defenses are clearly inconsistent with a conclusion that it was changing the use of the land "to some other use," within the language of §723.061(1)(d), since the Park Owner specifically stated that there were no plans to change the use.

Moreover, the five grounds for eviction specified in §723.061 are exclusive, and eviction in order to sell is not included among them. The meaning of the word "use" (or even "no use"), does not equate with the meaning of the word "sell" by any stretch of the dictionary (R379-80). Since evicting in order to sell is not within the exclusive grounds for eviction, the Park Owner's refusal to openly admit that that was its intent violates both §723.061 and the statutory requirement of good faith which was recognized as an affirmative defense to an eviction by the court in CROWN DIVERSIFIED INDUSTRIES v. WATT, supra.[5]

The defensive allegations of bad faith which were lacking in the WATT case are clearly present here, supported by the Homeowners' unrebutted record showing, and should have precluded the entry of summary judgment against them. At the very least, outstanding questions of fact remain regarding those allegations.

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[5]/The Homeowners also alleged that the Park Owner's callous and evasive statements to the effect that it is a "lawyer's question" as to what the new use will be and that it "doesn't know what the new use will be, maybe a pasture," are clearly inconsistent with the statutory obligation to act toward them in "good faith." (R390)

The existence of good faith, like intent, is a question of fact not susceptible to disposition on summary judgment. See 55 Fla. Jur. 2d "Trial" §74 at 409. Especially here, where a party is under a statutory obligation to exercise good faith, summary judgment cannot be entered. In WOLOFSKY v. WALDRON, 526 So.2d 945, 946 (Fla. 4th DCA 1988), the Fourth District reversed a summary judgment because of the existence of genuine issues of material fact regarding the exercise of good or bad faith by a vendor of real property. The same conclusion should apply here, where the Park Owner neither negated nor contradicted any of the Homeowners' affirmative defenses.

Moreover, although the Homeowners had no obligation to make a record showing supporting their affirmative defenses, nevertheless they provided a record showing that the Park Owner's intent was to sell the park, not change its use, in the affidavits of Roger Hill, Jay Knohl, and Howard E. Googe, Jr., which are quoted in the Statement of Facts in this brief (R333-37). This record showing was unrebutted. Of course, the introductory allegations to the Homeowners' affirmative defenses and counterclaims also stated that Kern had said that he was inexperienced at running mobile home parks, that he represented a partnership which buys and sells land at a profit, and that he intended to sell the park and not to operate it as a mobile home park (R58).

In response, the Park Owner made no record showing whatsoever that it was indeed changing the use of the land (even if that meaning includes a change to no use , and not simply

dumping the Homeowners in order to sell it. The Park Owner submitted no affidavits, no depositions, no transcripts, or any other documents or proof, to show that it was changing the use of the land and not evicting the Homeowners to facilitate a rezoning and sale. Thus, the Park Owner was absolutely not entitled to summary judgment. In PARK ROAD MOBILE MANNOR V. BRIEDEN, 409 So.2d 1069 (Fla. 4th DCA 1981), the Fourth District held that it was error to grant a summary judgment when

> [a] review of the record discloses the summary judgment was entered totally without sworn proof as to any of the factual issues made by the pleadings. There was simply nothing in the court file upon which summary judgment could have been based.

In sum, even if the statute permits a change from use to no use, summary judgment should not have been entered here because the unrebutted record showing is that the Park Owner dishonestly claimed that it intended to change the use of the land, when in fact its intent was to evict the Homeowners in order to sell. This fact, or at the very least, the existence of unresolved questions of fact regarding bad faith posed by the affirmative defenses, present independent grounds for reversal which alone are dispositive of this appeal.

Preservation

In the final paragraph of its Opinion in this case, the Fourth District identified the good faith issue exclusively with the issue of the denial of a right of first refusal, and somehow concluded that the issue of the Park Owner's breach of the

statutory duties of good faith and fair dealings had not been raised in the trial court. Respectfully, the Fourth District misapprehended the good faith issue which the Homeowners had presented to it, and overlooked the fact that that issue was thoroughly raised and argued in the trial court.

The Homeowners here will rely on the portion of their Statement of the Facts entitled "Preservation" to demonstrate the many ways in which the issue of the breach of good faith was raised in the trial court. From the very first pleadings which they filed and on through a rehearing, as recited in the Statement of the Facts, the Homeowners argued repeatedly that the Park Owner had not been truthful about its intent from the very beginning, and that eviction in order to sell violated the eviction, sale and zoning provisions of the Act, all of which constituted a violation of the statutory duty of good faith under S723.021. The Homeowners raised the affirmative defense of good faith recognized in the WATT case in a variety of ways in five of their seven affirmative defenses, the fifth and sixth of which specifically incorporated Kern's statements that he wanted to resell the land at a profit. The Homeowners also raised the issue of bad faith in their counterclaims, in their memoranda of law presented to the trial court before the entry of summary judgment, and in their motion for rehearing after the entry of judgment.

The possible source confusion was what took place at the summary judgment hearing itself. However, the transcript of the hearing shows (R1-25), that the amount of time which had been

originally scheduled was not available because the judge had to begin a trial, and for that reason he specifically invited the parties to file post-hearing memoranda (in addition to the memorandum which had been filed before the hearing by the Homeowners) for the court's consideration before judgment. He stated that he would not decide the issue quickly, but would consider the parties' submissions. In their pre-judgment memorandum, the Homeowners specifically argued that summary judgment was precluded by the existence of outstanding affirmative defenses, which the Park Owner had not addressed "either by way of factual refutation or legal insufficiency. Therefore Plaintiff [the Park Owner] is absolutely precluded from obtaining summary judgment in his favor." (R380-81). In the Summary Judgment itself, the trial judge stated that he had reviewed the memoranda submitted to him, and when the Homeowners submitted further legal argument in writing on rehearing, he specifically invited counsel for the Park Owner to respond. A court's discretion is narrowed when a motion for rehearing from a summary judgment is filed, and "every disposition should be indulged in favor of granting the motion." HOLL v. TALCOTT, **191 So.2d 40, 46-47** (Fla. **1966).**

Considering the fact that at various points during the hearing the trial judge requested the parties to submit memoranda in order to preclude the need for further hearings, and considering the fact that the memoranda as well as the affidavits filed by the Homeowners were before the judge before the entry of judgment, and finally considering the many times the good faith

issue was raised by the Homeowners from the beginning through rehearing, it boggles the mind to wonder how the issue of good faith could have been raised and argued more thoroughly in the trial court.

In fact, in briefing and at oral argument, the Park Owner never contested preservation of the good faith issues before the Fourth District. However, in response to the Homeowners' motion for rehearing in the Fourth District, the Park Owner focused on one portion of the summary judgment hearing (R21-22), and argued that both sides argued that there were no outstanding questions of fact. This argument overlooks the rest of the Record, especially the fact that in paragraph 1(a-g), of their summary judgment motion (R317-18), the Homeowners very carefully had spelled out the only material facts about which they maintained there was no dispute. Both sides sought summary judgment only on the legal issue (the meaning of the statute), and the Homeowners' motion shows that the facts listed there related only to the legal issue. No concession was ever made about all the other facts underlying the affirmative defenses and the good faith issue. Quite obviously, if the Homeowners had been successful in obtaining summary judgment on the legal issue, it would have mooted the issues in the seven affirmative defenses in the case. Thus, it is absolutely incorrect to argue that there was any stipulation that no issues of material fact remained outstanding in the case at all, since the Homeowners had been very careful to specify which facts were undisputed, and made it clear in their submissions to the trial court that summary judgment could not be

entered against them because of their unrebutted affirmative defenses.

Moreover, the fact that the Homeowners filed their own motion for summary judgment does not preclude them from contesting that there were outstanding questions of material fact which should have negated the entry of summary judgment against them. Neither did it preclude their requests for entry of summary judgment in their favor. See SUNRISE LAKES CONDOMINIUM APARTMENTS, PHASE 111, INC. v. HECHTMAN, 446 So.2d 272 (Fla. 4th DCA 1984); DANIEL LAURENT, INC. v. CORAL TELEVISION CORP., 431 So.2d 1047 (Fla. 3d DCA 1983). These rules apply with special force here, where the Homeowners carefully delineated in their summary judgment motion the material facts about which they maintained there was no dispute.

In sum, this case presents two independent bases for reversal. The first is the meaning of the statute. The second is that even if the statute allows no use as a change in use, the Homeowners made an unrebutted record showing that the Park Owner intended to sell the land, not change its use, in violation of the statutory obligation of good faith. Alternatively, there are outstanding questions of material fact raised by affirmative defenses regarding whether the Park Owner had violated the mandate of good faith and fair dealings. The second basis for reversal was exhaustively pled and argued, and should be considered by this Court.

POINT III

THE HOMEOWNERS ARE ENTITLED TO SUMMARY JUDGMENT ON THE EVICTION COMPLAINTS

The Homeowners moved for final summary judgment on the Park Owner's complaints (R317-18), specifying the facts which were material to the meaning of §723.061(1)(d), and the validity of the grounds for eviction recited in the notices of eviction. After arguing that the grounds recited in the statute are exclusive, they asserted that "[a]s a matter of law, neither 'extenuating circumstances', 'the cost of making repairs', 'the probability of further restrictive legislation', nor a park owner's 'wish to vacate' a park are among the EXCLUSIVE grounds for eviction authorized by Section 723.061(1), F.S." Therefore, they requested the trial court to enter summary judgment against the Park Owner on its eviction complaints, and award costs and attorney's fees to the Homeowners (R318-19).

If the Homeowners are correct on the meaning of the statute as argued under Point I, then they are entitled to an order from this Court directing the entry of summary judgment in their favor. If the Park Owner's "wish to vacate'' the park is not a valid ground for eviction, neither are the other recitations in the notices, for indeed the Park Owner has never even argued that they are within the grounds permitted by the statute. Further, the only record showing in the case has been made by the Homeowners, and that record showing clearly establishes that the Park Owner did not intend to change the use of the land, but

intended to sell it, and the Park Owner has made no record showing otherwise.

If summary judgment is entered on the present complaints for the Homeowners, then if the Park Owner still intends to evict them, it will be required to serve new notices of eviction. Those notices will be subject to the amendments to the eviction statute which were enacted after the notices in the instant case were served, §723.061(2), Fla. Stat. (Supp. 1986). Those provisions specifically provide mobile home owners the right to object to the change in use by petition for administrative or judicial remedies. It also requires that within 90 days of the notice of eviction, the park owner must notify the residents that he will either buy their mobile homes, relocate them to another park owned by the same owner, or pay to relocate the mobile homes to another mobile home park. In sum, as they did in the Fourth District, here the Homeowners assert that it is they, and not the Park Owner, who are entitled to summary judgment.

POINT IV

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

When it issued its Opinion in this case, the Fourth District also entered an Order awarding appellate attorney's fees to the Park Owner pursuant to the prevailing party fee statute in the Act, §723.068, Fla. Stat. (1985). If the Fourth District's Opinion in this case is quashed, the attorney's fee order should be quashed as well.

CONCLUSION

Based on the foregoing Argument, Petitioners respectfully request that this Court quash the Opinion filed by the Fourth District in this case, quash the award of attorney's fees to Respondent, and direct that summary judgment be entered for Petitioners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 25th day of JANUARY, 1990 to BOB L. HARRIS, ESQ., Post Office Box 10095, Tallahassee, Florida 32301; and THOMAS A. MUNKITTRICK, ESQ., 4020 Portsmouth Road, Largo, Florida 34641.

JOANNA R. MARTIN, ESQ.
300 Colorado Avenue
Suite 202
Stuart, Florida 34994
and
Russell S. Bohn, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Petitioners

BY: Russell S. Bohn
RUSSELL S. BOHN
Fla. Bar No. 269824

BY: Joanna R Martin
JOANNA R. MARTIN
Fla. Bar No. 168769

DH/HARRIS.BRF/deb