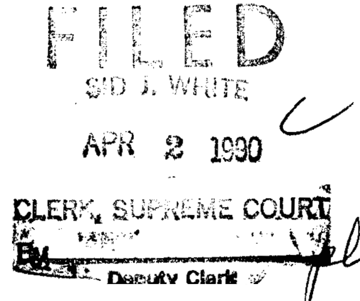
IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA



JENNIE HARRIS, et al.,

Petitioners,

v. CASE NO: 75,097

MARTIN REGENCY, LTD.,
a Florida Limited Partnership,

Respondent.

______________________________/

CONSOLIDATED REPLY BRIEF OF PETITIONERS

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PREFACE

The amici curiae, The Federation of Mobile Home Owners of Florida, Inc. and the Florida Manufactured Housing Association, Inc., will be referred to as "FMHO" and "FMHA" respectively. This brief is in reply to the Answer Brief of Respondent and the Brief of Amicus Curiae FMHA.

STATEMENT OF THE CASE AND FACTS

The Homeowners will rely on the Statement of the Case and Statement of the Facts presented in their Initial Brief. They specifically reject FMHA's assertion that the Park Owner assisted over 90% of the residents to move and to secure other accommodations. The record citation is to the argument of the Park Owner's counsel at the summary judgment hearing. It is axiomatic that arguments of counsel are not evidence. Moreover, the Homeowners maintain that the departure of many of the residents was caused by bullying, threatening, and termination of services as alleged in their second counter-claim (R62-63), and not by the beneficence of the Park Owner.

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).

In its argument regarding the meaning of §723.061(1)(d), Fla. Stat. (1985), the Park Owner ignores the plain language of the statute. It begins by arguing that if a particular use is being made of the land, and that use ceases to exist, such constitutes a change in the use of the land. This simply ignores the issue in this case, which is whether the statutory language itself, which specifies a "change in use of the land.. .to some other use " also includes a change from use to alleged "no use". As the Homeowners have argued, where the statute says the word "use," it thereby excludes its opposite, "no use," under the standard principle that the inclusion of one thing is the exclusion of another. Thus, in response to the questions at page 4 of the Park Owner's brief, once the homes are removed and the land is vacant, the change is from use to no use, contrary to the statute which specifies a change in use "to some other use."

Regarding the Park Owner's discussion at pages 4-9 of its brief concerning the intent and history of the statute, the Park Owner is correct in stating that the change in use subsection was enacted in order to cure the possible constitutional defect posed by a requirement of perpetual tenancy. However, the instant case does not involve perpetual tenancy. So long as a park owner is given the option to change the use of the land, there is no perpetual tenancy, as this Court's opinions established in STEWART v. GREEN, 300 So.2d 889 (Fla. 1974) and PALM BEACH MOBILE HOMES, INC. v. STRONG, 300 So.2d 881 (Fla. 1974). Nor does requiring that the change be to another use, and not to no use, create a perpetual tenancy. It only guarantees

that if the property is not going to be otherwise put to use, once a neighborhood has been established there, the homeowners' rights not to be disrupted at the whim of the landowner are protected. This is consistent with the accomodation of property rights arising out of the hybrid type of property relationship explained by this Court in STEWART.

Moreover, the Park Owner's discussion totally omits another, crucial aspect of the legislative history of the Act, which is thoroughly explained at pages 12 and 13 of the amicus brief of FMHO, that is, eviction without cause.

At the conclusion of its opinion in STRONG, this Court in dicta observed that it would be constitutionally permissible to permit termination of a tenancy of substantial duration on no less than twelve months' notice. 300 So.2d at 888. In fact, the legislature enacted **§83.759(1)(e),** Fla. Stat. (1983), which permitted eviction "without cause" upon twelve months' notice. However, when the Act was transferred to Chapter 723 in 1984, and various amendments were made, the eviction without cause provision was deleted, and has not appeared since. **See** §723.061, Fla. Stat. (Supp. 1984). As the court stated in BACON v. MARDEN, 518 So.2d 925, 926 (Fla. 3d DCA 1987), when the legislature amends a statute and in so doing omits a portion of it, common sense dictates that the legislature intended to remove that portion of the statute from the law. There is no clearer commentary on the intention of the legislature regarding eviction without cause than its elimination, and what the Park Owner

essentially seeks to do here is to reinstitute it under the guise of a change in use to vacant land.

The Park Owner's review of the history of the statute is woefully incomplete in its omission of the history of eviction without cause, because permitting eviction simply to clear the land at the whim of the landlord is the functional equivalent of eviction without cause. To say "I want to evict so the land will be vacant," is the same as saying "I want to evict because I want you out," which is the same as saying "I want to evict because I want to evict." That, of course, is eviction without cause.

At pages 7 and 8 of its brief, the Park Owner quotes from a meeting of a legislative subcommittee, and the Homeowners welcome those quotations. A reading of the first statement by Representative Allen Becker, along with the statements by Chairman Bill Andrews and Representative Curt Kiser, shows that in each instance discussed, the change was from one use to another <u>use</u>, not to no use. Perhaps the best statement is the second quotation from Representative Becker, where he states: "When somebody sells or is building something else.. .it is only fair to give them this right...." Representative Becker's statement is precisely the argument by the Homeowners in the instant case. If a park owner wishes to sell the land, §723.071, Fla. Stat. (1985) provides that right, along with the mechancism for preserving the rights of the homeowners. It is precisely that statute which the Park Owner in this case has blatantly attempted to evade. Further, in Representative Becker's words, "When somebody.. .is building something else.. .;" again, this is

precisely the Homeowners' argument, that the change in use provision was enacted to allow a change in **use**, such a "building something else," but was not enacted to allow the homeowners to be dumped just because the park owner is tired of them, or worse, to be dumped as in this case because the park owner wants to sell the land without according the homeowners the rights guaranteed them in the sale and zoning provisions of the Act. **See** §§723.071 and 723.083.

The Park Owner's interpretation of Representative Becker's statement, claiming that it sanctioned a sale following a change in use eviction, is belied by the sale provisions of the statute. If the Park Owner's interpretation of Representative Becker's statement is correct, there is nothing left of §723.071, which is precisely what the Park Owner and its amicus FMHA want, because then a park owner would be allowed to evict simply because he wanted to evict. Finally, the fact that some of the new uses discussed by the legislators would result in the land being vacant for a short interval before the new use is begun is not counter to the Homeowners' position in this case. The Homeowners have never argued that there can be no hiatus between an old and a new use. The issue here is not a transitional vacancy, but alleged permanent vacancy. Further, the examples cited by the legislators support the Homeowners, not the Park Owner. The premise of each example is an honest intent to begin a new use, unlike here, where change in use is a cover for an intent to sell.

Moreover, the Park Owner's argument at pages 8-9 of its Brief that the "unusually long" advance notice of eviction of twelve months is the only (and sufficient) protection afforded mobile homeowners is refuted by the repeal of the eviction without cause provision, which itself required twelve months' notice. Obviously, the legislature did not feel that long notice was any protection for someone who was losing their home for no reason. Moreover, the Park Owner's statement at page 9 that 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 is refuted by the 1986 amendments to the change in use provision, which include a specific mechanism to contest the change in land use by petitioning for administrative or judicial remedies. **See** §723.061(2), Fla. Stat. (Supp. 1986); SMITH v. DEPT. OF BUSINESS REGULATION, 504 So.2d 1285, 1289 (Fla. 1st DCA 1986) (in seeking legislative intent it is proper to consider acts passed at subsequent legislative sessions); DADE COUNTY v. AT&T INFORMATION SYSTEMS, 485 So.2d 1302, 1304-5 (Fla. 3d DCA 1986).

At pages 10-12 of its brief, the Park Owner presents a "parade of horribles" which it claims will result from the Homeowners' argument regarding the meaning of the statute. The Park Owner's hypotheticals actually illustrate the issue for the Homeowners in this case. The hypotheticals about building multi-family dwellings instead of single-family dwellings, about plans to build a shopping center, and about financing falling through, all share the same underlying assumption. That is, in

each of those hypotheticals the Park Owner acted in good faith, intending to build single family dwellings, a shopping center, or some other use following eviction of the residents. If the original good-faith plans did not work out, of course the statute does not bind the Park Owner to that intent. The point is that there was an initial, good-faith intent to change the use of the land (not to sell it after it is vacated, as here), consistent with the statutorily-mandated requirement of good faith, which is totally absent in the instant case.

Contrary to the Park Owner's interpretation at the top of page 10, the Homeowners have never argued that there could be no interval of time between the departure of the last resident and the beginning of the new use, so long as there was a bona fide intent at the time the eviction notices were sent and thereafter to put the land to another use, and not simply to displace the Homeowners in order to facilitate the sale of the land, as happened here. What the statute does **not** permit is a lie--eviction of the homeowners on the pretext of plans to change the use of the land, followed by a sale of the land after a brief period of vacancy intended to mask the real intent. If, as alleged in the Homeowners' defenses, especially the fifth and sixth defenses, the Park Owner intended from the time the notices of eviction were sent to simply dump the Homeowners, lie about his intent, and then sell the land, then the Park Owner is guilty of blatant bad faith. Such constitutes a defense to eviction actions, and subjects the Park Owner to a suit for wrongful eviction by the displaced Homeowners, as the Fourth District

recognized in CROWN DIVERSIFIED INDUSTRIES v. WATT, 415 So.2d 803, 806 (Fla. 4th DCA 1982). Absent from all of the Park Owner's hypotheticals is a deliberate dumping of homeowners by a land speculator, immediately after his purchase of the park for that purpose, as in the instant case.

Finally, the Park Owner's constitutional argument at pages 12-14 of its brief is without merit. The Park Owner's argument focuses exclusively on a land owner's right to use his property as he chooses. In so focusing, the Park Owner ignores the teaching of the STEWART and STRONG cases. First, while the right to use one's property as one wishes is a fundamental constitutional right, that right is not immune from regulation or limitation in the interest of the common good pursuant to the police power of the state in areas relating to the public health, safety, and general welfare. STRONG, 300 So.2d at 884. Second, the Park Owner forgets the clear teaching of STEWART that it is not the only party with property rights here. In STEWART this Court stated that the legislature recognized that both the park owner and the homeowners have "basic property rights which must reciprocally accommodate and harmonize, and that a mobile home park involves "a hybrid type of property relationship.. .." 300 So. 2d at 892. The Park Owner chooses to forget that the Homeowners have property rights also which are entitled to protection under the Fifth Amendment to the United States Constitution and Art. I, section 2 of the Florida Constitution. The Park Owner's argument here is based on the very premise rejected in STEWART, where this Court stated that a park owner is

not like any other landlord who rents rooms in a landlord-owned building. Id. at 892.

The issue in this case does not present the problem of perpetual tenancy because a park owner is free to sell the park, or to use it for something else. However, if he is not going to use the land in some other manner, then he must leave the homeowners alone, because they also have property rights. This is consistent with the following treatise quotation presented by this Court in STRONG:

> "In the mobile home field, the need is for specific legislation which recognizes the mobile home as a unique but permanent type of housing and provides standards which are consistent with its particular nature."

300 So.2d at 886. What the Park Owner chooses to forget is that its rights are not totally unfettered, like an ordinary land owner. The STEWART and STRONG cases teach that when one builds or purchases a mobile home park, the park owner knowingly and voluntarily gives up some of the unlimited rights of an ordinary land owner. A purchaser of unimproved land may keep it as a vacant lot, but a purchaser of a mobile home park may not buy the park in order to turn it into a vacant lot, especially if his real interest is to buy it in order to sell it as vacant land. The Park Owner in this case did not have to buy this park, but when it did, it also **"bought"** the bundle of responsibilities that come with it. As the Homeowners argued in their memoranda in the trial court, when the Park Owner bought the park, it also "bought" the statute.

POINT II

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 HAS NOT BEEN TRUTHFUL ABOUT ITS INTENT, BECAUSE ITS REAL INTENT WAS NOT TO CHANGE THE USE OF THE LAND, BUT TO SELL IT.

Under Points III and IV of its brief, the Park Owner attempts to meet the arguments raised under Point II of the Initial Brief. Because the Park Owner knows that this issue is its Achilles heel, its strategy is to dismiss the Homeowners' affirmative defenses as "paper issues."

First, the Park Owner argues that the issues were not preserved for appeal, attempting to capitalize on the content of the final paragraph of the Fourth District's opinion, which everyone knows astonished all parties to this case. Significantly, while the Park Owner argues that the issues were not preserved, it does not contest the content of the "Preservation" portion of the Statement of the Facts in the Initial Brief. In its brief and at oral argument in the Fourth District, the Park Owner never challenged preservation, and never argued that the issues were not presented to the trial court.

Instead, the Park Owner asserts at pages 15-97 of its Brief that there are no outstanding questions of material fact because both sides moved for summary judgment, and because both attorneys stated that there were no disputes of material fact at the hearing. That is incorrect. Case law does teach that a party may not seek summary judgment asserting that there is no issue of fact with regard to a specific question and then on appeal take

the contrary position that there is a material fact issue on the same question. COUCH CONSTRUCTION CO. v. FLORIDA DEPT. OF TRANSPORTATION, 537 So.2d 631, 632 (Fla. 1st DCA 1988); DANIEL LAURENT, INC. v. CORAL TELEVISION CORP. , 431 So.2d 1047, 1048 (Fla. 3d DCA 1983). However, cross-motions for summary judgment do not mean in themselves that no genuine issues of material fact exist anywhere in the action. COUCH, supra.

As the Homeowners explained at pages 44-47 of their Initial Brief, in their own summary judgment motion, wherein they asked for summary judgment on the naked legal issue that a park owner's desire to "vacate the land" was not an authorized ground for eviction under §723.061(1), they were very careful to specify those facts about which they maintained there was no dispute (R317-318). Those specified facts were the facts relevant to the legal issue of the meaning of **§723.061(1)(d),** and it was only those specified facts about which the Homeowners' counsel stated there was no dispute.

The Homeowners further pointed out in their post-hearing memorandum of law, which was solicited by the trial judge since he had cut the time for the oral hearing (R5, 13, 21, 23-24), and again in the motion for rehearing (R388-394), that even if a park owner's desire to "vacate the land" was an authorized ground for eviction, summary judgment could not be entered against the Homeowners, because they had raised affirmative defenses which had not been refuted by the Park Owner (R380-381).

Among the affirmative defenses raised by the Homeowners were allegations that when asked what the new use of the land would be, Kern's responses included:

> I have no plans, I just want to resell it [the land comprising the park] at a profit.

See The Homeowners' fifth and sixth defenses (R55-56).[1] Since a park owner's desire to sell a park is not, and never has been, an authorized ground for eviction under §723.061(1), the Homeowners' defenses raised issues of material fact which absolutely precluded the entry of summary judgment against them.

The Park Owner next attempts to avoid the bad faith issues by arguing incorrectly under its Point Four that the affirmative defenses did not present disputed issues of fact, but simply restatements of the legal issues which have already been rejected by the courts below. The overriding issue of fact in this case is this: even if the Court determines that a change in use includes a change to no use, did the Park Owner, at the time the notices of eviction were issued, truly intend to change the use of the land to vacant land, or did it dishonestly allege an intent to change the use in the eviction notices, when its real

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[1]Although the Homeowners had no obligation to make a record showing of the truth of the facts alleged in their defenses, HOWDESHELL v. FIRST NATIONAL BANK OF CLEARWATER, 396 So.2d 881 (Fla. 2d DCA 1979), they did so anyway in their Affidavits (R333-337). The Affidavit of Howard E. Googe, Esq., discloses that the Park Owner had told Attorney Googe on several occasions that he had no plans to change the use of the land but intended to sell it (R336-337).

intention was to empty the park in order to sell the land, as expressed in Kern's off-the-record statements. The Homeowners have maintained all along that the latter is the truth, because the partnership's real reason for buying the park in the first place was to empty it and sell it to developers, and that the notices of eviction did not tell the truth. At least amicus FMHA on page three of its brief honestly discloses that the real issue here is whether a mobile home park owner has the right to evict the homeowners in order to sell the property as vacant land.

The Homeowners articulated this central fact issue in as many ways as they could. The essence of the first four affirmative defenses (R53-55) is that the Park Owner was guilty of bad faith because it was seeking eviction, knowing it had no grounds for eviction authorized by the statute, claiming that it was changing the use of the land, and yet refusing to state the nature of the change for the record. The essence of the fifth and sixth defenses was that Kern's off-the-record statements showed that the Park Owner was not intending to change the use of the land, as the eviction notices claimed, but intended to sell it (R55-56). One of the statements quoted by Kern specifically said so.

At page 18 of its brief, the Park Owner claims that all of the Homeowners' defenses are "paper issues," ignoring the direct contradiction between one of Kern's statements quoted in the fifth and sixth affirmative defenses to the effect that he had no plans to change the use, and the affidavits, especially of Howard Googe, where Kern said he had no plans to change the use and

intended to sell, with the statement in the eviction notices that the Park Owner is changing the use of the land. This is not a paper issue, but a direct factual one. The seventh defense was the failure to provide the Homeowners with a prospectus, which pursuant to §723.012(2) Fla. Stat. (1985), requires a detailed description of any plans for a change in the use of the land comprising the park. The failure to provide a prospectus is addressed fully at pages 13-17 of the FMHO amicus brief.

In short, the fundamental fact issue in this case is whether the Park Owner was lying in the notices of eviction, and whether it is still lying about them now. If it gets away with the lie, the same lie can be used to clear out any park in this state, and eviscerate Chapter 723. The Park Owner's response in its arguments at page 22-23 simply avoids this issue, again by attempting to label it as a legal issue. Given the number of times and variety of ways in which the Homeowners have raised the issue of bad faith in this litigation, this Court will no doubt forgive them for wondering how many times they have to raise the question.

To use the Park Owner's own definition of an affirmative defense at page 19 of its Brief, if the answer to the factual questions in this case shows that the Park Owner intended to evict simply so that it could offer the vacated park for sale and avoid its responsibilities to the Homeowners by claiming a change in use, then that is a factual matter, which if true, raises a legal defense to an eviction judgment, and lays the basis for recovery on the counterclaims, as recognized in CROWN DIVERSIFIED

INDUSTRIES v. WATT, supra, and as is explained so well by the FMHO in its amicus brief at pages 4-11. At page 23, the Park Owner claims that the Homeowners have stated that if they had been successful in obtaining summary judgment, their affirmative defenses would have vanished. Not *so.* Had the Homeowners prevailed on the legal issue of the meaning of the statute, it would have been unnecessary to proceed to the affirmative defenses, but they would not have vanished.

Finally, in its fifth point, the Park Owner argues that it had no obligation to give the Homeowners a chance to buy the park under §723.071, since it had not yet offered it for sale. While that is apparently correct, **see** BRATE v. CHULAVISTA MOBILE HOME PARK OWNERS ASSOC., INC., 15 FLW D588 (Fla. 2d DCA March 9, 1990), it misses the point. The point is that the Park Owner attempted to rid itself of the Homeowners before it arrived at the point of offering the land for sale, and would need to accord them their rights. The Park Owner's concluding argument that it did not need to evade the requirements of §723.071 since it did not matter to whom the land was sold, since the price and terms would be the same, is not accurate. By ridding itself of the Homeowners before making arrangements for a sale, the Park Owner could relieve itself of the impediments to rezoning, as is already explained in the Initial Brief, thereby greatly increasing the resale value of the land.

ARGUMENT IN RESPONSE TO AMICUS FMHA

FMHA is more forthright that the Park Owner when it asserts that the issue here is whether a mobile home park owner has the right to evict the tenants of the park in order to sell the property as vacant land. That is precisely what the Park Owner has never admitted to doing in this case, and it is precisely what is not permitted under Chapter 723.

At page four of its brief, FMHA alleges that the Homeowners' argument is that park owners must sell their park to the residents. The Homeowners will rely on their briefs to demonstrate that that is not, nor has it ever been, their position. Park owners are required to afford the homeowners a right of first refusal.

At page seven, FMHA argues that it is the change from use as a mobile home park to another use that is important, not what the particular future use will be. That is correct to the extent that there must be a change, and not a sale, to justify an eviction under the change in use provisions of S723.061, Fla. Stat. **(1985).** FMHA argues repeatedly that the Park Owner need only notify the residents of the fact of a change, and not the new use. In the instant case, the Homeowners have maintained that the failure to ever identify a new use indicates the Park Owner's bad faith. Further, they argued, among other places in their final affirmative defense (R57), that under §723.012(12), Fla. Stat. **(1985),** the Park Owner was required to provide them with a prospectus which the statute requires must contain a detailed description of any definite future plans which the Park

Owner has for changes in the use of the land comprising the park. Moreover, the logic of the new provision of **§723.061(2),** <u>**Fla**</u>. <u>Stat</u>. (Supp. **1986),** which provides a mechanism for a challenge to a change in use, requires that the new use be disclosed, How else can it be challenged by judicial or administrative remedies as provided by the statute?

However, because by the time this case was briefed in the Fourth District, that Court had already decided BROWN v. POWELL, 531 So.2d **731** (Fla. 4th DCA **1988),** in the Fourth District the Homeowners maintained that they were still correct regarding the need to specify the new use, but that they recognized the controlling effect of BROWN in the Fourth District, and asserted that the main issue in this case, which did not arise in BROWN, is that a valid eviction under **§723.061** requires that there be a bona fide change in the use of the property, and does not permit a park owner to simply vacate the land in preparation for a future sale. Clearly, while the Fourth District found BROWN to control the issue of whether the eviction notice must state what the future use would be, it did not find that case to control any of the other issues in this case.

Moreover, the Homeowners asserted below, and assert here, that the contrast of the facts in BROWN and the facts here illustrates their position. In BROWN, the first thing the park owners did was to inform the residents of their intention to sell the park, and to apprise them of their right of first refusal orally, and in writing. When no viable offers to purchase were made by either the residents or third parties, the park owners

then offered the residents a lease/purchase option. It was only after that offer went unanswered that the owners sent eviction notices, citing a projected change of use of the land. Thereafter, the park owners consented to renegotiate the lease/purchase option, and offered another one. After the second lease/purchase option was not accepted by the residents, the owners proceeded with the evictions.

BROWN offers a perfect counterpoint to illustrate the Homeowners' argument here. In BROWN, the park owners complied with the homeowners' statutory right of first refusal. Here, the Park Owner patently evaded it. In BROWN, the eviction notices followed the attempt to afford the homeowners their rights of purchase; here, the notices were issued first in order to deny those rights. Here, the Park Owner has coyly equivocated on its intention to sell, and has hidden its intent behind the notices in order to evade other responsibilities under the Act. Finally, in BROWN the property lies vacant only because the homeowners (and third parties! declined to purchase it. Here, if the Park Owner prevails, the property will be vacant only as long as it takes to sell it and move in the bulldozers.

At page nine, FMHA incorrectly argues that the Homeowners assert that they have a right to purchase the park before a park owner can evict for a change in use. Again, the Homeowners will rely on their briefs and the pleadings in the case to demonstrate that this is simply a total misreading of their position. A true change in use would not trigger any right to purchase.

At page 16, FMHA argues that the Park Owner acted in good faith simply because the notices of eviction tracked the language of the statute. If that is all that was necessary to demonstrate good faith, then the concept of good faith is an empty shell. The Homeowners will rely on the amicus brief of the Federation of Mobile Homeowners of Florida for their position regarding the place which good faith plays in the operation of the statutes at issue here.

The Homeowners will rely on their arguments in their Initial Brief and Point I and II of this Reply Brief as their response to all the other arguments raised by FMHA.

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 30th day of MARCH, 1990 to BOB L. HARRIS, ESQ., Post Office Box 10095, Tallahassee, Florida 32301; THOMAS A. MUNKITTRICK, ESQ., 4020 Portsmouth Road, Largo, Florida 34641, and JACK M. SKELDING, JR. and DAVID D. EASTMAN, Parker, Skelding, Labasky & Corry, Post Office Box 669, Tallahassee, FL 32303.

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