72,994 O/A 2-10-89

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

SCHNURMACHER HOLDING, INC.

Petitioner,

vs.

Case No. 3d DCA 87-2358

WILLIAM L. NORIEGA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

This case arises out of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and the District Court of Appeal of Florida, Third District. Respondent, WILLIAM L. NORIEGA, Trustee, was the Applicant and Appellant respectively below in these proceedings arising out of arbitration pertaining to the question of who, as between the landlord and tenant, is obligated to pay the sales tax under a commercial lease in which the Respondent is the lessor. The Petitioner, SCHNURMACHER HOLDING, INC., a Florida corporation, was the Appellee below and is the tenant under the subject lease. The parties shall be referred to in this Brief interchangeably by court designations, proper names, and as landlord and tenant, wherever clarity is best served. The symbol "R" shall be used to designate the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is so sketchy and incomplete that it tends to create misimpressions that can only be corrected by a complete statement of the factual and procedural background of this case.

The parties entered into the subject lease agreement on April 16, 1985. [R 11-28] The Lease is a commercial lease for an auto dealership at which Collection Chevrolet is operated in Miami, Florida.

At the time the Lease was entered into and to date the sales tax law of Florida provided, and continues to provide, in Section 212.031(2)(a) entitled "Lease or rental of real property", as follows:

> The tenant actually occupying, using or entitled to the use of any property the rental from which is subject to taxation under this section shall pay the tax to his immediate landlord or other person granting the right to such tenant to occupy or use such real property." [Emphasis added]

The above-quoted provision is a part of the contract entered into by and between the parties to this cause as though it were set forth therein verbatim. The actual lease provision between the parties pertaining to taxes is contained in Section Three of the Lease entitled "Additional rent" and shifts the burden from the lessor to the lessee for ad valorem taxes but says nothing specific about sales tax. The language of that provision reads as follows:

> The LESSEE agrees for the term of this leasehold interest to pay all real estate taxes and other ad valorem taxes and building insurance premiums which may be assessed against the real estate so leased hereunder promptly upon demand of the LESSOR hereunder. LESSEE specifically agrees to pay in addition to the aforementioned items, any interest and penalties that may accrue thereon in the event of the failure of LESSEE to pay those items, and all other damages, costs, expenses, and sum that LESSOR may suffer or incur, or that may become due, by reason of any default of LESSEE or failure by LESSEE to comply with the terms and conditions of this lease shall be deemed to be additional rent, and, in the event of nonpayment, LESSOR shall have all the rights and remedies as herein provided for failure to pay rent. [R 13]

A dispute arose between the parties as to who, as between them, had the obligation to pay the sales tax. That issue was submitted to arbitration. [R 10] The arbitrator rendered his "Award" on May 13, 1987. [R. 4-9] Notwithstanding that the statutory law of Florida was a part of the contract between the parties and plainly imposed the obligation of paying the sales tax on the tenant, the arbitrator re-wrote the agreement between the parties by deciding as follows:

> . . . the arbitrator has come to the conclusion that absent a specific assumption or requirement by the Lessee set forth in the lease agreement, it is the obligation of the Lessor to pay the sales tax on the rental payments he receives under the lease. [R 6]

On May 19, 1987, pursuant to the applicable provisions of the Florida Arbitration Code, Florida Statutes, Chapter 682, the landlord, as the Applicant in the trial court, filed his "Application and Motion to Vacate and/or Modify and Correct Arbitration

Award and as Such to Confirm the Same and Make it a Judgment of the Court". [R 1-28] The theory of the Application was that the arbitrator exceeded his authority by rewriting the contract between the parties which embodied the law of Florida as stated above. On June 10, 1987, the tenant moved to dismiss the Application on the ground that the arbitrator had not exceeded his authority by rewriting the agreement between the parties. [R 29] That motion was denied on June 19, 1987. [R 31] On July 6, 1987, the tenant filed its Response [R 32], which was in effect a general denial with the affirmative assertion that no basis existed to change the award because the arbitrator only interpreted the subject statute to require a specific written assumption by a tenant in order for it to bear the obligation of paying the sales tax.

On August 13, 1987, the trial court entered its Final Judgment which succinctly crystalizes the issues at hand. The Final Judgment reads, in pertinent part, as follows: [R 35-39]

> The arbitrator found as follows: [Exhibit A, pg. 3]
>
> . . . the arbitrator has come to the conclusion that absent a specific assumption or requirement by the Lessee set forth in the lease agreement, it is the obligation of the Lessor to pay the sales tax on the rental payments he receives under the lease.
>
> * * * * *
>
> C) It is the law of Florida that an arbitrator cannot rewrite the agreement between the parties. See: School board of Seminole County v. Cornelison, 406 So.2d 484 (Fla. 5th

DCA 1981), pet. rev. pen., 421 So.2d 67 (Fla. 1982) and Sac Construction Co. v. Milam Dairy Associates, 481 So.2d 28 (Fla. 3d DCA 1986. In Cornelison the governing rule of law is stated explicitly as follows:

> . . . an arbitrator cannot rewrite the agreement and he is bound by it.

The Applicant contends and the Court agrees with him, that when an arbitrator does rewrite the plain, unambiguous language of the agreement between the parties submitting to arbitration, the Circuit Court is empowered to correct that error. The Respondent, on the other hand, contends that the arbitrator in this case did not rewrite the contract between the parties because the parties specifically submitted that issue for arbitration and the arbitrator was bound as a matter of law to rule as he did and thus this Court has no jurisdiction. This Court disagrees with the Respondent in both particulars, that is, it is the Court's decision that the arbitrator did rewrite the agreement between the parties and this Court does have jurisdiction of the issue; however, the Court does agree with the Respondent, as shall be hereinafter more specifically explained, that under the current posture of the law the arbitrator undoubtedly felt bound, as does this Court, to follow the decision of the District Court of Appeal of Florida, First District, in the case of Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982), even though this Court is of the opinion that the decision in that case is fundamentally erroneous.

D) As stated previously, the constitution and laws of Florida are a part of every Florida contract and a contract made in violation of the law is illegal. See, as exemplary: 11 Fla. 2d CONTRACTS, Section 129, p. 429-430, Board of Public Instruction v. Town of Bay Harbor Is., 81 So.2d 637 (Fla. 1955) and 11 Fla.Jur.2d CONTRACTS, Section 83, p. 375, Local No. 234, et seq. v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953) and Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (1930).

In Board of Public Construction v. Town of Bay Harbor Is., supra. the Florida Supreme Court held:

> We reach this conclusion for the very evident reason that an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice.

In the case at bar the statutory provision contained in Florida Statute Section 212.031(2)(a), as quoted above, is a part of the contract between the parties. The language of that provision in mandatory terms puts the obligation on the tenant to pay the tax to his immediate landlord or other person granting him the right to such tenancy, occupancy or use of such real property. For the arbitrator to have reached the view he did he had to rewrite the contract between the parties; and, as such, the Arbitrator's award should be vacated and modified to comply with the terms of the contract containing the aforementioned statutory provision.

E) But for the decision in Oven v. Dawirs, supra; this Court, and undoubtedly the arbitrator, would have ruled in favor of the Applicant. But the Court, as did the arbitrator, feels bound by that Appellate Court decision; although, this Court believes that decision is, as heretofore stated, fundamentally erroneous because the decision overlooks and fails to recognize the basic law stated herein, namely, that the law is a part of every Florida contract and the law in this instance is mandatory that the tenant must pay his landlord the tax. The Court in the Oven decision stated that it was a novel question and did overlook the aforementioned law making the cited statutory provision a part of the

contract. The Court did, however, cite Section 212.03(3) which in pertinent part reads as follows:

> The tax imposed by this section shall be in addition to the total amount of the rental and shall be charged by the lessor or person receiving the rent in and by a rental arrangement which the lessee or person paying the rental and shall be due and payable at the time of the receipt of such rental payment by the lessor or other person who receives said rental or payment.

That provision imposes in mandatory language the duty on the landlord or such other person receiving rent "in and by a rental arrangement" to collect the tax from the tenant. That provision does not require that the tenant's obligation to pay the tax be explicated in a written document. Actually, the provision contemplates that rental arrangements may not be in writing; but, nonetheless, imposes the duty on the landlord or such other person collecting rent by whatever rental arrangement there is, to collect the tax as well.

F) It is this Court's view that the Oven case, supra; is erroneous, but it is the decision of a higher Court; and, as stated, this Court feels bound by it. Stare decisis gives the law stability but does not mandate inflexibility. Error should not be perpetuated but this Court is not empowered to correct the decisions of higher courts. It is this Court's opinion that the decision in Oven v. Dawirs, supra; should be corrected through the appellate process.

The landlord timely appealed to the District Court of Appeal of Florida, Third District, which rendered its opinion agreeing with the trial court's analysis of the substantive issue that, as between the landlord and tenant, under a commercial lease of real property in Florida, the tenant has the contractual obligation to

pay the sales tax; and, thus, reversed the trial court's conclusion dictated by following Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982).

On the tenant's invocation, the Florida Supreme Court accepted jurisdiction of this cause, on November 2, 1988, and set the same for oral argument on February 10, 1989.

ISSUES PRESENTED

The Respondent cannot accept the Petitioner's sequencing of statement of the issues on review. Consequently, those issues are restated as follows:

I. WHO, AS BETWEEN THE LANDLORD AND TENANT, UNDER A COMMERCIAL LEASE OF REAL PROPERTY IN FLORIDA, HAS THE OBLIGATION OF PAYING THE SALES TAX?

II. WHETHER OR NOT THE COURTS HAVE JURISDICTION TO SET ASIDE AN ARBITRATOR'S AWARD THAT NOT ONLY REWRITES THE AGREEMENT BETWEEN THE PARTIES, BUT IS CONTRARY TO PUBLIC POLICY AND THE ARBITRATOR, ATTEMPTING TO DECIDE THE CASE ACCORDING TO LAW, DECIDES IT WRONG?

SUMMARY OF ARGUMENT

The statutory and constitutional law of Florida is a part of every Florida contract. In this case the law of Florida, which is part of the subject lease, unambiguously places the contractual obligation of paying the sales tax, as between the landlord and tenant, on the tenant. The trial court reluctantly followed what the landlord respectfully submits is the erroneous decision of the District Court of Appeal of Florida, First District, in the case of Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982). That case imposed the burden of the sales tax on the landlord because the lease did not expressly impose the burden on the tenant. That case is fundamentally erroneous because it overlooks the controlling rule of law that makes the statutory and constitutional law of Florida a part of every Florida contract and the law of Florida (Florida Statutes, Chapter 212.031(2)(a), unambiguously and unequivocally imposes the obligation on the tenant to pay the sales tax. Had the parties contracted expressly to place the burden of the tax on the landlord, that provision would have been unenforceable as a violation of the constitution and public policy of Florida.

An arbitrator cannot rewrite the agreement between the parties. That is an excess of authority that the Courts have jurisdiction to correct under well-settled law in Florida and elsewhere. Additionally, the Courts have jurisdiction to correct an arbitration award which is contrary to public policy and of such

a magnitude as to call for judicial intervention. Furthermore, where it clearly appears that an arbitrator meant to decide a matter according to law and decides it wrong, the Courts have the power to correct the award.

ARGUMENT

I.

A TENANT IN FLORIDA UNDER A COMMERCIAL LEASE HAS THE OBLIGATION, AS BETWEEN THE LANDLORD AND TENANT, OF PAYING THE SALES TAX EVEN THOUGH THE LEASE DOCUMENT ITSELF DOES NOT EXPRESSLY SO PROVIDE BECAUSE THE STATUTORY LAW OF FLORIDA MANDATORILY REQUIRES THAT THE TENANT PAY THE TAX TO THE LANDLORD AND THE LAW IS A PART OF THE CONTRACT.

Petitioner has misconceived the issue in this case. It argues ardently that the answer to this case lies in deciding which of the parties to a commercial lease owes the State of Florida the sales tax. That is not the issue! The issue is not the payment of tax to the State, but rather who, as between the landlord and tenant, is contractually obligated to pay the sales tax. Unquestionably, the landlord has the burden and duty to pay the tax to the State. The landlord is the state's agent and trustee for the collection and payment of the tax but it is the tenant who must pay the tax as a contractual matter between the parties to the lease. That is the fundamental public policy expressed in the Florida sales tax law, as the Florida Supreme Court so stated in the cases relied upon so heavily by Petitioner. See: Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950) and Green v. Panama City House Authority, 115 So.2d 560 (Fla. 1959). In both those cases unquestionably it was held that the Florida sales tax is an excise tax upon landlords for the privilege of doing business in this state. That, however, is not an

answer to the question at hand. The answer is found in Gaulden v. Kirk, supra, where the Florida Supreme Court discussed in depth the public policy of the state in requiring that the tax be passed on to the tenant because to do otherwise would give large merchants and large landlords an economic advantage over small dealers who could not afford to absorb the tax. The pertinent language of the decision reads as follows: (47 So.2d at 577-578)

> The provision of the law which requires the merchant or landlord to pass the tax on to, and collect it from, the purchaser or tenant appears harsh and unreasonable to the merchant or landlord who is financially able to absorb the tax. However, we must consider the plight of the small merchant or landlord who cannot afford to pay the tax and remain in business. The provision for passing on the tax was obviously inserted for the purpose of protecting merchants and landlords as a whole and to forestall unfair trade practices, thus preventing the destruction of the small operator's business.
>
> We quote with approval from the case of Hooten v. Carson, 186 Tenn. 282, 209 S.W. 2d 273, 275:
>
> > There is a strong and very just reason why the legislature made it mandatory upon the seller to collect the tax from the purchaser. This express direction is found in many of the retail sales tax statutes. The courts, in discussing this provision, have held that it is a matter of reasonable regulation of trade practices. Thus in Doby v. Sales Tax Commission, 234 Ala. 150, 174 So.233, 237, the Supreme Court of Alabama, in dealing with the question, says: 'The mandatory provision in this section is for the benefit of the seller, but more particularly for the protection of all retailers charged

> with the payment of this tax. The lawmakers deemed it unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker dealer who could not absorb it. So, the legal duty of the retailer, the taxpayer, is to pay the tax and also to collect a like amount from the purchaser. It is not a question of whether he should pay the tax or, in the alternative collect the tax for the state.' See also Tanner v. State, 28 Ala.App. 568, 190 So.292; State ex rel. Rice v. Allen, 1980 Miss. 659, 177 So. 763.

Hence, it is plain that the Florida Supreme Court has from its first consideration of the Florida sales tax law recognized that contractually, as between the landlord and tenant, the obligation is the tenant's for the strong public policy reason quoted from Gaulden v. Kirk.

The Respondent will demonstrate in the succeeding paragraphs of this section that Oven v. Dawirs, supra, and Spacelink of Florida, Inc. v. Golden Lakes Village Ass'n, 505 So.2d 32 (Fla. 4th DCA 1987), are fundamentally erroneous. Those decisions overlook the basic tenet of Florida law that the Constitution and statutory law of the state are a part of every Florida contract and the cases misconstrue the plain language and the public policy purposes of the sales tax statute itself.

That the constitution and statutory laws of Florida are a part of every contract is a matter of black letter law found in 11 Fla.Jur.2d, CONTRACTS, Section 129, Pages 429-430; and, in many cases, two examples of which are Saunders v. Cities Service

Oil Co., 46 So.2d 597 (Fla. 1950) and Board of Public Construction v. Town of Bay Harbor Is.,, 81 So.2d 637 (Fla. 1955). In Saunders, supra, this fundamental controlling principle of law is stated as follows:

> Any citizen who is sui juris may enter into any agreement that is not illegal or contrary to public policy or not prohibited by statute, but all laws in effect in the State of Florida at the time and place of making the agreement entered into become a part of the agreement as if they were expressly referred to and incorporated therein. See Commissioners of Columbia County v. King, 13 Fla. 45. This rule has been reaffirmed by this Court on many occasions. (46 So.2d at 599). [Emphasis supplied]

The Oven and Spacelink courts overlooked this basic principle of law, for if they had not, they could not have held, as they did, that the sales tax was the landlord's obligation because it was not expressly made the obligation of the tenant in the agreement. The Court in the Oven decision held that it was deciding a novel issue; but it not only overlooked the aforementioned basic principle of law which made the cited section a part of the contract, the Court cited Section 212.03(3) as support for its position. That provision states:

> The tax imposed by this section shall be in addition to the total amount of the rental and shall be charged by the lessor or person receiving the rent in and by a rental arrangement with the lessee or person paying the rental and shall be due and payable at the time of the receipt of such rental payment by the lessor or other person who receives said rental or payment.

This provision is similar to the provision regarding transients cited by Petitioner. That provision imposes, in mandatory language, the duty on the landlord or such other person that receives rent "in and by a rental arrangement" to collect the tax from the tenant. That provision does not state or require that the tenant's obligation to pay the tax be expressed in writing. Actually, the provision plainly contemplates that rental arrangements might not be in writing in whole or in part; but, nonetheless, the duty is imposed on the landlord or such other person collecting rent, by whatever rental arrangement there is, to collect the tax in "addition" to the rent. Furthermore, Subsection (3) makes the lessor or such other person receiving the rent, the agent of the Department of Revenue to remit the same, as a dealer under the law, to the State of Florida. That proviso states:

> The owner, lessor, or person receiving the rent shall remit the tax to the department at the times and the manner hereinafter provided for dealers to remit taxes under this chapter.

Moreover, Subsection (4) of Section 212.031 makes the tax a lien on the tenant's property and collectible in the same manner as a lien authorized and created by Florida Statutes, Chapter 713.68 and 713.69, which are the liens created by law in favor of innkeepers. The language of that proviso reads:

> The tax imposed by this section shall constitute a lien on the property of the lessee of any real estate in the same manner as, and shall be collectible as are, liens authorized and imposed by ss. 713.68 and 713.69.

Thus, it appears plain that the obligation, as between the landlord and tenant, to pay sales tax is the tenant's and not the landlord's. The Oven court's conclusion that it is the landlord's tax because Subsection (1)(a) declares the legislative intent that renting is a taxable privilege does not follow the logic of the subsequent provisions of the act or the public policy established by it as elucidated by the Florida Supreme Court in Gaulden v. Kirk, supra.

Rarely in law do lawyers, like scientists, have a control experiment that can be utilized to establish an acid test for their hypothesis. In this case we have such a control! If the parties entered into a commercial lease by which they expressly provided that the sales tax would be the obligation of the landlord that provision would be violative of the law and unenforceable. See: 11 Fla.Jur.2d, Contracts, Section 83, Page 375, Local No. 234, et seq. v. Henley v. Beckwith, Inc., 66 So.2d 818 (Fla. 1963) and Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So.14 (1930). In the first cited case the Florida Supreme Court held:

> We reach this conclusion for the very evident reason that an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice. [66 So.2d at 821]

To allow the parties to covenant to impose the obligation of the sales tax on the landlord would do the very violence to the express language of the Act and its public policy that was recognized in Gaulden v. Kirk. It is important to note that the court in Oven v. Dawirs, supra, and the court in Spacelink, supra, in following Oven, seem to have confused sales tax with ad valorem tax. Unquestionably, when it comes to ad valorem taxes, it is the obligation of the property owner, by virtue of his ownership, to pay the tax. Unless that burden is shifted by contract to a tenant or purchaser, the property owner must pay the tax.

Before closing this point, it is important to note that the First District Court of Appeal of Florida, in Zero Food Storage v. Department of Revenue, 330 So.2d 765 (Fla. 1st DCA 1976), in a decision pre-dating Oven v. Dawirs, recognized that contractually, as between the landlord and tenant, the obligation is the tenant's to pay sales tax and specifically held that Section 212.031(2)(a) "places the tax on the tenant". Similarly, the Department of Revenue in applying Section 212.031(2)(a) construes the statute exactly as its language requires and states in its Regulations that the tenant bears the obligation of paying the tax. Department of Revenue Regulation 12 A-1.070, entitled "Real Property", Subsection 2 reads as follows:

> (2) The tenant actually occupying, using or entitled to use any such property shall pay the tax to his immediate landlord or such other person granting the right to such tenant to occupy or use such property.

In the instant case the sales tax is the tenant's obligation and the lease or rental arrangement cannot be silent, as between the landlord and the tenant, because the statute is a part of their agreement and it is plain and unambiguous and it imposes the obligation on the tenant to pay the tax.

II

THE COURTS HAVE JURISDICTION TO SET ASIDE AN ARBITRATOR'S AWARD THAT NOT ONLY REWRITES THE AGREEMENT BETWEEN THE PARTIES, BUT IS CONTRARY TO PUBLIC POLICY AND THE ARBITRATOR, IN ATTEMPTING TO DECIDE THE CASE ACCORDING TO LAW, DECIDES IT WRONG.

As the trial court held, both it and the arbitrator felt bound by Oven v. Dawirs, supra. The arbitrator, deeming himself so bound, rewrote the contract between the parties by stating the following:

> . . .the arbitrator has come to the conclusion that absent a specific assumption or requirement by the Lessee set forth in the lease agreement, it is the obligation of the Lessor to pay the sales tax on the rental payments he receives under the lease. [R-6]

No greater or more direct conflict can exist than does exist between the contract embodying the law of Florida [F.S. 212.031(2)(a)], and the arbitrator's decision which is a plain outright rewrite of the contract between the parties. That rewriting of the agreement between the parties by the arbitrator is contrary to settled law. See: United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 591, 80 S.Ct. 1358 (1960); School Board of Seminole County v. Cornelison, 406 So.2d 484 (Fla. 5th DCA 1981), pet.rev.den., 421 So.2d 67 (Fla. 1982); and SAC Construction Company v. Milam Dairy Associates, 481 So.2d 67 (Fla. 3rd DCA 1986). In United Steelworkers, supra, the United States Supreme Court held that an arbitrator could not rewrite the agreement between the parties and his award was

legitimate only so long as it drew its essence from the agreement. The pertinent language of that holding reads:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement, he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [80 S.Ct. at 1361]

Following United Steelworkers, the District Court of Appeal of Florida, Fifth District, in the Cornelison case, supra, held that an arbitrator could not rewrite the agreement between the parties and when he did so, he exceeded his authority. The Court's holding reads as follows:

> We are aware that a collective bargaining agreement should be broadly construed and all doubts resolved in favor of the arbitrator's authority, but an arbitrator cannot rewrite the agreement and he is bound by it. Western Iowa Port Co. v. National Packinghouse & Dairy Workers, 366 F.2d 275 (8th Cir. 1966); Cosmos Broadcasting v. New Orleans Local Am. etc. 455 F.Supp. 426 (E.D.La. 1978). An arbitrator lacks the authority to revise the agreement in a manner the parties did not contemplate and to which they did not assent. See United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

> This is especially true where the arbitrator's action has the effect of depriving the school board of its sole prerogative, reserved to it by law, to determine whether the contract of a non-tenured employee will be renewed. [406 So.2d at 487] [Emphasis supplied].

Plainly, the decision under scrutiny is incorrect in holding that the Courts did not have jurisdiction to review the arbitrator's award under the provisions of Florida Statutes, Section 682.13(c) on the ground that the arbitrator rewrote the agreement in excess of his authority. The decision under scrutiny that the Courts have power to review the arbitrator's award for misapplication of Florida Statutes, 212.031, is correct for two reasons novel to Florida law that create no conflict with past precedent of the Florida Supreme Court or sister District Courts of Appeal. First, the Court of Appeals of New York, a highly honored tribunal, established as precedent in Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 795 that "the Court will vacate an award violative of public policy" if the violation of public policy is of "such a magnitude as to call for judicial intrusion". In the case at bar the arbitrator and the trial court both recognized the incorrectness of Oven v. Dawirs, supra, but felt bound to follow that case even though it turned the public policy of Florida upside down, as specified in Florida Statutes, Section 212.031(2)(a) and elucidated by the Florida Supreme Court in Gaulden v. Kirk, supra. A direct 180 degree reversal of the public policy of the state as to taxing matters is a violation of public policy of such a magnitude as to mandate judicial

intrusion. Thus, the District Court of Appeal of Florida, Third District, in the decision under review, was clearly correct when it held that "both the trial court and the arbitrator misapplied Section 212.031, thereby constituting grounds for our reversal as a matter of law."

The second novel ground for jurisdictional review of the arbitrator's award in this case is that Courts can and should set aside an arbitrator's award for error of law where it clearly appears that the arbitrator meant to decide the case according to law but decided wrong. See: 5 Am.Jur.2d "Arbitration and Award", Section 167 at Page 643-644, Howe v. Patrons' Mut. F. Ins. Co., 216 Michigan 56, 185 N.W. 865 and Rueda v. Union Pac. R. Co., 180 Or. 133, 175 P.2d 778. In this case the arbitrator and the trial court attempted to correctly apply the law but were bound by what the trial court expressly recognized as the fundamentally erroneous decision in Oven v. Dawirs, supra. Under these circumstances, this second novel ground for jurisdiction to review the arbitrator's award is correctly applied in this case.

CONCLUSION

Respondent respectfully requests that the Florida Supreme Court recognize the correctness of the trial court's reasoning and the decision of the District Court of Appeal of Florida, Third District, and affirm that decision and thereby correct the fundamentally erroneous decisions in Oven and Spacelink.

WHEREFORE, Respondent prays that the decision under review be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the above and foregoing Respondent's Brief on the Merits was furnished by U. S. Mail, on this the 30th day of December, 1988, to Arthur J. England, Esquire, Charles M. Auslander, Esquire and Joanne M. Rose, Esquire, FINE, JACOBSON, SCHWARTZ, NASH, BLOCK & ENGLAND, Attorneys for Petitioner, One CenTrust Financial Center, 100 S.E. Second Street, Miami, Florida 33131.

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