IN THE SUPREME COURT OF FLORIDA

HAINES CITY COMMUNITY DEVELOPMENT, d/b/a PARKVIEW VILLAGE,

Petitioner,

v.

LEILA HEGGS,

Respondent.

Case No. 84,243

District Court Case No. 94-00524
Circuit Appellate Case No. U-93
L.T. Case No. 93-CC-11-0282

Petitioner's Initial Brief On The Merits

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Statement of the Case

This action arises from the entry of a final judgment in favor of petitioner, Haines City Community Development, d/b/a Parkview Village (hereinafter "Parkview"), in an eviction action filed in the County Court of the Tenth Judicial Circuit in and for Polk County, Florida, which was reversed by the Circuit Appellate Court for the Tenth Judicial Circuit. A at 156.

Respondent, Leila Heggs (hereinafter "Heggs"), admitted in the answer that she had failed to pay rent November, 1992, and on other occasions. A at 185-190. Initially, Heggs raised affirmative defenses including "lack of good cause", "lack of proper notice" and "equitable defense". A at 198-201. Parkview filed a motion for summary judgment, or, in the alternative, judgment on the pleadings. A at 178-185.

At the hearing on the motion for judgment on the pleadings and/or summary judgment, Heggs orally requested leave to amend the answer to add additional defenses. A at 174.

The trial court entered a order granting partial judgment on the pleadings. A at 174-175. In the order granting partial judgment on the pleadings, the trial court found that:

> 1. Parkview Village is a federally funded low-income housing project for farm laborers funded through Farmers Home Administration;
>
> 2. Non payment of rent is not curable conduct for purposes of federal or state law or under the terms of the lease;

3. A cause of action for non-payment of rent does not arise until non-payment is repeated;

4. On the face of the pleadings, the defendant has admitted repeated non-payment of rent and receipt of a three-day notice.

5. Based upon the foregoing, plaintiff is entitled to a partial judgment on the pleadings based on the complaint, answer and first two affirmative defenses;

6. The first two affirmative defenses do not state an appropriate avoidance of judgment;

7. The court is concerned that evidence should be considered on the third affirmative defense which is an equitable defense.

Id. The trial court entered judgment in favor of Parkview on the affirmative defenses lack of good cause and lack of notice. Id. The trial court granted Heggs' ore tenus motion to amend and allowed additional defenses to be added to the answer. A at 174-175.

Subsequently, Heggs filed an amended answer raising as affirmative defenses "lack of good cause", "lack of proper notice", "retaliation", "equitable defense", "the Vocational Rehabilitation Act, 29 U.S.C. §794", "the Fair Housing Act, 42 U.S.C. §3601, et. seq." and "Estoppel" which was based upon, among other things, an alleged history of Parkview accepting late rent from tenant after service of a three day notice. A at 191-197.

Parkview filed a motion for summary judgment and/or judgment on the pleadings on the amended answer and affirmative

defenses. The motion was heard on the day of the trial. A at 1-15. The trial court took the motion under advisement. A at 15.

The trial court proceeded to trial solely on the equitable defenses. Id.

At trial, Heggs offered the testimony of two other Parkview tenants in an attempt to demonstrate Parkview's alleged practice of accepting late rent. Both of these neutral witnesses offered by Heggs supported Parkview's contentions concerning its practices with regard to accepting late rent and pursuing evictions if there is no tenant response to a three day notice. A at 113-121. Erma Jean Campbell (hereinafter, "Campbell"), another tenant at Parkview, testified that she has paid late rent in the past and has received three day notices.[1] A at 113-114. She testified that if she is late with her rent, she gets a three day notice. Id. Campbell further testified that: anytime her rent is late, she has always gone in and talked to Parkview management (A at 116); she has always worked out a plan for repayment with Parkview (id.); she has paid her rent "down to zero" at times (id.); and she understands that it is Parkview's practice to evict her if she does not go in and discuss her rent with management when she receives a three-day notice. Id. Grace Johnson (hereinafter "Johnson"), another tenant at Parkview, also testified that: she has paid late rent, but that she always "pays on her rent"[2] (A at 118); that she always receives a three-day notice when her rent is late and that

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[1] Campbell was called as a witness by Heggs.

[2] Johnson was also called by Heggs.

she always goes down to the office to discuss her past due rent (A at 119); that she has always worked out a plan to pay her rent when she has been late (A at 120); and that she realizes that if she does not work out a plan to pay her rent off, she will be evicted. Id. Yolanda Lopez (hereinafter "Lopez"), a project manager at Parkview, testified that: she met with Heggs in January and discussed a written payout agreement (A at 122); the agreement is a form (id.); that she showed Heggs the agreement (id.); that Heggs did not sign it (A at 122-123); that Heggs told her she would come back and sign it (A at 123); that she never did (id.); and that subsequently a three day notice was served upon Heggs and she failed to respond to it.

The trial judge ruled in favor of Parkview and final judgment was entered. A at 159.

Heggs appealed to the Circuit Appellate Court of the Tenth Judicial Circuit. A at 160. The circuit appellate court reversed, stating:

> Appellee is estopped from terminating Appellant's tenancy for late payment of rent without giving prior notice that the practice would no longer be acceptable. It appears to this court that Appellee arbitrarily enforces its own rules and regulations regarding rent payments. In the past, Appellee has allowed past due payments to accrue for several months without issuing a three-day notice. Here, in the instant case, Appellant failed to pay rent for two months, and then filed [sic] to satisfactorily attend to the matter. Appellee then issued the three-day notice to which Appellant did not respond. Appellee then initiated eviction proceedings. It does appear that at least some of the tenants understood that a three-day notice means "quote or be evicted"; however, there is no

> indication that Appellant was aware of this policy. Appellant even testified that there were times in the past when she had been served with a three-day notice, had not tendered the rent within three days, and had not then been evicted or faced with any eviction proceedings.

A at 157.

Petitioner filed a petition for certiorari review in the Second District, arguing, among other things, that the circuit appellate court had departed from the essential requirements of law by improperly reweighing the facts and misapplying the law. A at 268-307. The Second District denied the petition, but specifically stated that in doing so it was applying the standard set out in Combs v. State, 436 So.2d 93 (Fla. 1983). A at 356-360. The Second District noted that ..."even though the circuit court found that respondent had a history of repeated nonpayment of rent, it reversed the final judgment of eviction." Haines City Community Development, d/b/a Parkview Village v. Heggs, _____ So.2d _____, 19 Fla. L. Weekly D1386, D1387 (Fla. 2d DCA June 22, 1994). The Second District stated that it was denying the petition "because the petitioner has not demonstrated that the circuit court's action has resulted in a miscarriage of justice as required by Combs v. State." 19 Fla. L. Weekly D1387. The Second District found that there was no prejudice to petitioner because petitioner could re-evict based upon nonpayment of rent in the future. Id. The Second District also stated that if it were applying the standard set out in Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989), the decision

might be different:

> This standard is quite different from the one announced in Combs and could compel a different result in this case were we to find an incorrect application of the law by the circuit court.

19 Fla. L. Weekly at D1387. The Second District certified the following question as one of great public importance:

> AFTER EDUCATION DEVELOPMENT CENTER, INC. V. CITY OF WEST PALM BEACH, 541 SO.2D 106 (FLA. 1989), DOES THE STANDARD OF REVIEW IN COMBS V. STATE, 436 SO.2D 93 (FLA. 1983), STILL GOVERN A DISTRICT COURT OF APPEAL WHEN IT REVIEWS, PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(b)(2)(B), AN ORDER OF A CIRCUIT COURT ACTING IN ITS REVIEW CAPACITY OVER A COUNTY COURT?

Both petitioner and respondent filed motions for attorney's fees in the district court proceeding. The district court granted Heggs' motion and denied Parkview's motion. A at 367-368. Petitioner filed a motion for rehearing arguing that in the instant case, there was prejudice sufficient to meet the standard set out in Combs. A at 361. The Second District denied the motion for rehearing. A at 366. Petitioner sought discretionary review in this court. A at 369.

Statement of the Facts

I. PARKVIEW'S BACKGROUND.

The purpose of this nonprofit corporation is to provide low-income housing to farm workers. A at 87. Parkview Village is a 196 unit apartment complex, which was built and is maintained through grants and loans provided through a federal agency, the Farmer's Home Administration. Hereinafter, "FmHA". Id.

Parkview's lease contains a paragraph which states:

> Failure of the owner to insist upon strict performance of the terms, covenants, agreements and conditions herein contained or any of them shall not constitute or be construed as a waiver or relinquishment of the owners right thereafter to enforce any such term, covenant, agreement or condition, but the same shall continue in full force and effect.

A at 201.

Because Parkview Village is funded through FmHA, federal rules and regulations apply to the apartment complex. The federal regulations require that a lease contain certain provisions including, but not limited to the following:

> Resident understands that this apartment project is operated and maintained for the purpose of providing housing for domestic farm laborers and their families. Resident does hereby certify that a substantial portion of their family income is and will be derived from farm labor. Resident further understands that domestic farm labor means persons who receive a substantial portion of their income as laborers on farms in the United States, Puerto Rico or Virgin Islands and either (1) are citizens of the United States or (2) reside in the United States after being legally admitted for permanent residence therein, and may include the immediate families of such persons.

Id. The federal regulations also require the lease contain a provision that:

> Residents agree that if the household income ceases to be substantially from farm labor for reasons other than disablement or retirement, that they will promptly vacate their dwelling unit after proper notification by the owner.

Id.

The apartments are designed for use by low-income farm

workers. A at 90. Generally, only eligible tenants may reside at Parkview Village under the federal rules and regulations. Id. Eligibility requires that at least 25% of the tenant's total household income be derived from agriculture. Id. When there are vacancies and no eligible applicants on a waiting list, tenants who meet certain other obligations may be admitted if they meet income requirements. Id. However, as ineligible tenants, their tenancies are subject to the requirement that they agree to vacate if eligible tenants are on the waiting list at the end of the period of their tenancy.

Flora Jo Haber (hereinafter "Haber"), of Rand Management (hereinafter "Rand"), managed Parkview Village from 1981 through 1986. Id. During that time, there was an active tenant association at Parkview Village. Id. In 1986, when Rand was replaced at Parkview with another management company, the tenants were concerned and asked FmHA to allow Rand to continue management of the complex. A at 87-88. Parent Management Company (hereinafter "Parent") managed the project for four years, from 1986 through 1990. Id. In 1990, Rand returned as manager of Parkview Village. Id.

When Rand began management in 1990, there were many problems at Parkview including open sewer lines, broken windows, nonoperative locks, problems with water faucets and thirty six vacancies. A at 88. Haber and Rand began attempting to solve these problems. A at 89.

Because of the number of vacancies at Parkview, Rand

initially accepted tenants who would normally be ineligible to occupy the vacant apartments. Id. It took thirteen to fourteen months, until the fall of 1991, to fill the vacancies. Id. By that time, the waiting list at Parkview was growing, and Rand decided that it would no longer accept ineligible tenants. Id.

Prior to the fall of 1991, it had been Parkview's practice to attach an addendum to the lease of any tenant who was an ineligible tenant which made it clear that the tenant was ineligible, and that the tenant could remain in the project only so long as there were no eligible tenants on a waiting list. A at 84-85. Prior to 1991, there were so many vacancies at Parkview that ineligible tenants were allowed to remain with the agreement that they would vacate at the end of any tenancy term when eligible tenants were on a waiting list. Id. In 1991, when the number of vacancies was down, Parkview began notifying all ineligible tenants that they would have to leave at the end of their lease term. Id. If the ineligible tenant refused to leave at the end of their lease term, Parkview would initiate eviction. Id. FmHA endorsed Parkview's practice of filing the evictions against the ineligible tenants. A at 86.

II. HISTORY OF HEGGS' TENANCY RELATED TO HER RETALIATION DEFENSE.

Heggs originally became a tenant on the basis of her husband's farm worker capacity. Id. In approximately 1984 or 1985, Buster Heggs, Heggs' husband, moved from the apartment. Id. After Buster Heggs moved, Heggs was always deemed an ineligible tenant and provided with the addendum that made it clear that she

was ineligible and would have to move if there was an eligible tenant on the waiting list. A at 83-85. During all of this time, Heggs never provided Parkview with any information which indicated that she was or had been a farm worker. Id. There was no documentation in her files to indicate that Heggs had ever been a farm worker. A at 83. Heggs had never reported any agricultural income to the federal government for social security purposes or Parkview for herself or her children. A at 43-45. Any agricultural income they received apparently had been reported on Heggs' husband's social security. Id.

In the fall of 1991, Heggs received the notice that she would have to vacate because there were eligible tenants on the waiting list. A at 85. She refused to move. Id. However, she still did not provide Parkview with any information that she or her children had ever worked as an agricultural worker with her husband. Id. Parkview filed an eviction based upon non-eligibility. A at 92. Heggs testified at trial that she and her children worked under her husband's social security number as farm workers. Id. During the litigation, Heggs claimed that she was a disabled farm worker and had become disabled in approximately 1985. Id. This was the first time Parkview had any information that Heggs was claiming status as an eligible tenant based upon her own farm work. Id. Parkview did not prevail on the eviction filed on the basis of ineligibility. Id. Heggs remained as a tenant at Parkview.

Rand and Parkview have always encouraged a tenants

association to be active at Parkview Village. A at 94-96. Haber instructed her staff to help and encourage the tenants association in its activities by copying notices for tenants association meetings, posting copies of the notices and providing a meeting room for the tenants association. A at 94-95. Parkview and Haber also financially donated to the tenants association to help it with its activities.[3] A at 47; 95. Haber instructed her managers to call local businesses and get solicitations from these businesses for tenants association projects. A at 96. Parkview also bought sweatshirts and other items printed with "Parkview Village" for the tenants association. Id. Haber's policy was that the interaction with the tenants association helped to provide understanding for why rules and regulations are in place at Parkview. Id. This also provided a forum for tenants to bring problems to her attention. Id.

After the ineligible tenant notices were sent out in 1991, some of the tenants expressed concern.[4] A at 97. At that time, Parkview, through Haber, invited Nora Leto of Florida Rural Legal Services, who is counsel for Heggs in this action, to attend a meeting at Parkview to help educate the tenants about Parkview rules and regulations. Id. Nora Leto was unable to attend the meeting, but Bob Connely, an associate at Rural Legal Services, did attend the meeting. A at 97-98. Parkview also arranged for the

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[3] Heggs admitted at trial that Plaintiff "bought T-shirts, sweatshirts." A at 47.

[4] Heggs was President of the tenants association in 1989-90, prior to this time. A at 46.

services of an hispanic woman to translate the information that was being provided for hispanics who resided at Parkview. A at 98. There was a standing room only crowd at the meeting. Id. Parkview encouraged Connely to address the crowd and tell the residents about the fact that Legal Services was available to help them if they had questions about the actions of management at Parkview. A at 98. Connely was encouraged to explain his interpretation of the Parkview rules and regulations to the tenants. Id.

The tenants association has not been active in some time. A at 99.

III. HISTORY OF HEGGS' TENANCY RELATED TO HER CLAIM OF HANDICAP DISCRIMINATION.

Apparently during 1992, Heggs had some health problems including a urinary tract infection and problems with her back. A at 46. Heggs has never been admitted to a mental hospital, or reported any mental problems other than the "depression" and headaches listed on her disability form. A at 46-47. Parkview's only knowledge of Heggs' alleged illness was that she had a social security disability related to Heggs backaches, headaches and occasional depression. A at 73-74.

Information received during that prior litigation from the Social Security Disability office indicated that Heggs was capable of managing her own funds and capable of working 25 hours a week. A at 93. At the time this action was filed, there was nothing in Heggs' file which indicated anything to the contrary. Id.

If tenants are housebound at Parkview, the policy is to

collect rent from the home. A at 75. Parkview might also instruct management to stop by and see the handicapped tenants on a weekly or daily basis or ask a neighbor to look in on them. A at 76. Federal regulations forbid Parkview from inquiring as to whether a person has a physical or mental handicap. A at 87. Heggs has never asked for any special concession to help her to be able to pay rent because of any mental disability. A at 107-108. In the past, subsequent to Heggs date of disability in 1985, Heggs has continued to pay rent and has not asked that it be collected at her home. A at 107. If Heggs had asked a manager to come to her apartment to pick up rent, Parkview would have done so. A at 108. Heggs has a phone in her apartment and there is nothing in the record to indicate Heggs ever called the Parkview office or asked for someone to come and pick up her rent. A at 108-109. Heggs also has adult teenage children living with her and there is nothing in the record to indicate that any of her adult teenage children approached the office in an attempt to deliver rent. Id.

IV. PARKVIEW'S POLICY CONCERNING LATE RENT CARRYOVERS AND THREE DAY NOTICES.

A. Late rent carryovers.

In 1992, FmHA sent a directive to Parkview Village that carryover charges for late rent should not exceed ten percent (10%) of the annual rents for Parkview Village. A at 68. Because many tenants had an excess carryover of past due rent, Parkview was far exceeding this amount. Id. In the fall of 1992, Parkview started a concerted effort to make sure that tenants eliminated past due rent balances. Id. In the fall of 1992, Rand sent out a notice to

tenants that they would have to have a "zero balance on their rent" prior to the end of the year. A at 82; 124-126. The notice was posted and hand delivered to the tenants. Id.

B. Three day notices.

Parkview's policy concerning three day notices is and has been the same at all times since Rand began managing Parkview. The policy is to send a three day notice if a tenant has not made any payment or had any contact with management by the tenth of the month, and, if the tenant does not respond to a three day notice, to initiate eviction proceedings against the tenant. A at 99-100. If the tenant comes in and tries to work something out, Parkview's policy is to work with the tenant. Id.

V. HEGGS' FAILURE TO PAY RENT IN LATE 1992 AND EARLY 1993.

Beginning November 1, 1992, and continuing through the date of a partial final judgment entered below, Heggs' lease provided that rent should be paid in the amount of $53.00 per month. Id. Beginning in November, 1992, Heggs failed to make rental payments. Id. By January, 1993, Heggs was more than two months behind in rent. A at 70-71. Heggs contacted Parkview on January 4, 1993, and offered to pay $135.00 that day to reduce her past due balance and to pay the balance in February. A at 70-71, 102-103; 130-131. Parkview agreed to accept that amount if Heggs paid $135.00 immediately and signed an agreement to pay the balance

in February.[5] Id. The agreement Parkview sought to use with Heggs is a form agreement used with all late paying tenants. A at 130. Parkview made it clear that it would accept rent only if she paid that day and executed the agreement that day. A at 131. Heggs stated that she would return on January 4 to pay the $135.00 and sign the agreement. Id. Heggs then failed to return or tender any money to Parkview or sign any agreement. Id.

Heggs made no further contact with Parkview and on January 11, 1993, Haber directed Parkview to send Heggs a three-day notice. A at 70-71; 130-131. Heggs did not contact Parkview after the three-day notice was delivered. A at 71-72; 102-103; 131-132. Because Heggs did not respond to the three day notice, this action was filed.

The only time that an eviction for nonpayment has been pursued against Heggs is when she has not responded to a three-day notice. A at 100-101. If any tenant at Parkview does not respond to a three-day notice, Parkview files an eviction.[6] A at 101. Procedure followed in this case with Heggs is the same as the

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[5] Heggs admitted she discussed a payout agreement, and that after she discussed the payout agreement, she did not bring any money to the office or sign a payout agreement. A at 50. Both Haber and Lopez testified that they offered to allow Heggs to remain at Parkview only if she would make immediate partial payment and sign a payout agreement; and that Heggs failed to make any payment or sign the payout agreement. A at 70-71; 102-103; 130-131.

[6] Not only did Haber and Lopez testify that Parkview's policy was to file an eviction, but other tenants presented as witnesses by Heggs testified that they were aware that if they did not respond to a three-day notice by entering into a plan to pay off the overdue rent, they would be evicted. A at 101, 116, 120, 129.

procedure followed in any other tenant's case.[7] Id. In the past when Heggs has been late on her rent, she has come in and tried to resolve the problem. Id.

SUMMARY OF ARGUMENT

1. A. The circuit appellate court's decision is a departure from the clearly established principles of law because the circuit court clearly reweighed facts and misapplied the law. Clearly a miscarriage of justice has been suffered by Parkview since it has had to defend against frivolous defenses and will be required to pay attorney's fees in this case if Heggs is the prevailing party. The prejudice required under the Combs standard is met because the misapplication of the law substantially affected the outcome of the case.

B. If the Education Development standard applies, the standard is met since there was a departure from the requirements of law which is evident on the face of the circuit appellate court's opinion.

2. A. The circuit appellate court clearly reweighed facts and misapplied the law. Competent substantial evidence supports the final judgment and it is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of testimony and evidence.

B. It was Heggs' burden to prove the affirmative defense of estoppel and she failed to meet that burden.

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[7] This is established, not only by Haber's and Lopez's testimony, but also by Johnson and Campbell, Heggs' witnesses. A at 101, 116, 120, 129.

C. The circuit appellate court applied the wrong standard of review since it reversed based upon the "abuse of discretion" standard. However, under any standard, the trial court should have been affirmed.

3. The affirmative defenses raised by respondent are devoid of legal merit and without factual basis.

A. Respondent argued that nonpayment of rent should be deemed to be "other good cause" under the terms of the federal regulation which would require prior notice. However, the federal regulations clearly define material noncompliance to include repeated nonpayment of rent which does not require prior notice. Repeated nonpayment of rent was admitted by Heggs.

B. Heggs received all notice required under federal regulations and Florida law for purposes of eviction for nonpayment of rent. The plain language of the federal regulations, the lease and the Florida Statutes make it clear that a three day notice was required. It is undisputed that Heggs received the three day notice.

C. The retaliation defense raised by Heggs was supposedly based upon Heggs' term as president of the homeowners association and the prior eviction action for ineligibility. Clearly, the facts did not support any basis in law or fact for a retaliation defense. This defense is especially repugnant and frivolous given the history of tolerance shown to this tenant.

D. Heggs also alleged that Parkview failed to comply with the federal statutes with regard to accommodation of Heggs'

disability based upon headaches and depression. This is a patently frivolous defense. There is nothing in the law to suggest that any accommodation afforded under the federal law requires a landlord to continue to rent to a nonpaying tenant. There is nothing to suggest that Heggs ever asked for any accommodation.

E. There is nothing in the record to support Heggs' asserted estoppel defense. Heggs' own witnesses testified that it is Parkview's practice to evict upon failure to respond to a three day notice. It is undisputed that Heggs failed to respond to a three day notice.

LEGAL ARGUMENT

I. THE SECOND DISTRICT CLEARLY HAD JURISDICTION TO CONSIDER THE PETITION FOR CERTIORARI REVIEW.

A. Parkview has been severely prejudiced by the circuit appellate court's reversal.

In Combs v. State, supra, this court stated that the district courts should exercise their jurisdiction to grant certiorari only "when there has been a clearly established principle of law resulting in a miscarriage of justice." 436 So.2d at 95-96. In Combs, this court held it was proper to deny certiorari because the right legal result was reached although there had been a departure from the essential requirements of law. 436 So.2d at 96. This court specifically noted:

> Since the trial court reached the right result, albeit for the wrong reasons, the affirmance of the judgment by the circuit court on appeal did not depart from the essential requirements of law.

Id., citing Health Clubs Inc. v. Englund, 376 So.2d 453 (Fla. 5th

DCA 1979). (Emphasis added).

In this case, however, the district court indicated that it did not have jurisdiction even through the wrong legal result may have been reached by the lower court's departure from the essential requirements of law. This is completely opposite of the reasoning in Combs. In this case, the district court denied the petition for certiorari, stating:

> The order did nothing more than reverse a county court's eviction judgment based on a particular set of facts. It did not deprive the petitioner of its day in court, nor has it foreclosed the petitioner from seeking eviction of the respondent because of future nonpayment of rent.

19 Fla. L. Weekly at D1387, citing State v. Roess, 451 So.2d 879 (Fla. 2nd DCA 1984). This ignores the fact that petitioner prevailed on its day in court and was reversed because of a circuit appellate court improperly reweighing facts and misapplying the law. This clearly is a departure from the essential requirements of law which has resulted in a miscarriage of justice, i.e., the prevailing party has become the losing party. Under the reasoning in Combs, it seems clear that sufficient prejudice to justify accepting certiorari jurisdiction would not be suffered where the outcome of the case is not affected by the departure from the essential requirements of law. However, it also seems clear that there would be sufficient prejudice if the departure from the essential requirements of law does impact the outcome of the case. This point obviously needs clarification by this court since the Second District interpreted the language of Combs to mean that a

departure from the essential requirements of law that does impact the outcome of a case could still be insufficient prejudice to justify accepting certiorari jurisdiction.

Combs does encourage the district court to require a showing of prejudice to justify exercising its jurisdiction to review a petition for certiorari. It is the question of what prejudice must be suffered that is asked by the Second District in this case. This case clearly meets the prejudice required under the Combs standard.

First, the Second District's opinion has completely nullified the cause of action for eviction based upon breach of the leasehold contract when Heggs failed to pay rent in 1992-93. Even though a landlord can seek eviction for future nonpayment of rent, these evictions would be for future breaches of contract not for the breach of contract which has already occurred. For the cause of action which formed the basis of this case, the petitioner prevailed on its day in court, but was improperly reversed by the circuit appellate court. Not only does this deprive the petitioner of the right to evict on the basis of this particular breach by the respondent, but it also subjects the petitioner to the potential of an attorney's fee award. See §83.48, Fla. Stat. There could be no more severe prejudice, no greater miscarriage of justice, than the reversal of the outcome of the case based upon a mistaken application of the law.

Additionally, petitioner has been subjected to a long and drawn out litigation which is based solely upon what are

essentially frivolous defenses that have been raised by the respondent. In fact, this is exactly the type of sham appeal and stonewall defense which would justify an award of attorney's fees under Section 57.105, Florida Statutes. Essentially, respondent raised the following defenses:

(1) That nonpayment of rent should require additional notice under the federal rules which is completely refuted by the plain language of the federal rules (see 32 through 33, infra.);

(2) That respondent should have been given an opportunity to cure her repeated her nonpayment of rent; however, the evidence presented by Heggs indicated that she was given many such opportunities; and this is also refuted by the plain language of statutes, lease and federal regulations (see 33 through 34, infra.);

(3) That the eviction was actually filed as a retaliation which is especially repugnant as a defense given the history of the tolerance shown to this tenant which is evident in the fact that she has also raised as a defense that the landlord repeatedly accepted late rent (see 34 through 37, infra.);

(4) That her "handicap" provides a basis for avoiding payment of rent which is without any basis in law or fact (see 37 through 40, infra.); and,

(5) That Parkview should be estopped because of a history of accepting late rent; this was not supported by the facts or the testimony of witnesses placed on the stand by Heggs (see 40 through 42, infra.).

This is prejudice of a nature which clearly gave discretion to the district court to exercise its jurisdiction under Combs. The decision of the Second District that it did not have jurisdiction under these facts is in conflict with the decision of this court. See Combs, supra.

B. Under either Combs or Education Development Center, the Second District had jurisdiction to consider the petition.

As already noted, under Combs, the Second District had jurisdiction because there was a departure from the essential requirements of law which has severely prejudiced petitioner.

In Education Development Center, Inc. v. The City of West Palm Beach, supra, this court reaffirmed the standard set out in City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). In both Vaillant and Education Development Center, review was sought in the district court under Florida Rule of Appellate Procedure 9.030(b)(2)(B). In Vaillant and Education Development Center, review was taken from an administrative body to circuit court in an appeal as a matter of right, and subsequently review was sought in the district court. The standard set out in Vaillant and Education Development Center for review at the district court level has two discrete components: whether the circuit appellate court afforded

procedural due process and applied the correct law. In both Vaillant and Education Development Center, jurisdiction in the circuit court was based upon Rule 9.030(c)(3), whereas jurisdiction in the circuit court in this case was under Rule 9.030(c)(1)(A). In both cases, jurisdiction was sought in the district court under Rule 9.030(b)(2)(B).

Although there are slight difference in the procedural posture of Combs and Education Development Center, it appears that in both case the standard of review requires a finding of a departure from the essential requirements of law. That there was a departure essential requirements of law in this case is evident in the opinion of the circuit appellate court. The circuit appellate court specifically found that Heggs failed to pay rent for two months, failed to satisfactorily attend to her late rent, that a three day notice was issued subsequently, and that Heggs did not respond to the notice. The circuit appellate court goes on to indicate that at least some of the tenants understood that the issuance of a three day notice would put one on notice that they would be evicted if they did not pay. Although the circuit appellate court then indicates that Heggs was not aware of this policy, the mere finding that some of the tenants understood that three day notice meant that eviction was imminent by the circuit appellate court demonstrates that there was competent substantial evidence in the record to support the trial court's finding that estoppel was inappropriate. On the face of the opinion by the circuit appellate court, it is evident that the circuit appellate

court misapplied the law and exceeded the scope of its authority by improperly reconsidering and reweighing evidence. Under Education Development Center, since there was a misapplication of the law, the district court had jurisdiction.

If anything, the standard in this case should be less stringent at the district court level than that in Vaillant and Education Development Center. In both Vaillant and Education Development Center, there had been two repetitive reviews prior to applying for certiorari in the district court. Both involved a situation where there was an appeal to a civil service board, an appeal to the circuit court, and an application for certiorari review in the district court of appeal. 419 So.2d at 626.

II. THE CIRCUIT APPELLATE COURT INAPPROPRIATELY REWEIGHED THE FACTS AND MISAPPLIED THE LAW.

A. Competent substantial evidence supports the final judgment.

It is a general principle of appellate procedure that if the record on appeal discloses any competent substantial evidence to support the decision of the trier of fact, the judgment must be affirmed. See Shaw v. Shaw, 334 So.2d 1316 (Fla. 1976) on remand, 336 So.2d 1282 (1976). This is based upon the reasoning that the trier of fact had the opportunity to evaluate and weigh the testimony and evidence based upon an observation of the bearing, demeanor and creditability of the witnesses. Id. As long as the evidence is legally sufficient, the appellate court may not substitute as judgment for that of the trier of fact. See Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31,102

S.C. 502, 70 L.Ed. 2d 378 (1982). As noted by this court in Shaw v. Shaw, supra:

> It is not the function of the appellate court to substitute its judgment for that of the trial court through reevaluation of the testimony and evidence from the record on appeal before it. The test. . . is whether the judgment of the trial court is supported by competent evidence.

334 So.2d at 14; see also Oceanic International Corp. v. Lantana Bait Yard, 402 So.2d 507 (Fla. 4th DCA 1981), appeal after remand, 438 So.2d 948 (1983).

Here, the trial court entered a final judgment upon the evidence presented at trial. Obviously, since Respondent vigorously argued the estoppel theory to the trial court, the trial court considered that theory in conjunction with the facts presented to it and chose to believe the testimony of the witnesses who refuted the existence of any facts which would support an estoppel. Inherent in the trial court's decision is a finding that Respondent failed to present sufficient evidence to establish an estoppel. Since estoppel is an affirmative defense, it was Respondent's burden to establish the estoppel by a preponderance of the evidence. See Hough v. Menses, 95 So.2d 410 (Fla. 1957).

The factual decisions of the trial court are clothed with the presumption of correctness that should not be disturbed on appeal absent a showing that there was no competent evidence to support them. Wales v. Wales, 422 So.2d 1066 (Fla. 1st DCA 1982). (Emphasis added). The trial court determined, after hearing all of the testimony and observing the witnesses, that Heggs failed to demonstrate a sufficient basis for an avoidance. The circuit

appellate court, however, departed from the requirements of law by obviously reweighing the facts. See Wales v. Wales, supra.

Further, Petitioner presented evidence which would refute an estoppel. The circuit appellate court specifically stated that there was no evidence that Heggs had been made aware of the policy to evict upon non-payment of rent or inaction after receiving a three-day notice. However, the record clearly establishes that there was evidence upon which the trial judge could find that Heggs had notice.[8] There was testimony that: in 1992, Parkview received a directive from Farmers Home that carryover charges for late rent should be reduced and that Parkview started in the fall of 1992 to make a concerted effort to make sure that tenants eliminated past due rent balances; that in the fall of 1992, Rand sent out a notice to tenants that the tenants had to have a zero balance on their rent prior to the end of year; and that the notice was posted and hand delivered to all tenants. Both Lopez and Haber testified that a notice was sent to all tenants concerning the change in policy with regard to past due rent. Thus, there was testimony presented that all tenants received a written notice that Parkview would not allow accumulation of past due rent.

Additionally, there was overwhelming evidence that Parkview's policy had always been that a failure to respond to a three day notice would result in an eviction. Both of the other tenants who were Heggs' witnesses admitted during cross-examination

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[8] The circuit appellate opinion makes this clear since the court notes that there was evidence that other tenants knew of the policy.

that they understood that Parkview's policy had always been to evict if a three-day notice was received and no action was taken by the tenant. Lopez and Haber also testified that this was the established policy at Parkview. Thus, there was evidence presented that Parkview's policy was to evict if there was no response to a three-day notice. Heggs admitted and it was undisputed that she did not respond to the three-day notice which was served upon Heggs on January 11, 1993.

There was additional testimony that there was a meeting with Heggs prior to January 11, 1993, and that Parkview agreed to accept rent only if Heggs would immediately make a partial payment and sign an agreement to pay off the balance in February. It was undisputed that Heggs met with Lopez on January 4, 1993. Lopez testified that she told Heggs at that time that she could remain at Parkview only if she would make a partial payment that day and sign a payout agreement.[9] Heggs did not choose that option and instead failed to pay rent or make any further contact. It was only after Heggs made no further contact with Parkview after the January 4th meeting that the three-day notice was sent on January 11, 1993.[10] It was undisputed that after the three-day notice was sent, Heggs made no contact with Parkview. Thus there was competent evidence

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[9] Even Heggs admitted the meeting occurred, and that the payout agreement was discussed. A at 50.

[10] Even Heggs admitted that she did not sign the agreement and did not make any payment after the meeting occurred, and that she received the three-day notice <u>after</u> she failed to sign an agreement or make any payment. A at 50.

to establish that Heggs was on notice that she would be evicted if she failed to pay her rent.

The trial judge had the opportunity to view the witnesses' demeanor as they testified. The circuit appellate judge seems to rely heavily upon Heggs' testimony without consideration of the testimony of other witnesses on the same subjects. The trial judge was in the better position to make a decision about the facts and to give weight to the testimony of the various witnesses based upon their bearing and demeanor. See Shaw v. Shaw, supra. The circuit appellate court reweighed the evidence and came to its own conclusions without the benefit of observing the demeanor of the witnesses.

In Clegg v. Chipola Aviation, Inc., 458 So.2d 1186 (Fla. 1st DCA 1984), the court noted that the resolution of factual conflicts by a trial judge in a non-jury case will not be set aside on review unless totally unsupported by competent substantial evidence. See also Abreu v. Amaro, 534 So.2d 771 (Fla. 3rd DCA 1988); Green v. Hartley Realty Corp., 416 So.2d 50 (Fla. 3rd DCA 1982); Charles R. Perry Construction, Inc. v. C. Barry Gibson & Associates, Inc., 523 So.2d 1221 (Fla. 1st DCA 1988); Marrone v. Miami National Bank, 507 So.2d 652 (Fla. 3rd DCA 1987); Crooks v. Atlantic National Bank of Florida, 445 So.2d 1042 (Fla. 5th DCA 1984). As further noted by this court in Shaw v. Shaw:

> ... it is not the prerogative of an appellate court, upon the de novo consideration of the record, to substitute its judgment for that of the trial court.

334 So.2d at 14. The weight to be given evidence is of matters

that is clearly within the exclusive province of the trier of facts. See Tibbs v. State, supra. See also Clegg v. Chipola Aviation, supra.

The only circumstance where the appellate court should reverse the finding of a factual determination by the trial judge is in a circumstance where there is no evidence to support the trial court's factual findings. See Bell v. Jefferson, 414 So.2d 273 (Fla. 5th DCA 1982); Blanford v. Polk County, 410 So.2d 667 (Fla. 2d DCA 1982); Trueba v. Pawley, 407 So.2d 945 (Fla. 3d DCA 1981). However, where, as here, there is competent evidence to support the judgment entered by the trial court, the trial court's decision should remain undisturbed.

Here, the circuit appellate court interfered with the decision of the fact finder as to what weight the evidence should be given. Even if the circuit appellate court would have come to a different conclusion, given the evidence, it was inappropriate to reverse under these circumstances where there was clearly competent substantial evidence to support the trial judge's findings. See Shaw v. Shaw, supra; Wales v. Wales, supra. The fact that there was evidence to support the trial judge's finding is apparent on the face of the circuit appellate opinion. Thus, the circuit appellate court's decision is a departure from the essential requirements of law and should be reversed.

B. It was respondent's burden to prove an affirmative defense and respondent failed to meet that burden.

The law is clear that the burden is on a defendant to

prove an affirmative defense. See Hough v. Menses, supra; Captain's Table, Inc. v. Khouri, 208 So.2d 677 (Fla. 4th DCA 1968). Clearly, Respondent failed to meet the burden of proving an affirmative defense by a preponderance of the evidence. The trial judge, the finder of fact, clearly found that this burden was unmet when the trial judge entered a final judgment in favor of Petitioner. The circuit appellate court exceeded the scope of its discretion and exceeded the scope of review by reversing the trial court on this point.

C. Utilizing any standard of review, it is clear that the final judgment should have been affirmed.

It is a fundamental principle of appellate procedure that an order or judgment of the lower tribunal is presumed to be correct. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); Mills v. Heenan, 382 So.2d 1317 (Fla. 5th DCA 1980). The correct standard when reviewing decision such as that of the trial court in the instant case is whether or not there was substantial competent evidence to support the decision of the trial court. See Shaw v. Shaw, supra.

Here, the circuit appellate court apparently applied the discretionary review standard since it found that the trial court abused its discretion in entering judgment in favor of Petitioner. See A at 57. Specifically, the circuit appellate court stated that "this court is of the opinion that the trial court abused its discretion in not finding that Appellee [petitioner] was equitably estopped from prevailing in this action." Id. However, this

standard is not applicable in the instant case. Compare Shaw v. Shaw, supra; Mercer v. Raine, 443 So.2d 944 (Fla. 1983).

Although not applicable, application of the abuse of discretion standard should also result in affirmance of the trial court. A mere disagreement with the reasoning or opinion of the lower tribunal is not enough to justify reversal of a discretionary decision. See Castlewood International Court v. LaFleur, 322 So.2d 520 (Fla. 1975). As with findings of fact, discretionary decisions come to the appellate court clothed with a presumption of correctness and it is improper to overturn a discretionary decision simply because a panel of appellate judges might have resolved the issue in a different fashion had they been on the trial bench. Id. Here, applying the appropriate standard, the trial judge clearly should have been affirmed. Even applying the discretionary standard, the trial judge should have been affirmed.

III. THE LAW SUPPORTS JUDGMENT IN FAVOR OF PETITIONER.

This case is a simple non-payment of rent eviction which has been so extensively litigated that it appears to have been turned into a litigation circus for no valid legal or factual reason. The case went to trial solely on the affirmative defenses raised by the respondent. These defenses were patently frivolous and were not supported by the evidence presented to the trial court. Every principle of law and every fact supports Petitioner's position.

A. Nonpayment of rent constitutes material noncompliance under the federal rules.

Respondent argued to the circuit appellate court that the federal regulations which govern tenancy in a Farmers Home Project require good cause for termination of tenancy and that there was no good cause in this case. This argument is patently frivolous. Heggs has admitted in briefs filed in the appellate courts that the federal regulations define material noncompliance to include repeated non-payment of rent. However, in the answer filed in the record and in testimony at trial, Heggs admitted repeated failure to pay rent.

Heggs argued that eviction on the basis of non-payment of rent falls within the parameters of the concept of "good cause" under the federal regulations. This is contradicted by the plain language of the federal regulations.

The federal regulations which govern Parkview Village provide that the project manager may terminate or refuse to renew any tenency only for "material noncompliance" with the lease or "other good cause". See 7 C.F.R., Ch. XIX, Part 1930, Sub-part C, Exhibit B, §XIV. A. 1. "Other good cause" is defined by the federal regulations as:

> Non-eligibility for tenancy, action, or conduct of the tenant which disrupts the liveability of the project by adversely affecting the health or safety of any tenant, or the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, or that has an adverse financial affect on the project.

Eviction for good cause, as defined under the regulation, requires that a project manager give a tenant prior notice that the conduct

will constitute a basis for termination of occupancy. See Id. at §XVI. A. 3. However, the prior notice required for termination based upon "good cause" is not required for termination based upon material noncompliance. Material noncompliance is defined under the rules as:

> One or more substantial violations of the lease, repeated non-payment of rent or any other financial obligations under the lease (including any portion thereof) beyond any grace period, and repeated minor violations of the lease which disrupt the liveability and harmony of the project.

(Emphasis added).

Here, the basis for eviction of Heggs was repeated nonpayment of rent. Thus, the claim fell within the definition of material noncompliance under federal regulations. Heggs admitted repeated nonpayment, and thus, there is no basis in law or fact for this defense.

B. Heggs received all notice required under the federal regulations and Florida law.

Heggs further argued to the circuit appellate court that Heggs should have been given an opportunity to cure her repeated non-payment of rent. Again, this is a frivolous argument.

The federal regulations provide:

> The notice of intent to terminate tenancy will be handled according to the terms of the lease. Tenants will be given prior notice of eviction according to state or local law.

7 C.F.R. Ch. XVIII, Part 1930, Sub-part C, Exhibit B, §XIV.B.1. The lease provides that state law shall apply in determining when eviction is appropriate. Paragraph 24 of the lease provides that the resident will be given fifteen days notice if the agreement is

being terminated because of noncompliance other than non-payment of rent, and, in the case of non-payment of rent, a three day notice will be given. Thus, under the terms of the lease and the federal regulations, a three day notice is sufficient. Clearly, under Florida law, eviction for non-payment of rent requires only a three day notice. See §83.56(3), Fla.Stat. (1991).

Heggs also alleged that there was a lack of proper notice under Section 83.56(2)(b), Florida Statutes. Clearly Florida law requires neither a seven day notice nor an opportunity to cure to one who fails to pay rent. See §83.56(3), Fla.Stat. In fact, under Florida law, failure to pay rent is treated so differently from any other type of violation that only a three day notice is required during which rent must be paid or possession tendered. Heggs has admitted and the overwhelming evidence supports that she received a three day notice in January after failing to pay rent in January and that she failed to pay rent after receiving the notice. Thus, Heggs' position that the notice was improper is completely unsupported by any fact and entirely devoid of any merit.

C. Retaliation is a frivolous defense under the facts of this case.

Heggs also argued that the eviction in this case was based upon retaliation by Parkview against Heggs for "her Tenants Association activities, as well as for her successful defense of her previous action for eviction." The position taken by appellant is ludicrous for two reasons.

First, Section 83.64(3), Florida Statutes, provides:

In any event, this section does not apply if the

> landlord proves that the eviction is for good cause. Examples of good cause include, but are not limited to, good faith actions for non-payment of rent, violation of the rental agreement or of reasonable rules, or violation of the terms of this chapter.

When the words of a statute are plain and unambiguous, courts must give them their plain meaning. See VoCelle v. Knight Brothers Paper Company, 118 So.2d 664 (Fla. 1st DCA 1960); Thayer v. State, 335 So.2d 815 (Fla. 1976). A statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts. See City of Casselberry v. Mager, 356 So.2d 267 (Fla. 1978).

The statute specifically requires that the tenant act in good faith in order to give rise to the right to raise the defense of retaliatory conduct. § 83.64(1), Fla. Stat. Here, it is clear that Parkview acted in good faith in bringing this action based upon admitted repeated nonpayment of rent and that Heggs has not acted in good faith in raising this defense. In the answer and at trial, Heggs admitted repeated non-payment of rent. Heggs admitted that she did not return to sign a payout agreement or make any payment after January 4 when she met with Yolanda Lopez. The record demonstrates that Parkview continued to attempt to work with Heggs on that date and gave her the chance to pay $135.00 toward her rent when her total balance was much higher than that. Heggs failed to pay the $135.00, sign the agreement, or even return to the office to make any type of explanation. The undisputed testimony was that the three day notice was mailed on January 11th and that Heggs did not return to the office to pay January's rent

or attempt in any manner to work with management toward resolution of her rent overburden problem anytime after January 11, 1993.

As to Heggs' alleged leadership of a tenants organization, the testimony was that the tenant organization is no longer active, that Heggs was President during a period of time when the Tenants Association was friendly toward Rand, and that the only period of time when Rand was in any sort of dispute with the tenants was during the period when ineligible tenants began to be evicted for ineligible status. It was undisputed that during that period of time, management actually encouraged tenants to seek advice from Legal Services on this matter. Management went so far as to invite the lawyers from Legal Services to come and address the tenants at a special meeting.

It is ludicrous to suggest that these facts support the existence of a cause of action or a defense of retaliation. Clearly, the "good cause" required by the statute is met since it is undisputed that Heggs did not pay rent, one of the items specifically listed in the statute as a basis for "good cause". Thus, under the plain language of the statute, since there was good cause, this defense is inapplicable.

The most compelling point which refutes absolutely the existence of a retaliatory intent with regard to this eviction is the fact that between the time of the present action and the time of Heggs' leadership in the tenants organization and the subsequent lawsuit which involved ineligible status which was rightfully believed to be the case by Parkview, Parkview repeatedly allowed

Heggs to "work with it" toward payment of late rent. Whenever Heggs came to Parkview and requested an opportunity to work out a payment plan for late rent, Parkview worked with her. Even on the occasion which led to eviction in this case, Heggs admitted that Parkview discussed a payment plan with her. It was only after Heggs failed to respond in any manner and failed to make any kind of payment or come into the office and discuss the three day notice that she received after meeting with management, that Parkview filed an eviction against Heggs. There is simply no basis from which anyone could conclude that this eviction was retaliatory in nature.

Respondent cited Great Atlantic v. Hughes, 5 Fla. Supp.2d 36 (County Ct., Orange County, 1983) in support of her position. However, in the instant case, unlike the Hughes case, the events leading to Plaintiff's good faith basis for eviction occurred immediately prior to this eviction being filed. The other cases which have been cited by Heggs are cases which deal with whether or not there is ill feeling between the tenant and landlord and are simply inapplicable in this case. Certainly the case provides no basis to support a retaliatory eviction defense in this case.

D. Parkview has always acted appropriately with regard to any handicap of any tenant and Heggs has failed to demonstrate that her handicap has in any manner impacted this case.

Heggs also attempted to argue that her "handicap" provides a proper basis to avoid paying rent. Heggs has argued that she has established that she is ill and incapable of managing

her business affairs. The record utterly refutes this. The only record information concerning Heggs' disability is that she was capable of handling her financial affairs and working several hours a week. The fact finder, the trial court, obviously believed this evidence. Even without this evidence, Heggs has admitted that she never asked for any accommodation. Thus, there is no factual basis for this defense.

The federal regulations which have been cited by Heggs certainly provide no legal basis to excuse nonpayment of rent. 29 U.S.C. Section 794, the Rehabilitation Act of 1973, provides that no "otherwise handicapped" or "disabled" individual shall be excluded from participation or subjected to discrimination under any program or activity receiving federal financial assistance solely because of his or her handicap or disability. The record is undisputed that Heggs never asked for any help in the manner in which she paid her rent. Parkview is prohibited by law to inquire or treat her differently because of any handicap. See 24 C.F.R., Ch. 1., §100.202(c).

The law is clear based on the plain language of the statute that a handicapped person must be "otherwise qualified". In the context of this case, "otherwise qualified" means capable of payment of rent. The documentation Parkview had in its possession in its files concerning Heggs' alleged disability indicated that Heggs was capable of handling her financial affairs. Certainly since the time that she had been declared disabled she had paid rent on many occasions and caught her rent up to date on many

occasions at Parkview's office. Heggs never asked that Parkview arrange to come her apartment to pick up her rent. Parkview had no right to request information concerning any needs that Heggs might have as a result of a handicap.

Under the rules which have been promulgated to effectuate the policies set out in the Fair Housing Act, 42 U.S.C. Section 3601, et. seq., management was prohibited from inquiring into whether or not Heggs had a handicap or to the nature or severity of the handicap. See 24 C.F.R. Chapter 1, Section 100.202(3)(c). Under both the Rehabilitation Act and the Fair Housing Act, Parkview was required to make reasonable modification for existing premises. Id. at §100.203. The undisputed testimony was that Parkview would have been perfectly willing to pick up Heggs rental checks at her apartment but she never asked. This clearly met any requirements under either statute. Heggs blindly ignores the actual statutory language and attempts to make this case into something it is not.

There is simply no evidence whatsoever of any discriminatory act of the part of Parkview. Heggs has cited to Atlanta Housing Authority v. Franklin, Case No. 92-ED0101612 (Fulton County, Georgia, March 1992) at 13. However, in Atlanta Housing Authority, apparently the Housing Authority refused to allow time to arrange for a representative payee for a disability check. Here, the undisputed testimony is that Parkview attempted to work with Heggs in accepting late rent but that Heggs simply refused to pay. There is no law, either state or federal, that

says that a landlord must continue to rent to person who wilfully refuses to pay rent. Again, Heggs has raised a patently frivolous defense with is supported by neither law nor fact.

E. The overwhelming evidence established that the practice at Parkview is to evict if there is no response to a three-day notice.

Heggs has argued that Parkview Village is estopped from evicting her based upon a prior practice. Heggs forgets all principles of equity in making this argument.

First, ones hands must be clean before one can claim equity. Here, Heggs refused to pay rent after a history of repeated failure to pay rent. Parkview acted in the best of faith in attempting to work with Heggs and she simply failed to take any responsibility toward her contractual obligations by failing to pay rent or sign the agreement that would have allowed her to remain in her apartment.

Further, the witnesses offered by Heggs purportedly to establish a practice at Parkview of accepting late rent, in fact, established the opposite. The witnesses testified that Parkview accepted late rent on a regular basis if the tenant came in and tried to work out a plan for payment. However, the same witnesses who testified that Parkview accepted late rent also testified that it was the clear practice at Parkview and that they understood that they would be evicted if they did not respond to a three day notice. It is undisputed in the record that Heggs did not respond to the three day notice which was delivered on January 11, 1993. The overwhelming evidence demonstrated that this was after it was

made clear to her in the Parkview office that she would be evicted unless she made partial payment and signed a payout agreement.

In order to establish the affirmative defense of estoppel, one must prove that there is a representation of some material fact made by the party estopped to the party claiming estoppel; that such representation is contrary to the conditions asserted by the estopped party; and that the party claiming estoppel must have relied upon such representations, and, because of such reliance, changed his position to his detriment. See generally Phoenix Insurance Company v. McQueen, 286 So.2d 570 (Fla. 1st DCA 1973). The burden of proving an estoppel rests upon the party invoking it and every fact essential to an estoppel must be clearly and satisfactorily proved. See generally Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514 (Fla. 2nd DCA 1967).

Here, the fact finder found that no estoppel was proven. Clearly, the evidence presented by Heggs herself establishes that estoppel was inappropriate. Looking solely at the evidence offered by Heggs, the evidence establishes that the practice at Parkview was to evict if there was no response to a three-day notice, that she met with Lopez, that Lopez discussed the payout agreement, that Heggs never made a payment or signed an agreement after that meeting and that she received and did not respond to the three-day notice. Thus, based solely upon the evidence presented by Heggs herself, it is clear that application of estoppel under these circumstances is a departure from the essential requirements of law. This is without even consideration of the overwhelming

evidence presented by the other witness by Parkview at trial.

As to the other arguments concerning equity which have been raised by Heggs, these cases are simply inapplicable to the situation before the court. Simply stating that Heggs is ill is an insufficient basis to estop Parkview from demanding its rights under the law. Generally, where the courts have allowed an equitable defense to eviction, a tenant has made a substantial change to the premises in reliance upon a long term lease. See generally Rader v. Prather, 130 So. 15 (Fla. 1930); Smith v. Winn Dixie Stores, Inc., 448 So.2d 62 (Fla. 3rd DCA 1984). See also Mayflower Associates, Inc. v. Elliott, 81 So.2d 719. That type of situation is completely absent in the case before this court.

CONCLUSION

In conclusion, Petitioner requests that this court reverse the district court and remand with directions that the court has jurisdiction to review the opinion of the circuit appellate court and reverse the district court's entry of order granting attorney's fees to respondent and the order denying motion for attorney's fees to petitioner or, in the alternative, reverse the opinions of the district court and circuit appellate court and the orders regarding attorney's fees and affirm the decision of the trial court.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Nora Leto, Esq. Post Office Box 24688, Lakeland, Florida 33802-4688 by mail on this the 30th day of September, 1994.

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