IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

SCHNURMACHER HOLDING, INC.,

Petitioner,

vs.

WILLIAM L. NORIEGA,

Respondent.

_____/

CASE NO. 3d DCA 87-2358
CASE NO. _____

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PETITIONERS' BRIEF ON JURISDICTION

Discretionary Proceeding to
Review a Decision of the
Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This case is a simple one, in terms of its facts and the presence of express and direct conflict of decisions on which this court should premise its jurisdiction to review the merits of the matter. Although simple in fact, and evident in conflict, the case is of far reaching impact as it concerns the rightful allocation of responsibility for the payment of state sales tax in a landlord-tenant relationship.

Noriega, the landlord, and Schnurmacher, the tenant, entered into a commercial lease agreement which was silent as to which party had responsibility for payment of the sales tax imposed by section 212.031, Florida Statutes (1987). The parties elected to arbitrate the sales tax dispute. The arbitrator concluded that Noriega must pay the sales tax in the absence of a contractual provision to the contrary. The circuit court affirmed the decision of the arbitrator and Noriega appealed.

The district court reversed the trial court's order confirming the arbitrator's determination, reaching its result with a statement, unsupported by case law, that "the arbitrator misapplied [the law], thereby constituting grounds for our reversal as a matter of law." Noriega v. Schnurmacher Holding, Inc., No. 87-2358 at 5 (Fla. 3d DCA 1988).[1]

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[1] A copy of the panel decision is attached to this brief as Appendix 1, and a copy of the court's order denying rehearing is attached as Appendix 2.

The decision of the Third District concedes direct conflict with the decisions of two other district courts of appeal on the question of who is obligated to pay the tax. See Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982); Spacelink of Florida, Inc. v. Golden Lakes Village Ass'n, 505 So.2d 32 (Fla. 4th DCA 1987). This brief discusses that jurisdictional basis for this Court's review, as well as that basis left unnoted by the district court's decision, but just as obvious. A misapplication of law does not constitute an appropriate ground for vacating an arbitrator's award. In so holding, the Third District has placed itself in conflict with decisions of this Court and other district courts of appeal.

SUMMARY OF THE ARGUMENT

Two clear grounds of express and direct conflict exist between the Third District's decision and precedent. As the district court's opinion acknowledges, its determination that section 212.031(2)(a) requires that, in the absence of an opposing contractual provision, the tenant in a commercial lease must pay the sales tax, is in express and direct conflict with Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982) and Spacelink of Florida, Inc. v. Golden Lakes Village Ass'n, 505 So.2d 32 (Fla. 4th DCA 1987).

That conflict arises from the Third District's resolution of the merits of the case. In order to get that far, however, that court traversed yet another path of conflict with prior decisions. Section 682.13 narrowly defines the jurisdiction of trial and appellate courts to review arbitration awards. A consistent line of cases has held that when no statutorily enumerated ground to vacate an arbitration decision is present, that decision is final and conclusive. The Third District based its reversal of the arbitrator's decision on a misapplication of law. Errors of law by an arbitrator are not reviewable, however. See Cassara v. Wofford, 55 So.2d 102 (Fla. 1951); Affiliated Marketing, Inc. v. Dyco Chemicals and Coatings, Inc., 347 So.2d 1240 (Fla. 2d DCA) cert. denied 353 So.2d 675 (Fla. 1976); Bohlmann v. Allstate Insurance Co., 171 So.2d 23

(Fla. 2d DCA 1965). These two grounds of express and direct conflict provide adequate reason for this court's review. Uniformity of decision in the application of the sales tax law is vital.

ARGUMENT

Express and Direct Conflict of Decisions

A. Jurisdiction of the District Court.

The district court's opinion acknowledges that the statutorily enumerated grounds for vacating an arbitration award are absent in this instance. Noriega, at 4. Nonetheless, the arbitrator's award was reversed with the succinct, but unsupported, statement that the arbitrator had misapplied the sales tax law and that this error constituted grounds for reversal. Section 632.13(1)(e), however, restrains the District Court from reaching this result.

That section expressly states that the courts of Florida may not vacate or refuse to confirm an arbitration award because the relief granted by the arbitrator either "could not or would not be granted by a court of law or equity ..." Noriega and Schnurmacher voluntarily resorted to arbitration to resolve this dispute and, as a direct consequence, voluntarily relinquished their right to have the dispute resolved in accordance with legal principles applicable in a court of law.

Precedent plainly provides that "the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment either as to the law or as to the facts ..." Cassara v. Wofford, 55 So.2d at 105 (Fla. 1951); see also Affiliated Marketing, Inc., supra. The district court's

errant jurisdictional overreach is marked by its failure to cite authority for the procedure it followed.

There is no support for the district court's assertion of jurisdiction to vacate this arbitration award. On this ground of direct conflict alone, this court should accept review.

B. The Merits of the Third District's Decision.

In Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982), the court concluded that the tax levied by section 212.031 is a tax on the landlord and not on the tenant for the reason that the language of the statute declares that a person in the business of leasing real property exercises a taxable privilege. The lessor bears ultimate responsibility for the payment of the tax. Id. at 1187.

In Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959), the Court held that the tax levied by section 212.03 is an excise tax on the landlord for the privilege of doing business in the state. The statute analyzed in Green is in all pertinent respects identical to section 212.031. The First District recognized this in Oven by citing Green as support for its decision. That decision of the First District and the Spacelink decision approving its analysis are correct interpretations of section 212.031. They recognize that this Court has, for all intents and purposes, already passed on and rejected the notion that the tax imposed by section 212.031 imposes a

burden on tenants, rather than landlords, to pay the tax. An express and direct conflict in decisions is apparent and can only be resolved by this Court.

C. Reasons for Accepting Review

The effect of the Third District's decision is to allocate to the tenant the burden of sales tax payment where a commercial lease is silent on this point. A host of commercial transactions may well be affected by this determination. In substance, that decision is incorrect and in conflict with prior cases.

As a matter of procedure, the district court's decision also rests on an infirm foundation. The parties' dispute was resolved by arbitration. The district court reversed that arbitration award for an error of law, in direct derogation of the narrow statutory scope of review recognized and adopted by prior cases. This procedural conflict, left unresolved, will also have significant impact.

CONCLUSION

For the foregoing reasons, the Court should review this decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a correct copy of this Jurisdictional Brief was ~~served~~ mailed September 2, 1988 on Irwin B. Levenson, Esq., of Counsel, Buchbinder & Elegant, P.A., Counsel for Respondent, 46 S.W. 1st Street, 4th Floor, Miami, Florida 33130.

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