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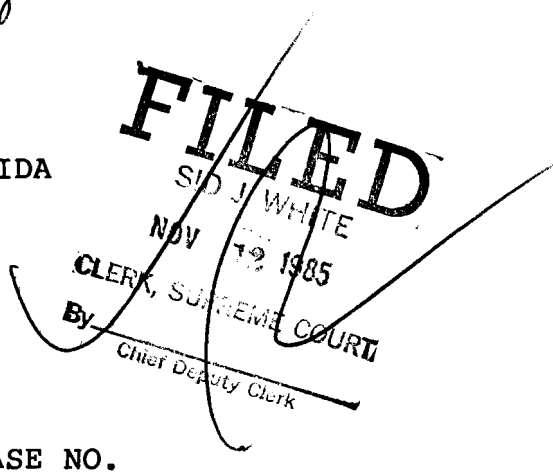
IN THE SUPREME COURT OF FLORIDA



HARRY HORN and
SALA HORN, his wife,

Petitioners,

vs. CASE NO.

SHELDON GREENE & ASSOCIATES, INC.,
a Florida corporation, and
LITWIN REALTY, INC.,
a Florida corporation,

Respondents.
_____/

APPLICATION FOR DISCRETIONARY REVIEW OF THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' BRIEF ON JURISDICTION

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and
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SUMMARY OF ARGUMENT

By inferring from certain comments made by the circuit court formal and binding findings of fact, and by drawing a further inference from that inference, the district court of appeal placed itself in express and direct conflict with those cases which hold that an appellate court may not substitute its judgment for that of a trial court by reevaluating the evidence.

By holding that the intentional exclusion of a broker by the buyer and seller vitiates the need for continuous negotiations in order for the broker to collect a fee, the district court of appeal placed itself in express and direct conflict with those cases which hold that there must be continuous negotiations conducted by the broker in order for the broker to collect a fee.

By holding that the intentional exclusion of a broker by the buyer and seller vitiates the need for continuous negotiations in order for the broker to collect a fee, and by stating that a fee is due to the broker although the buyer has no interest in the property at the time the property is shown to the buyer, the district court of appeal placed itself in express and direct conflict with those cases which hold that there must be continuous negotiations from which the buyer and seller have purposely excluded the broker in order for the broker to collect a fee.

STATEMENT OF THE CASE AND OF THE FACTS

Harry Horn and Sala Horn, his wife, pursuant to article V, section 3(b)(3), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), petition the Supreme Court of Florida for review of the Third District Court of Appeal of Florida's decision in Sheldon Greene & Associates v. Rosinda Investments, N.V., No. 84-857 (Fla. 3d DCA Aug. 13, 1985)(motion for rehearing denied Oct. 4, 1985).

The petitioners, along with Rosinda Investments, N.V., a Netherlands Antilles corporation, were the defendants before the Circuit Court for Dade County, Florida, and the appellees before the Third District Court of Appeal of Florida. The respondents were the plaintiffs before the circuit court and the appellants before the district court of appeal. The appeal was from a final judgment by the circuit court sitting as the finder of fact in an action to recover brokerage commissions from the petitioners. The circuit court ruled in favor of the petitioners. The district court of appeal reversed the circuit court with directions to enter judgment for the respondents.

In its final judgment, the circuit court found

> that under all of the circumstances [1] the Plaintiffs have failed to establish that they were the procuring cause of the sale, and [2] the Plaintiffs have

> failed to prove that there were continuing negotiations between the seller and purchaser, conducted by or through the broker, and as such have failed to meet the test enunciated by the Court in the case of Shuler v. Allen, Fla. 76 So.2d 879 (S.Ct. 1955) . . . .

(Appendix at 14.)

Essential to the district court of appeal's reversal of the circuit court, is an inference by the district court of appeal that the circuit court made a finding of fact that the petitioners were initially shown certain commercial real property, known as the Prince Arthur, by a Mr. Pollock, an agent of the respondents. (Appendix at 2.) The district court of appeal drew this inference from certain comments made by the circuit court during the course of the trial. (Appendix at 2.) The final judgment under review by the district court of appeal, however, contained no such finding of fact. (Appendix at 14-15.) Indeed, there was competent evidence before the circuit court from which the circuit court could have found that Mr. Pollock did not show the Prince Arthur to the petitioners. (Appendix at 16-25.)

Also essential to the district court of appeal's reversal of the circuit court, is a further inference drawn by the district court of appeal from the "findings of fact" that the district court of appeal inferred from the comments made by the circuit court during the course of the trial.

The district court of appeal inferred that the petitioners "misleadingly" informed the respondents that the petitioners "had no interest in purchasing" the Prince Arthur. (Appendix at 3.) The final judgment under review by the district court of appeal, however, contained no such finding of fact. (Appendix at 14-15.) Indeed, there was competent evidence before the circuit court from which the circuit court could have found that, not only had the petitioners never been shown the Prince Arthur by the respondents, but that the petitioners were, as a matter of fact, honestly not interested in any of the properties that actually were shown to the petitioners by the respondents. (Appendix at 16-25.)

Also essential to the district court of appeal's reversal of the circuit court, is a conclusion by the district court of appeal that the "correct rule of law" is "that a broker, to be considered the 'procuring cause' of a sale, must have brought the purchaser and seller together and effected a sale through continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations." (Appendix at 3.)

Also essential to the district court of appeal's reversal of the circuit court, is a conclusion by the district court of appeal that "a broker has done all that he is required

to do and is entitled to a commission where he has shown the buyer the property but makes no further efforts because an initial purchase offer is rejected or the buyer expresses no interest in the property." (Appendix at 4.)

ARGUMENT

I

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN EXPRESS AND DIRECT CONFLICT WITH DELGADO V. STRONG, 360 SO. 2D 73 (FLA. 1978), AND THOSE OTHER CASES WHICH HOLD THAT AN APPELLATE COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF A TRIAL COURT BY REEVALUATING THE EVIDENCE.

By taking certain comments made by the circuit court during the course of the trial and inferring from those comments formal and binding findings of fact, and by drawing a further inference from the "findings of fact" that the district court of appeal inferred from the circuit court's comments, the district court of appeal, in effect, reweighed the evidence and substituted its judgment for that of the circuit court on disputed issues of fact. In doing so, the district court of appeal placed itself in express and direct conflict with Delgado v. Strong, 360 So. 2d 73 (Fla. 1978), and those other cases which hold that an appellate court may not substitute its judgment for that of a trial court by reevaluating the evidence. See, e.g., Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); Prevatt

v. Prevatt, 462 So. 2d 604 (Fla. 2d DCA 1985); Deakyne v. Deakyne, 460 So. 2d 582 (Fla. 5th DCA 1984); Clegg v. Chipola Aviation, Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984); Diversified Commercial Developers, Inc. v. Formrite, Inc., 450 So. 2d 533 (Fla. 4th DCA 1984).

II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN EXPRESS AND DIRECT CONFLICT WITH SHULER V. ALLEN, 76 SO. 2D 879 (FLA. 1955), AND THOSE OTHER CASES WHICH HOLD THAT WHERE A BROKER HAS BROUGHT THE PARTIES TOGETHER AND THE SALE IS EFFECTED AS A RESULT OF CONTINUOUS NEGOTIATIONS BETWEEN THE PARTIES, INAUGURATED BY AND CONDUCTED BY THE BROKER, THE BROKER WILL BE ENTITLED TO HIS COMMISSION EVEN THOUGH THE SALE EVENTUALLY CONSUMMATED IS ON TERMS AND AT A PRICE DIFFERENT FROM THOSE IN THE ORIGINAL LISTING OR UNDER THE ORIGINAL EMPLOYMENT.

In its decision, the Third District Court of Appeal of Florida stated the "correct rule of law" to be "that a broker, to be considered the 'procuring cause' of a sale, must have brought the purchaser and seller together and effected a sale through continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations." (Appendix at 3.) The Third District Court of Appeal of Florida further stated, "[A] broker has done all that he is required to do and is entitled to a commission

where he has shown the buyer the property but makes no further efforts because an initial purchase offer is rejected or the buyer expresses no interest in the property." (Appendix at 4.)

The Supreme Court of Florida, in Shuler v. Allen, 76 So. 2d 879, 882 (Fla. 1955) (emphasis added), held that

> if the broker has brought the parties together and the sale is effected as a result of continuous negotiations inaugurated by him, he will be nevertheless entitled to his commission even though the sale eventually consummated is on terms and at a price different from those in the original listing or under the original employment. Continuous negotiations, as used in this decision, and as referred to in many others, means continuous negotiations between the seller and the prospective purchaser conducted by the broker.

The decision of the Third District Court of Appeal of Florida is in express and direct conflict with the decision of the Supreme Court of Florida cited and quoted above.

III

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN EXPRESS AND DIRECT CONFLICT WITH FIRST REALTY CORP. OF BOCA RATON V. STANDARD STEEL TREATING CO., 268 SO. 2D 410 (FLA. 4TH DCA 1972), AND THOSE OTHER CASES WHICH HOLD THAT WHERE A BROKER HAS BROUGHT THE PARTIES TOGETHER AND THE SALE IS EFFECTED AS A RESULT OF CONTINUOUS NEGOTIATIONS INAUGURATED BY THE BROKER, THE PARTIES CANNOT COMPLAIN THAT THE BROKER DID NOT PARTICIPATE IN THE CONTINUOUS NEGOTIATIONS WHEN THE PARTIES HAVE PURPOSELY EXCLUDED THE BROKER FROM THE CONTINUOUS

NEGOTIATIONS BY DEALING WITH ONE ANOTHER DIRECTLY AND IN SECRET.

In its decision, the Third District Court of Appeal of Florida stated the "correct rule of law" to be "that a broker, to be considered the 'procuring cause' of a sale, must have brought the purchaser and seller together and effected a sale through continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations." (Appendix at 3.) The Third District Court of Appeal of Florida further stated, "[A] broker has done all that he is required to do and is entitled to a commission where he has shown the buyer the property but makes no further efforts because an initial purchase offer is rejected or the buyer expresses no interest in the property." (Appendix at 4.)

The Fourth District Court of Appeal, in First Realty Corp. of Boca Raton v. Standard Steel Treating Co., 268 So. 2d 410, 412-13 (Fla. 4th DCA 1972) (emphasis added), held:

> If a broker has brought the parties together and a sale is effected as a result of continuous negotiations inaugurated by the broker, he will be entitled to his commission even though the sale is eventually consummated on different terms and at a different price. Shuler v. Allen, Fla.1955, 76 So.2d 879 . . . .

. . . .

> [I]f the trier of fact determines that there were continuous negotiations between the buyer and seller following the negotiations inaugurated by [the broker] . . . [the buyer and seller] cannot complain that the broker did not participate in negotiations when they have purposely excluded the broker from these negotiations by dealing with one another directly and in secret. [Citations omitted.]

See, e.g., Danieli Corp. v. Bryant, 399 So. 2d 387 (Fla. 4th DCA), review denied mem., 407 So. 2d 1102 (Fla. 1981); Alcott v. Wagner & Becker, Inc., 328 So. 2d 549 (Fla. 4th DCA 1976).

The decision of the Third District Court of Appeal of Florida is in express and direct conflict with the decisions of the Fourth District Court of Appeal of Florida cited and quoted above.

CONCLUSION

The petitioners request that the Supreme Court of Florida extend its discretionary jurisdiction to this action and enter an order quashing the decision of the Third District Court of Appeal of Florida and reinstating the final judgment of the circuit court.

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