37,305

IN THE SUPREME COURT OF FLORIDA

NO. 37,305

JEFFERSON REALTY OF FORT LAUDERDALE, INC., a Florida corporation; JEFFERSON REALTY OF SOUTH DADE, INC., a Florida corporation; JEFFERSON FUNLAND, INC., a Florida corporation; and JEFFERSON STORES, INC., a Delaware corporation authorized to do business in the State of Florida,

Petitioners,

vs.

UNITED STATES RUBBER COMPANY, a New Jersey corporation,

Respondent.

ADDITIONAL BRIEF OF RESPONDENT

RICHARD S. BANICK and
MARVIN E. BARKIN
Attorneys for Respondent
501 City National Bank Bldg.
Miami, Florida 33130

Of Counsel:
FOWLER,WHITE,COLLINS,GILLEN,
HUMKEY & TRENAM
501 City National Bank Bldg.
Miami, Florida 33130

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INTRODUCTION

For the first time in this Court, and in their Reply Brief on the Merits, Petitioners purport to discuss the vital questions of damages and the propriety of the summary judgment on liability entered by the trial court. As we will demonstrate, they fail to justify the errors of the trial judge. Since petitioners have attached to their Reply Brief as an appendix, the brief which they filed in the District Court of Appeal, we also attach hereto our Reply Brief in the District Court of Appeal.

POINTS INVOLVED

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED ON INADEQUATE AND SPECULATIVE EVIDENCE.

POINT II

THE TRIAL COURT ERRED IN GRANTING PETITIONERS' AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY, THEREBY ADJUDICATING THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES DESPITE THE NON-PERFORMANCE OF AN EXPRESS CONDITION PRECEDENT BY PETITIONERS.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED ON INADEQUATE AND SPECULATIVE EVIDENCE.

Petitioners concede throughout their Reply Brief that this action is for "damages" and not "rent". The thrust of their argument is an attempt to justify the damages awarded for an alleged breach of an agreement to lease. They could not seek rent as such, for the "lease agreements" in question do not contain an accelleration clause and the term of the "lease agreements" has not run. They clearly, therefore, cannot recover rent as such for future years. Williams v. Aeroland Oil Co., 155 Fla. 114, 20 So. 2d 346 (1944).

The first point here is that damages for breach of an agreement to lease require, but in this case were not supported by, evidence of fair rental value. With no such evidence, a verdict should have been directed for respondent.

Petitioners choose to split hairs by contending that the proper measure of damages is not the difference between the stipulated rent and the "fair rental value" but the difference between the stipulated rent and the "value of the use of the premises". The recent Florida cases use the

expression "rental value"; but it makes no difference which phrase you use, because the cases are perfectly clear that "rental value" and "value of the use" are completely synonymous for the purposes of the instant case. See cases cited in 36A Words & Phrases 691 (1962); 44 Words & Phrases 110 (1962).

Petitioners impliedly concede, as indeed they must, that the burden was on them to establish the rental value of the premises for the lease term, so that the jury would be able to determine the difference between that figure and the rent reserved and thereby compute damages. As stated in Branning Mfg. Co. v. Norfolk Southern R. Co., 138 Va. 43, 121 S.E.74,80 (1924):

> "The measure of damages mentioned is practically the same as that which is applicable in actions by the seller against the buyer for non-acceptance of goods which remain in the possession of the seller. In such case 'the burden is upon the plaintiff to show what damage, if any, he has suffered'; and 'it is incumbent upon him, in order to make out a case for recovery of more than nominal damages, to show that the market value of the goods is less than the contract price'. 3 Williston on Contracts, § 1378, p. 2453. So, in the case of a breach of a contract for a lease by the prospective tenant, the burden is upon the plaintiff owner, in order to make out a case for more than nominal damages, to show that the rental value of the property was less than the contract rental." (emphasis added)

See also, Branhill Realty Co. v. Montgomery Ward & Co., 60 F.2d 922 (2d Cir.1932); Kulm v. Coast to Coast Stores Central Organization, 432 P.2d 1006 (Ore.1967); 51 C.J.S., Landlord and Tenant, §§ 200,201 (1947).

To meet respondent's argument that the plaintiffs were required to and failed to prove the reasonable rental value of the premises, the best petitioners can say is that the space in question was far away from the main entrance of the stores; that it was in part surplus parking areas; that "in other words, 'the value of the use of the premises' is zero dollars, or a nominal amount."

The petitioners thereby concede that there was no evidence whatsoever of the value of the premises, either as "rental value" or as "use of the premises", for the period of the leases. Their illogical assertion can be answered head-on by the rhetorical question: If Mr. Samuel Mufson, the president of Jefferson Stores, were approached by a party who desired the use of the areas covered by the leases in question for a period of 15 years, said property being on the parking lots of the various Jefferson Stores and adjacent to main thoroughfares in the Dade County area, would Mr. Mufson take the position that no rent would be necessary as the premises had a rental value of "zero dollars or a nominal amount"? This is

pure nonsense -- when the "lease agreements" with U. S. Rubber were negotiated, the premises indeed had a rental value. By some strange logic, however, Petitioners suggest the same premises are now valueless.

This Court recognized in Young v. Cobbs, 83 So.2d 417, 420 (Fla.1955) that when "no evidence was offered by plaintiff as to the difference between the agreed rental and the market value of the leasehold for the unexpired term, it must be assumed that plaintiff suffered no damage in this respect."

Other courts have reached the same conclusion. For example, in Palmer v. Connecticut Ry. & Lighting Co., 311 U.S. 544, 557-558, 61 S.Ct. 379, 383, 85 L.Ed. 336 (1941), the Supreme Court of the United States stated:

> "Nothing appears in the record to suggest that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated. At the time the lease was executed, it was fair to assume the parties thought the annual rent reserved and rental value were the same. Without proof to the contrary, only nominal damages would be awarded the claimant. Until something else is shown, courts are entirely justified in assuming that for the long years ahead the rent and the rental value are the same." (Emphasis added)

See also, C. D. Stimson Co. v. Porter, 195 F.2d 410, 413 (10th Cir.1952).

It was Petitioners' burden to prove their damages, and in the course thereof to prove the reasonable rental value of the premises. They failed to do this at the trial; their brief here makes no better showing, their reliance being upon the specious contention that the premises obviously had no value.

In their brief, Petitioners contend that the jury found they were at least entitled to $325,600.00, being the minimum rent payments under the leases, following the deduction of projected expenses, and reduction to present worth. This argument completely overlooks the fact that the plaintiffs were only entitled to the difference between the rent stipulated and the reasonable rental value; in other words, the benefit of their bargain. By their failure to prove the reasonable rental value, they leave no other conclusion that the presumption in law that the reasonable rental value and the stipulated rent are one and the same. They therefore failed to prove rental damages of any amount, as a matter of law. Indeed, the jury so concluded, as zero verdicts were returned for the Jefferson Subsidiaries, the only plaintiffs entitled to rental damages.

The Florida decisions cited in our prior brief clearly establish that a plaintiff cannot recover lost profits to be derived from a business wholly in contemplation.

Here the petitioners made no showing that there was a reasonable rental value which was less than the minimum rent reserved by the leases. Nor did they prove with reasonable certainty that the operation of new business that never came into existence would have resulted in percentage rentals in excess of the minimum rents reserved in the leases.

In Florida Ventilated Awning Co. v. Dickson, 67 So. 2d 215, 217 (Fla.1953), this Court stated:

> "Except for the deceptive practices of defendants, plaintiffs would have profited materially from these sales, but from the evidence as a whole, like the chancellor, we are unable to point out sufficient predicate on which a definite sum could be awarded. Any sum we awarded would be pure speculation. There must be something to authorize or justify a definite amount in damages before it can be awarded. ..."

The law in this state is clear that the plaintiff is held to the same degree of proof to recover damages in an action for anticipatory breach as if he had waited until after the time elapsed for fulfillment of the contract. In neither case will the verdict be sustained for speculative,

fictitious or supposed damages, and the plaintiff cannot avoid proof of actual damage by alleging that the defendant's wrongful act has made such proof impossible. Gilliland v. Mercantile Inv. & Holding Co., 147 Fla.613, 3 So.2d 148 (1941).

In the instant case, the Petitioners seek damages for a period through and including 1979. They offered no yardstick as to sales of tire businesses in Dade County in years past or future. Indeed, the respondent offered the testimony of a vice president of Burdine's, Mr. Russell A. Jones, that sales at Burdine's tire centers in Dade County are decreasing and have done so rather steadily since 1961. (T 645-653) The evidence upon which the petitioners' case was predicated, the starting point for the growth estimates of petitioners' expert, is solely and entirely the estimates and projections made by Mr. Kamens in 1962, at a time when he was negotiating for the leases and puffing, by his own words. No authority whatsoever is offered by the petitioners that such negotiating projections, which necessarily vary the minimum rental provided in the leases, can be introduced in the face of the parol evidence rule. Nor do petitioners make any showing that any court has ever regarded such negotiating projections sufficient in and of themselves to be a predicate for the calculation of damages as petitioners have done. This is

especially true when we note that these predictions were (a) inconsistent with Mr. Kamens' testimony at trial, which was based on his actual experience subsequent to 1962, and (b) inconsistent with Mr. Jones' testimony, again based on actual experience.

In sum, the petitioners offered no evidence of the fact or amount of damages as required by law. The whole of their evidence relates to net rental income (as compared with the difference between stipulated rent and fair rental value), to be derived from contemplated businesses, which, under settled Florida law, is rank speculation.

Petitioners further contend that "simple subtraction" reveals that the jury assessed advertising damages in the amount of $74,000.00, representing $4,960.00 per year on each of three leases for 15 years. They justify this figure by arguing that Mr. Kamens testified to possible gross sales by the businesses which never in fact were established, and that his projections and estimates, both during the course of negotiating for the agreements and at the trial, were evidence that gross sales would occur sufficient to generate at least $74,000.00 in advertising expenditures by U. S. Rubber.

Unfortunately for the Petitioners, their arithmetic does not bridge the gap as to certain vital missing facts. Even if the Petitioners are accurate in saying that there would have necessarily been some sales at the premises in question, it is apparent that they cannot prove what the amount of those sales would have been for the non-established business. There is therefore no accurate way to approximate what U. S. Rubber's advertising expenditures would have been. Moreover, the hurdle that the petitioners have never cared to face, and still refuse to face, is the difference between showing that there could have been gross sales sufficient to require the defendant to make an expenditure of $74,000.00 and showing that plaintiffs would have received economic and financial benefits in the amount of $74,000.00 from any advertising expenditure that U. S. Rubber in fact made.

Mr. Samuel Mufson, the president of the plaintiffs, testified that he did not know how to measure the financial benefits to his corporations of the advertising by U. S. Rubber. (T 102) Mr. Mufson also testified that Jefferson Stores' gross sales were growing and that its advertising budget has stayed rather constant between three and four per cent of gross sales over the last four or five years. (T 777,778) Obviously, therefore, his advertising expenditures were growing.

Mr. Russell A. Jones, a Vice President of Burdine's, testified that one cannot measure the benefit in dollars and cents that Burdine's derives from the advertising done by its lessees; and that he knows of no way that such benefit can be measured; that sales increase from advertising, but he knows of no way that you can measure the benefit to Burdine's from an advertising expenditure. (T 669-670) Mr. Kamens, whom the petitioners readily acknowledge to be an expert in tire retailing, squarely testified that you cannot measure the financial or economic benefits of advertising; that there is no relationship between the defendant's advertising expenditures and the advertising budget of the plaintiff. (T 541, 542, 582, 587) This was fully supported by defendant's economic expert, Dr. E. J. Fox, who testified that you can rarely measure the economic benefit to be derived from advertising expenditures (T 721,722); that there is no practical way of measuring the benefit of U. S. Rubber's advertising to the plaintiffs (T 754, 755, 757); and that there is no reason to believe that the plaintiffs would have proportionately reduced their advertising budget by any expenditures made by U. S. Rubber (T 724-726).

To support their case, plaintiffs relied entirely upon certain professors. However, their witnesses were not able to say for sure what portion of the revenue from the advertising

dollar spent by U. S. Rubber would go to the petitioners and what portion would go to other lessees in the shopping center "complex" (T 305-307); and their testimony completely fails to prove any definite amount of economic benefit to petitioners from advertising expenditures to be made by U. S. Rubber or that they lost a definite dollar amount.

The courts have frequently held that the "actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable." Central Coal & Coke Co. v. Hartman, 111 Fed. 96,98 (8th Cir. 1901). Only by speculation and conjecture could any loss to petitioners by respondents' failure to advertise be shown on this record. This evidentiary void cannot be filled by any conclusion of so-called experts. The basis for a conclusion cannot be deduced or inferred from the conclusion itself, and the opinion of an expert cannot constitute the existence of facts necessary to support his opinion. Arkin Construction Company v. Simpkins, 99 So.2d 557 (Fla.1957); Monsalvatge & Co. of Miami, Inc. v. Ryder Leasing, Inc., 151 So.2d 453 (Fla.App. 3rd Dist.1963). An estimate of loss for which no basis or definite foundation is given or shown is devoid of probative weight. 32 C.J.S., Evidence, § 546, p. 253 (1964).

POINT II

THE TRIAL COURT ERRED IN GRANTING PETITIONERS' AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY, THEREBY ADJUDICATING THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES DESPITE THE NON-PERFORMANCE OF AN EXPRESS CONDITION PRECEDENT BY PETITIONERS.

Because of the confused manner in which petitioners have presented the summary judgment question to this Court, it is difficult to reply to their argument. Rather than repeat in full our complete argument on the facts, which is contained in our main brief in the District Court, and which is already a part of the record here, we will simply reply to petitioners' argument on this point.

As justification for the granting of summary judgments in their favor, petitioners contend that the record before the trial judge conclusively established that they had done everything required of them and that respondent prevented them from performing their part of the bargain. The only facts advanced in support of this contention are that U. S. Rubber withheld certain subordination agreements and that by doing so Jefferson Subsidiaries were left without a means of securing the required title insurance.

This argument is utter nonsense. First, respondent made no covenant in the subordination agreements and its signature was nothing more than a "mere formality". Furthermore, as is correctly stated by petitioners, the signature of U. S. Rubber was not even necessary. What then is the thrust of petitioners' argument? Very simply, that U. S. Rubber prevented petitioners from obtaining the title insurance by failing to perform a useless act. The law does not require the performance of such an act, 7 Fla.Jur., Contracts, § 127, p.195 (1956), but petitioners nonetheless insist that they were prevented from performing because U. S. Rubber did not return the subordination agreements. Their argument, then, is not only illogical, but contrary to law.

Next, U. S. Rubber did not really prevent petitioners from obtaining title insurance by failing to return the subordination agreements. Inasmuch as U. S. Rubber was possessed with the agreements executed by the mortgagees and by Jefferson Subsidiaries, U. S. Rubber indeed had the contractual assurance that any title insurance would provide, i.e., the subordination of those interests to the leasehold estate of U. S. Rubber. Surely a title policy could have been obtained from Lawyers' Title and the three subordination agreements listed as exceptions therein, which is common

practice. As a matter of fact, the specimen binders on the Dade County properties disclose a separate section for exceptions, namely, Schedule B thereof. For unknown reasons, however, petitioners tell us that they simply could not obtain the title policy because the subordination agreements were not returned. The hollowness of that argument is apparent.

It is elementary that there must be at least a substantial performance of conditions precedent in order to obtain recovery for performance of a contract. 7 Fla.Jur., Contracts, § 130, p. 197 (1956). Florida law requires that performance of a condition precedent, or a valid excuse for non-performance, be made to affirmatively appear. Cohen v. Rothman, 127 So.2d 143 (Fla.App.3rd Dist.1961); Ballas v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So.421 (1930); Maryland Casualty Co. v. Hallatt, 295 F.2d 64 (5th Cir.1961); Goodwin v. Jacksonville Gas Corp., 302 F.2d 55 (5th Cir.1962).

Performance by petitioners, or substantial performance, or even an attempt to perform the condition precedent (the obtaining of title policies) is not made to appear on the record in this case, and petitioners have not pointed to any part of the record which would establish or suggest performance

or even an effort to perform. Conversely, the record is uncontroverted that title to the Broward County property was never searched, and title searches on the Dade County properties were stale. Even though it was represented to U. S. Rubber that title binders would be issued after the attornment agreements were recorded (R. 196) and even though U. S. Rubber consented to such recording, for some unknown and unexplained reason the attornment agreements were never in fact recorded. In sum, no title report was ever submitted to U. S. Rubber, simply because the title work was never requested by petitioners. Title approval, quite clearly, was an express condition to the effectiveness of the lease agreements (R. 194,195). The failure of U. S. Rubber to execute subordination agreements, whereon its signature was not even required, is hardly a substitute for performance by petitioners.

With regard to the attornment agreements, U. S. Rubber was advised that they could not be recorded unless the parties thereto, the attornees, consented to delays in time (R 196-197). The record is clear that U. S. Rubber consented to the recording of these agreements, but they were never in fact recorded. The record is silent, however, as to whether

the attornees consented to the delays. Without such consent, based upon the representations of Jefferson Subsidiaries, the attornment agreements could not be recorded and Lawyers' Title could not issue the required title policy. Petitioners either failed to recognize the record void of attornee consent or have attempted to obscure the void by arguing prevention of performance.

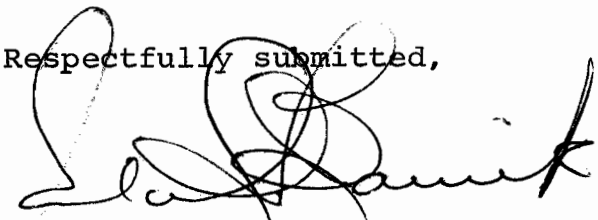
The prevention of performance argument is nothing more than a "straw man" for the obvious purpose of obscuring the complete lack of the performance which is a prerequisite to recovery. Absent their performance as required by law, which is so clearly demonstrated by the record, the trial court misconceived the facts and failed to apply the correct rule of law. Summary judgment should have been granted for U. S. Rubber.

CONCLUSION

Petitioners in their reply brief state that the real issue before this Honorable Court is the status of Jefferson Parent Corporation as the real party in interest. Strangely, however, their reply brief does not respond to the law and argument of U. S. Rubber on that issue. Indeed, the argument and law cited by petitioners in support of that

contention is so patently untenable and so contrary to firmly entrenched principles of law that petitioners must have recognized the futility of their position and thus have resorted to a reply brief containing argument -- no legal authority -- completely extraneous to positions advocated in their main brief. Petitioners' reply brief represents a flagrant rule violation and a substantial departure from orderly appellate practice, and their reply brief should be stricken from the record in this cause. Alternatively, our further brief in response thereto should be filed in this cause and considered by the Court in the disposition of this cause.

Respectfully submitted,



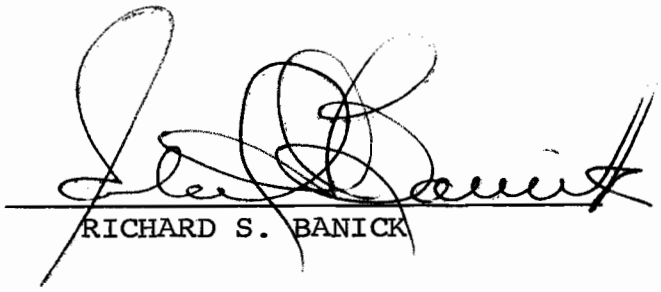
RICHARD S. BANICK and
MARVIN E. BARKIN
Attorneys for UNITED STATES
RUBBER CO.

Of Counsel:

FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
501 City National Bank Bldg.
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Additional Brief of Respondent was mailed on this 13th day of November, 1968, to BERNARD C. FULLER, 1674 Meridian Avenue, Miami Beach, Florida 33139 and to FRATES,FAY,FLOYD & PEARSON, 12th Floor, Concord Building, Miami, Florida 33130, Attorneys for Petitioners.



RICHARD S. BANICK