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IN THE SUPREME COURT OF FLORIDA

OCHA ENGINEERING INC.,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. SC14-1211
)	DCA CASE NO. 3D13-2735
AMS STAFF LEASING INC.,)	
)	
Respondent.)	
_____)	

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

This is a petition for discretionary review of the decision of the Third District Court of Appeal, on the grounds of express and direct conflict of decisions.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court on the same point of law. Art. V 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS

The trial court denied Respondent's Amended Motion to Dismiss Case on the merits, which raised arbitration as one of multiple substance grounds for dismissal. In reversing the trial court's decision, the Third District Court of Appeal rejected the argument that the Defendant AMS Staff Leasing Inc. had waived its right to arbitration and that the agreement was unconscionable. Petitioner OCHA ENGINEERING INC. appeals the order of the Third District Court of Appeal.

SUMMARY OF THE ARGUMENT

The Third District failed to follow the previous decision of this Court in *Basulto v. Hialeah Automotive*, 2014 Fla. LEXIS 1051, 39 Fla. L. Weekly S 140 (Fla. 2014). In *Basulto*, 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. Neither the trial court nor the Third District conducted the proper preliminary inquiry as to whether Petitioner OCHA had demonstrated the existence of both procedural and substantive unconscionability sufficient to bar enforcement of the alleged arbitration provision.

In *Jalis Construction, Inc. v. Mintz*, 724 So. 2d 1254 (Fla. 4th DCA 1999), the Fourth District held that where a party opposing arbitration asserts that the arbitration agreement is unenforceable, as OCHA claims, the trial court errs in deciding the motion before making a determination as to whether a valid arbitration agreement exists. The Third District does not address this issues raised by OCHA. It failed to provide OCHA an evidentiary evaluation of OCHA's claims regarding the arbitration clause. The Third District's opinion accordingly expressly and directly conflicts with this Court's opinion in *Basulto v Hialeah Automotive*.

ARGUMENT

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH BASULTO V. HIALEAH AUTOMOTIVE INC., 2014 FLA. LEXIS 1051, 39 FLA. L. WEEKLY S 140 (FLA. 2014)

The decision of the District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in *Basulto v Hialeah Automotive*. This Court reiterated its prior holding in *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999), 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. Although not addressed by the Third District, OCHA argued that the arbitration provision is unenforceable, partially due to the contract and its arbitration provision being unconscionable because it forces a non-interstate dispute to be litigated in a foreign jurisdiction.

Unconscionability is a common law doctrine that courts have used to prevent the enforcement of contractual provisions that are overreaches by one party to gain “an unjust and undeserved advantage which it would be inequitable to permit him to enforce.” *Steinhardt v. Rudolph*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982) (quoting *Peacock Hotel, Inc. v. Shipman*, 103 Fla. 633, 138 So. 44, 46 (Fla. 1931)). The absence of meaningful choice when entering into the contract is often referred to as

procedural unconscionability, which “relates to the manner in which the contract was entered,” and the unreasonableness of the terms is often referred to as substantive unconscionability, which "focuses on the agreement itself." *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574, (Fla. 1st DCA 1999).

As the lower court never held an evidentiary hearing regarding on the agreement being unconscionable as OCHA argued in its appellate brief, the Third District failed to permit the lower court to test the issue as was conducted in the *Basulto* case. Accordingly, the decision of the Third District should be reversed.

CONCLUSION

Based on the foregoing facts authorities and arguments, petitioner OCHA respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief On Discretionary Jurisdiction has been furnished to Chip George, Esq. via on July 10, 2014.

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I HEREBY CERTIFY this Brief has been prepared with 14 point Times New Roman type, in compliance with Fla. R. App. P. 9.210(a)(2), this 10th day of July 2014

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