IN THE SUPREME COURT OF FLORIDA

ROBERTO BASULTO and
RAQUEL GONZALEZ,
Petitioners,

vs.

Case No.: SC09-2358

HIALEAH AUTOMOTIVE, L.L.C.
d/b/a POTAMKIN DODGE, a
Florida corporation,
Respondent.

Lower Tribunal Cases:
3D07-855
05-5556

_____/

PETITIONERS' INITIAL BRIEF

On Review from the District Court
Of Appeal, Third District
State of Florida

LAW OFFICE OF TIMOTHY CARL BLAKE, P.A.
Counsel for Petitioners
Concord Building, Second Floor
66 W. Flagler Street
Miami, Florida 33130
tblake@timblakelaw.com
Lourdes@timblakelaw.com
Tel: 305/373-5210
Fax: 305/373-4323

By: _____
TIMOTHY CARL BLAKE, ESQ.
Fla. Bar No. 136028

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PRELIMINARY STATEMENT

In this brief Petitioners will be referred to as "Petitioners", "Plaintiffs" or by proper names ("Basulto/Gonzalez"). The Respondent will be referred to as "Respondent", "Defendant" or "Potamkin".

Filed simultaneously herewith is an Appendix as required by Fla.R.App.P. Rule 9.120(f). The Appendix contains a conformed copy of the decision of the Third District Court of Appeal as well as select documents pertinent to the Court's decision.

Citations to the Appendix are by Document Number and (where applicable) by page number within the particular document (for example: App. 1:2-6).

A copy of the Third District decision as published in the official Southern Reporter is also included in the Appendix for the Court's convenience. References to the Third District's opinion will be directly to the decision as printed in the Southern Reporter.

STATEMENT OF THE CASE AND FACTS

Petitioners seek review of the decision of the Third District Court of Appeal in *Hialeah Automotive, LLC v. Basulto*, 22 So.3d 586 (Fla. 3rd DCA 2009) on the grounds that it expressly and directly conflicts with the decision of this Court in *Seifert v. U. S. Home Corp.*, 750 So.2d 633 (Fla. 1999). This Court has jurisdiction pursuant to Art. V § 3(b)(3), Fla. Const.; Fla.R.App.P. Rule 9.030(a)(2)(A)(iv).

In 2004, Roberto Basulto and Raquel Gonzalez, who are husband and wife ("the buyers"), purchased a new 2005 Dodge Caravan from Hialeah Automotive, LLC, which does business as Potamkin Dodge ("the dealer"). The buyers alleged that while at the dealership, the dealer had the buyers sign the contract in blank, with the representation that the agreed-upon numbers would be filled in. The buyers alleged that when the dealership completed the sales contract, it allowed them a lower trade-in allowance than the amount agreed upon. The dealer refused to correct the situation. After negotiations proved unsuccessful, the buyers returned the van to the dealership (having driven a total of seven miles) and demanded the return of their trade-in. The trade-in had been sold.

Petitioners (Plaintiffs below) sued the Respondent for damages and declaratory/injunctive relief under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA)[1] based upon claims that the Respondent motor vehicle dealership engaged in fraudulent conduct in its sale of a motor vehicle to the Petitioners. App 5. Petitioners' Complaint also contained a claim for rescission of arbitration "agreements" which were included in the multiple documents that the Petitioners were required to execute in order to purchase Respondent's vehicle. App. 5:6-10. Plaintiffs' claim for rescission was based upon multiple theories attacking the validity of the "agreements", including, inter alia, both fraud and unconscionability. *Id*.

Following service of the Complaint on the Respondent, the Respondent moved to dismiss and to compel arbitration. App.4

The trial Court held an evidentiary hearing at which Petitioners (buyers) and representatives of the Respondent (dealership) testified. By Order entered on March 8, 2007, (App. 3) the trial court made the following pertinent findings:

> 3. It is undisputed that at least two of the documents which Plaintiffs were called

[1] Florida's Deceptive and Unfair Trade Practices Act, Section 501.201 et seq, Fla. Stat.

upon to sign contained arbitration clauses. Another document contained a jury waiver provision. Taken together, the subject documents contained conflicting provisions, such that, even if the documents had been printed in Spanish, a reasonable person reading these documents would not have a clear understanding of the precise terms and conditions to which they were called upon to agree.

4. Although defendant's sales representative and finance and insurance manager both testified that at the time the Plaintiffs signed the subject documents, these employees explained "arbitration" to the Plaintiffs, further testimony by these employees clearly established that (a) the sales representative had no basic understanding of the concept of arbitration and in fact admitted that she was unable to understanding the English language arbitration provisions for purposes translating same for the Plaintiffs; and (b) the finance and insurance manager did not convey to the Plaintiffs that arbitration deprived plaintiffs of their right to seek punitive damages or class action status.

5. Plaintiffs, on the other hand, testified that they had never been informed concerning arbitration and that their only negotiations, prior to being called upon to execute contract documents, related to the financial terms governing their purchase of Potamkin's vehicle. In addition, Plaintiffs testified that the Defendant did not afford them any opportunity to ask questions and were never put on notice that they were being called on to waive valuable rights, much less to ask important questions regarding what rights they were waiving. Any waiver was a blind and unknowing waiver.

6. Although Plaintiffs also testified that the Defendant did not force them to sign the

> documents which were presented and that the Plaintiffs could have sought outside assistance in reviewing the documents. Potamkin's finance manager also testified that if the Plaintiffs had refused to sign, they would not have had a deal. Plaintiffs also testified that they were hurried/rushed when signing the many documents that they could not read and were told to sign, sign, sign in rapid succession.
>
> 7. While Potamkin also adduced testimony (for purposes of establishing Plaintiff's familiarity with commercial undertakings) that Plaintiffs had previously signed lengthy (English language) mortgages, Plaintiffs testimony on this point clarified that the attorney for the mortgage company had sat with the Plaintiffs and explained (in Spanish) every aspect of the mortgage transaction.

Based upon the foregoing findings, the lower court specifically ruled:

> **This Court accordingly concludes as a matter of law that there was no meeting of the minds with respect to the terms by which the Defendant intended the parties to be bound. There is accordingly no valid agreement for this Court to enforce.**

Secondarily, the lower court also noted:

> Even if the conflicting arbitration provisions could be reconciled, the Court concludes that the "agreement" nevertheless remains unenforceable based upon unconscionability.

Respondent timely appealed and thereafter the Third District filed an Opinion and Revised Opinion, both of

which were subject to timely motions for rehearing. On December 2, 2009, the Third District finally issued a "Corrected Opinion" in which it affirmed in part and reversed in part the lower court's Order.

In particular the Third District ruled that the findings below established the existence of both procedural and substantive unconscionability as to an "Agreement to Arbitrate" which Petitioners had been required to sign and accordingly affirmed the trial Court's Order denying enforcement of that "Agreement". *Hialeah Automotive, LLC v. Basulto*, 22 So.3d 586, 591 (Fla. 3rd DCA 2009).

The Retail Installment Sales Contract that Petitioners had been required to sign also contained a clause under which Petitioners "agreed" to the arbitration of any disputes between the parties. As to this clause, however, the Third District ruled that although the findings below supported the existence of procedural unconscionability as to the circumstances under which the clause agreeing to arbitrate had been obtained by Potamkin, substantive unconscionability had not been established except as to Plaintiffs' claims for Injunctive Relief. The Third District accordingly held that the Defendant was entitled to compel arbitration as to the majority of Plaintiffs' claims and reversed the lower court's denial of Defendant's

Motion to Compel Arbitration as to all but Plaintiffs' claim for Injunctive Relief. *Id.* at 592.

Of significance for review by this Court is the following excerpt from the Third District's opinion:

> In this case, the buyers responded to the dealer's advertisement on Spanish-language television. The dealer's sales staff understood that the buyers did not speak or read English and conducted the entire transaction in Spanish. The dealer's personnel testified that although the contracts were written in English, they reviewed the content of the contracts with the buyers in Spanish. The buyers testified that in their conversations with the dealer's personnel, arbitration was never mentioned. The trial court found the buyers to be credible and concluded that either arbitration was not mentioned, or if mentioned, was not explained in an understandable way.
>
> The dealer argues that a party to a contract is bound to the agreement, even if he or she did not read it. See *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So.2d 558 (Fla. 3rd DCA 2004). While that is true as a general proposition, in this case the dealer's personnel undertook to explain contracts to the buyers in Spanish. Having done so, they were obliged to do so accurately. Cf. *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1186 (Fla. 2003)(in the context of tort law, "{w}henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service . . . thereby assumes a duty to act carefully and to not put others at an undue risk of harm").
>
> As the trial court states, "It has long been recognized in this state that if one is

> induced not to read a contract - or, as here, not to obtain outside assistance in reading the contract - and he signs an entirely different paper from what the opposing party has represented that paper to be, the party so signing is entitled to be relieved of the obligations which he has unknowingly assumed." Order at 7 (citing *Pepple v. Rogers*, 104 Fla. 462, 140 So. 205, 208 (1932)). Alternatively, if arbitration was mention (sic), it was mentioned in an understandable way.

Hialeah Automotive, LLC. V. Basulto, 22 So.3d at 590.

Nevertheless the Third District, constrained by earlier precedent, instructed that the foregoing, standing alone, was not sufficient to invalidate either of the purported "agreements" to arbitrate and explained:

> Our court has said that, to invalidate a contract for unconscionability "under Florida law, a court must find that the contract is both procedurally and substantively unconscionable." *Murphy v. Courtesy Ford, L.L.C.*, 944 So.2d 1131 (Fla. 3rd DCA 2006).

Id. at 590.

Thereafter, as noted above, the Third District, as to the clause "agreeing" to arbitrate, found substantive unconscionability to exist only as to Plaintiffs' FDUTPA claims for Injunctive Relief and reversed the majority of the lower court's order denying Defendant's Motion to Dismiss and/or to Compel Arbitration.

Remarkably, the Third District's Order clarifying and denying Motion for Rehearing rendered on that same date (App. 2) states in error (1) that the lower court failed to resolve whether a valid agreement to arbitrate existed[2]; and (2) that the lower court found unconscionability to be dispositive in resolving issues concerning enforcement.

Petitioners thereafter sought review of the Third District's decision herein and timely invoked the discretionary jurisdiction of this court. This Court accepted jurisdiction on January 9, 2013.

SUMMARY OF THE ARGUMENT

In *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999) this Court instructed that before a party can be compelled to arbitrate the trial court must engage in a three part inquiry and determine (1) whether a valid agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived. In determining whether a valid agreement to arbitrate exists, ordinary principles of contract law apply.

In the case at bar Petitioners (motor vehicle purchasers) brought an action against the respondent (the

[2] See Order (App. 3:4): "The Court concludes as a matter of law that no valid agreement to arbitrate exists in this case."

dealership) for violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). Included in the Complaint was a claim for rescission of arbitration "agreements" which the Respondent had included in the pile of documents that the buyers were required to sign. Petitioners' rescission claim sought relief on a variety of grounds, including both fraud and "unconscionability."

The Respondent moved to dismiss and/or to compel arbitration.

Following the procedure set out in *Seifert* the trial court held an evidentiary hearing and thereafter entered an order containing specific findings of fact and conclusions of law. Based upon the court's findings and application of law to the facts the lower court concluded that there had been "no meetings of the minds" and that therefore no valid agreement to arbitrate existed. The trial court accordingly denied the Respondent's motion to dismiss and/or compel arbitration.

Upon review the Third District in fact agreed with the factual findings made by the lower court as well as case law indicating that there had been no "meeting of the minds" and that the arbitration "had not been mentioned or, if mentioned, was not explained in an understandable way."

By all applicable standards of Florida contract law and under case law cited by the Third District itself, the Third District should have affirmed the lower court's conclusion that "no valid agreement to arbitrate existed."

The Third District, however, overlooked that Plaintiffs' had sought rescission on multiple grounds and that the lower court had found: first, that there had been no meeting of the minds and that therefore no agreement to arbitrate had come into existence; and only secondarily that even if there were such an agreement, it was unconscionable.

Instead the Third District focused solely on prior precedent which dictated in cases involving unconscionability that both procedural and substantive unconscionability must be shown.

At the same time that the Third District acknowledged the existence of circumstances sufficient to relieve Petitioners of any contractual obligations under the Common Law, the District Court nevertheless concluded that this showing only satisfied the procedural prong of unconscionability and that Petitioners were only entitled to relief from enforcement if substantive unconscionability also were shown.

The foregoing analysis by the Third District conflicts with *Seifert's* simple prescription that if circumstances demonstrating invalidity under the common law are shown to exist, arbitration may not be compelled.

The Third District completely sidestepped this required and simple preliminary inquiry and instead leap-frogged into an analysis of whether or not Petitioners had demonstrated the existence of both procedural and substantive unconscionability sufficient to bar enforcement. This issue was not even ripe for consideration unless/until the Third District determined that the lower court's conclusion that no valid agreement to arbitrate existed was not supported by competent substantial evidence. Further, by re-characterizing those factors which the lower court had specifically determined to be dispositive on the issue of "no meeting of the minds" as relevant only with respect to whether Petitioners had satisfied the procedural half of unconscionability, the Third District imposed a different and more complex test than that which this Court prescribed in *Seifert*.

The Third District's opinion accordingly expressly and directly conflicts with this Court's opinion in *Seifert v. U.S. Home Corp*. and should be reversed.

ARGUMENT

I. Standard of Review

Petitioners contend that the decision of the Third District Court of Appeal conflicts with this Court's decision in *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999). The issue presented by this claim is a pure question of law, subject to de novo review. *Shotts v. OP Winterhaven, Inc.*, 86 So.3d 456 (Fla. 2011), citing *Aills v. Boemi*, 29 So.3d 1105, 1108 (Fla. 2010)("Because this is a question of law . . . the standard of review is de novo.")

II. The decision of the Third District Court of Appeal expressly and directly conflicts with the decision of this Court in *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999).

A. Seifert Elements

In *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999) this Court held:

> Under both federal statutory provisions and Florida's arbitration code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.

Id., 750 So.2d at 636 (emphasis added).

The issue of "whether a valid written agreement to arbitrate exists" is controlled by principles of state contract law:

> Although the states may not impose special limitations on the use of arbitration clauses, the validity of an arbitration clause is nevertheless an issue of state contract law. Section 2[3] states that an arbitration clause can be invalidated on such grounds as exist "at law or in equity for the revocation of a contract." Thus, *an arbitration clause can be defeated by any defense existing under the state law of contracts*. As the [United States Supreme} Court explained [in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)], "*generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act*].

Shotts v. OP Winterhaven, Inc., 86 So.3d at 464, citing *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999)(emphasis supplied).

The law is accordingly clear - from the start - that defenses to enforcement of an arbitration agreement stand on an equal footing with each other; that fraud, duress unconscionability and other grounds each constitute a separate and distinct defense.

The Second District in *Parham v. East Bay Raceway*, 442 So.2d 399 (Fla. 2nd DCA 1983) sets out the well-settled law identifying the circumstances constituting fraud sufficient to relieve a party of his obligations under a contract:

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[3] The Federal Arbitration Act, 9 U.S.C. §2

"To be sure, it is generally the duty of a party to learn and understand the contents of a proposed contract before he signs it. *Pepple v. Rogers*, 104 Fla. 462, 140 So. 205, 208 (1932). It thus follows that a party to a written contract cannot defend against its enforcement on the sole ground that he signed it without reading it. *All Florida Surety Co. v. Coker*, 88 So.2d 508, 510 (Fla. 1956). However, the mere existence of an opportunity for a party to know the contents of a proposed contract is not sufficient by itself to infer constructive notice where the party justifiably relies to his detriment upon a misrepresentation by the other party about the nature of the proposed contract. *Morris v. Ingraffia*, 154 Fla. 432, 18 So.2d 1, 3 (1944). As our state supreme court remarked in *Peppel*:

> [I]f the opposite party has induced one by a trickery, fraud, or any kind of artifice, not to read the contract, with the view of obtaining from him a paper which he could not otherwise have obtained, the right to prove these circumstances, and thereby establish the fact that he was signing an entirely different paper, may be shown for the purpose of relieving such party from the obligation thus fraudulently obtained. 140 So. at 208.
>
> Similarly, it commented in *All Florida Surety Co. v. Coker*, that a party to a written contract can defend against enforcement on the ground that he signed it without reading it if he aver [sic] facts showing circumstances which prevented his reading the paper, or was induced by the statement of the other parties to desist from reading it. 88 So.2d at 510.

> Likewise, it stated in *Allied Van Lines, Inc. v. Bratton*, 351 So.2d 344, 347-48 (Fla.. 1977), that a contract is not binding if one can show facts and circumstances to demonstrate that he was prevented from reading the contract, or that he was induced by statements of the other party to refrain from reading the contract.

Parham, 442 So.2d at 401.

Not unexpectedly, the Third District is in accord. See: *Addison v. Carballosa*, 48 So.3d 951, 955 (Fla. 3rd DCA 2010)("[I]f a party to a written contract was prevented from reading it or he was fraudulently induced to sign the contract without reading it due to misrepresentations upon which he justifiably relied, he may be able to defend against its enforcement"); *Tinker v. De Maria Porsche Audi, Inc.*, 459 So.2d 487, 492 (Fla. 3rd DCA 1985)(recognizing fraud by seller of motor vehicles as complete defense to creditor's claim for balance of payment due under contract for sale of the vehicle). Also followed in: *Consolidated Residential Healthcare Fund I, Ltd. v. Fenelus*, 853 So.2d 500, 504 (Fla. 4th DCA 2003)(A party normally is bound by a contract that the party signs unless the party can demonstrate that he or she was prevented from reading it or induced by the other party to refrain from reading it").

B. Lower Court's Application of the Law

Section 682.03(1) Florida Statutes states: "If the Court shall find that a substantial issue is raised as to the making of the agreement or provision [to arbitrate], it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application [for arbitration]."

In the instant case the trial Court held an evidentiary hearing at which Petitioners (buyers) and representatives of the Respondent (dealership) testified. By Order entered on March 8, 2007, (App. 3), the trial court made the following pertinent findings:

> 3. It is undisputed that at least two of the documents which Plaintiffs were called upon to sign contained arbitration clauses. Another document contained a jury waiver provision. Taken together, the subject documents contained conflicting provisions, such that, even if the documents had been printed in Spanish, a reasonable person reading these documents would not have a clear understanding of the precise terms and conditions to which they were called upon to agree.
>
> 4. Although Defendant's sales representative and finance and insurance manager both testified that at the time the Plaintiffs signed the subject documents, these employees explained "arbitration" to the Plaintiffs, further testimony by these employees clearly established that (a) the sales representative had no basic understanding of the concept of arbitration

and in fact admitted that she was unable to understanding the English language arbitration provisions for purposes translating same for the Plaintiffs; and (b) the finance and insurance manager did not convey to the Plaintiffs that arbitration deprived plaintiffs of their right to seek punitive damages or class action status.

5. Plaintiffs, on the other hand, testified that they had never been informed concerning arbitration and that their only negotiations prior to being called upon to execute contract documents, related to the financial terms governing their purchase of Potamkins's vehicle. In addition, Plaintiffs testified that the Defendant did not afford them any opportunity to ask questions and they were never put on notice that they were being called on to waive valuable rights, much less to ask important questions regarding what rights they were waiving. Any waiver was a blind and unknowing waiver.

6. Although Plaintiffs also testified that the Defendant did not force them to sign the documents which were presented and that the Plaintiffs could have sought outside assistance in reviewing the documents. Potamkin's finance manager also testified that if the Plaintiffs had refused to sign, they would not have had a deal. Plaintiffs also testified that they were hurried/rushed when signing the many documents that they could not read and were told to sign, sign, sign in rapid succession.

7. While Potamkin also adduced testimony (for purposes of establishing Plaintiffs' familiarity with commercial undertakings) that Plaintiffs had previously signed lengthy (English language) mortgages, Plaintiffs testimony on this point clarified

> that the attorney for the mortgage company had sat with the Plaintiffs and explained (in Spanish) every aspect of the mortgage transaction.

Based upon the above findings of fact, and the Court's application of Florida contract law to those facts (specifically citing *Pepple*, supra "It has long been recognized in this State that if one is induced not to read a contract - or, as here not to obtain outside assistance in reading the contract - and he signs an entirely different paper from what the opposing party so signing is entitled to be relieved of the obligation which he has unknowingly assumed" - App. 3:7) the lower court ruled:

> **This Court accordingly concludes as a matter of law that there was no meeting of the minds with respect to the terms by which the Defendant intended the parties to be bound. There is accordingly no valid agreement for this Court to enforce.**

Secondarily, the lower court also noted:

> Even if the conflicting arbitration provisions could be reconciled, the Court concludes that the "agreement" nevertheless remains unenforceable based upon unconscionability.

C. Third District's Application of a Different Standard

Both *Seifert* and the Florida Arbitration Act state that as a pre requisite to enforcement of an arbitration

provision, the court must first determine that a valid written agreement to arbitrate exists. *Seifert*, 750 So.2d at 636. "If the Court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue." Section 682.03(1), Fla. Stat.

Significantly, as *Seifert* instructs, the foregoing determination is purely a matter of contract law. *Id.* at 636. If there is no valid contract, arbitration cannot be compelled. *Id.* See also, e.g. *Gustavsson v. Washington Mutual*, 850 So.2d 570 (Fla. 4th DCA 2003). Neither *Seifert* nor Florida's Arbitration Act state that an "agreement" to arbitrate can only be invalidated if both procedural and substantive unconscionability are found to exist. The test is whether there is a "valid agreement."

In the instant case the Third District specifically recognized that competent substantial evidence supported **both** the trial court's findings that "either arbitration was not mentioned, or if it was mentioned, was not explained in an understandable way" **and** the trial court's determination that application of the following common law principles supported the Petitioners' position that there was no "meeting of the minds" or valid agreement to arbitrate in the present case:

> "It has long been recognized in this State that if one is induced not to read a contract - or, as here, not to obtain outside assistance in reading the contract - and he signs an entirely different paper from what the opposing party has represented that paper to be, the party so signing is entitled to be relieved of the obligation which he had unknowingly assumed." Order at 7 (citing *Pepple v. Rogers*, 140 So.2d 205, 208 (Fla. 1932).

Hialeah Automotive, LLC. V. Basulto, 22 So.3d 586, 590 (Fla. 3rd DCA 2009).

In fact the Third District even offered its own independent assessment of the facts, expanding on reasons as to why no valid agreements to arbitrate existed and further substantiating the lower court's conclusions as follows:

> In this case, the buyers responded to the dealer's advertisement on Spanish-language television. The dealer's sales staff understood the buyers did not speak or read English and conducted the entire transaction in Spanish. The dealer's personnel testified that although the contracts were written in English, they reviewed the content of the contracts with the buyers in Spanish. The buyers testified that in their conversations with the dealer's personnel, arbitration was never mentioned, or if mentioned, was not explained in an understandable way.
>
> The dealer argues that a party to a contract is bound to the agreement, even if he or she did not read it. (Citations omitted). While that is true as a general proposition,

> in this case the dealer's personnel undertook to explain the contracts to the buyers in Spanish. Having done so, they were obliged to do so accurately. Cf. *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1186 (Fla. 2003))(in the context of tort law, "[w]henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service . . . thereby assumes a duty to act carefully and to not put others at an undue risk of harm").

Id., 22 So.3d at 590.

Under *Seifert*, the foregoing factual findings and application of Florida contract law to those facts unquestionably supported the trial court's conclusions (1) that no valid agreement to arbitrate ever came into existence; and (2) that existing law supported that the buyers be "relieved" of the obligations which [they] unknowingly assumed." *Pepple*, 140 So.2d at 208.

To the contrary, nevertheless, the Third District concluded that the foregoing circumstances and application of the law to the facts merely established the existence of procedural unconscionability. This conclusion is contrary to *Seifert* and forces the Petitioners-buyers (and others similarly situated) to be governed by the very "obligations which [they] unknowingly assumed" when the law recognized

as applicable states that they should be "relieved" of such obligations[4].

There is nothing in *Seifert* or in general contract law which requires, much less supports, this result when the objections made to enforcement are that "there was no meeting of the minds" and that no valid contract ever came into existence.

While Petitioners below alleged **both** that no valid contract ever came into existence and alternatively that any contract which did exist was unconscionable, the lower court's primary conclusion was that no valid agreement to arbitrate ever came into existence. Once the facts and law supporting this conclusion were upheld by the Third District (as they were: *Id.* at 590), there was no reason for the Third District to go any further and analyze the circumstances of the transaction in terms of whether they also satisfied procedural and substantive unconscionability.

Although the trial court did conclude secondarily that the "agreements" at issue also supported a finding of unconscionability (App. 3:7), this was the lower court's "back up" position. Once the circumstances indicating that

[4] Unless, of course, under Third District law, the aggrieved parties are also able to establish the existence of substantive unconscionability.

no valid agreement to arbitrate had been established, that determination should have been dispositive of whether arbitration was entitled to be compelled and no further analysis by the Third District was required.

The Third District's reliance upon *Murphy v. Courtesy Ford, LLC.*, 944 So.2d 1131 (Fla. 3rd DCA) as authority for its unconscionability analysis (*Hialeah Automotive, LLC. V. Basulto*, 22 So.3d at 590) is misplaced.

Although *Murphy* states that in order to invalidate a contract for unconscionability "under Florida law, a court must find that the contract is both procedurally and substantively unconscionable," *Murphy* never said that unconscionability is the sole basis for invalidation of a contract. While in *Murphy* it appears that "unconscionability" was the sole basis upon which the buyer attacked the validity of her contract, there is nothing in *Murphy* to indicate that a determination of invalidity can only be made on this single ground. Indeed this Court's Opinion in *Murphy* did not address, much less limit, other bases for invalidity which may exist under general principles of contract law.

Here, unlike the Appellant in *Murphy*, Petitioners specifically attacked the validity of the "agreements" (clause) at issue on **two** separate grounds: (1) that there

was "no meeting of the minds" (i.e., a valid written contract never came into existence); and (2) that any such contract was barred by "unconscionability" in any event. *Murphy* is accordingly both factually and legally inapplicable to the case at bar.

It is inconsistent and a rejection of both *Seifert* and *Pepple* for the Third District to have recognized that competent substantial evidence supports the lower court's findings that there was not any meeting of the minds and then to have enforced a "clause" which the Third District acknowledged (1) was mis-explained and (2) executed under circumstances warranting that the buyers "be relieved of [their] obligations." *Hialeah Automotive, LLC. V. Basulto*, 22 So.3d at 590.

In fact Judge Cope, writing for himself in *Basulto*, suggests that it is time for *Murphy* to be reconsidered:

"In Murphy, this court said, "To invalidate a contract under Florida law, a court must find that the contract is both procedurally **and** substantively unconscionable." *Id.* at 1124 (citing *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999). Although the requirement for **both** procedural and substantive unconscionability has been repeated in a number of arbitration cases in recent years, I respectfully suggest that holding is (a) illogical, and

(b) inconsistent with this court's decision in *Steinhardt v. Rudolph*, 422 So.2d 884 (Fla. 3rd DCA 1982)."

"In *Steinhardt*, Judge Hubbart explained:

> The law in Florida is clear that an unconscionable contract or and unconscionable term therein will not be enforced by a court of equity. "It seems to be established by the authorities that where it is perfectly plain to the court that one party [to a contract] has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, that a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness."

Id. at 889 (citing *Peacock Hotel, Inc. Shipman*, 103 Fla. 633, 138 So. 44 (1931)).

"Judge Hubbart explained that the Restatement (Second) of Contracts does not attempt to define unconscionability in procedural-substantive terms, and "the Florida decisions concerning unconscionability as applied to a mortgage foreclosure case are entirely devoid of this (procedural-substantive) analysis." 422 So.2d at 889. The *Steinhardt* panel held: "This procedural-substantive analysis is . . . only a general approach to the unconscionability question and **is not a rule of law.**" *Id.* (emphasis added). Instead, procedural unconscionability is merely one factor to be considered - not a required element. Clearly, if a contract is sufficiently inequitable to meet the test of

substantive unconscionability, then it should not be enforced."

Id., 22 So.3d at 595, Footnote 4 (emphasis supplied).

The natural corollary to Judge Cope's conclusion that "if a contract is sufficiently inequitable to meet the test of substantive unconscionability, then it should not be enforced" is the equally valid proposition - already recognized in Florida contract law - that where one party to a contract has been deceived by the other party as to the nature and import of the document that he has signed, then that contract should not be enforced.

This corollary is especially apt in the context of this consumer fraud case where both the lower Court and Third District recognized the clear existence of circumstances which -- under Florida contract law - were sufficient to relieve Petitioners of any obligations under the "agreements" which they had signed, but as to which the Third District felt bound by Murphy's two-prong test to deprive Petitioners of the relief to which they were otherwise entitled.

This result is not only unwarranted under general contract law but poses an especial danger in consumer fraud cases where, as here, contracts of adhesion have become the norm rather than the exception. As Professor David Horton

of Loyola Law School points out in his recent study critiquing the enforceability of "agreements" to arbitrate:

> These non-negotiated, unilaterally drafted documents reduce transaction costs. At the same time, though, they threaten to undermine the very definition of a "contract." Although binding agreements supposedly arise from words or conduct that each party could reasonably construe as assent to the exchange, drafters knew that few (if any) adherents would read the boilerplate. As a result, standard forms - particularly self-serving provisions in standard forms - do not seem to meet the minimum standards for contract formation.[5]

Here both the lower court and the Third District recognized that the circumstances in the instant case did not in fact "meet the minimum standards for contract formation." Yet under *Murphy* the Third District perceived itself to be without choice to deny Potamkin's Motion to Dismiss and/or Compel Arbitration unless substantive unconscionability were also demonstrated -- notwithstanding the complete lack of any hallmarks of "agreement" between the parties. This case accordingly provides an opportunity and basis for this Court to re-visit *Seifert,* reaffirm basic contract law governing "validity" of agreements, vel non, and, to the extent necessary to clarify the law, accept Judge Cope's invitation to re-evaluate *Murphy v.*

[5] Horton, David. "Unconscionability Wars", Northwestern University Law Review Colloquy, 2011, Vol. 106, pp 13-33 at p. 17. (Verb tenses have been changed to fit the context.)

Courtesy Ford, LLC. in the context of issues raised in this case.

CONCLUSION

This Court should reverse the decision of the Third District Court of Appeal which reversed the lower court's denial of Defendant's Motion to Dismiss and/or to Compel Arbitration as applied to the arbitration clause at issue with instructions to the Third District Court to remand this case to the trial court for reinstatement of the lower court's Order denying Defendant's Amended Motion to Dismiss and/or to Compel Arbitration and for further proceedings consistent therewith.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of this Petitioners' Initial Brief has been furnished to Mark A. Goldstein, Esq., 111 N. E. 1st Street, Suite 300, Miami, Florida 33132-2517 by regular United States mail and via email at markgoldstein98@yahoo.com on this _____ day of _____, 2013.

LAW OFFICE OF TIMOTHY CARL BLAKE, P.A.
Counsel for Petitioners
Concord Building, Second Floor
66 W. Flagler Street
Miami, Florida 33130
tblake@timblakelae.com
Lourdes@timblakelaw.com
Tel: 305/373-5210 Fax: 305/373-4323

By: _____
TIMOTHY CARL BLAKE
Fla. Bar No. 136028

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fla.R.App. Rule 9.210. It is typed in Courier New 12 point and is double spaced.

_____
TIMOTHY CARL BLAKE