37,385

IN THE SUPREME COURT OF FLORIDA

NO. _____

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.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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STATEMENT OF THE CASE

This is a Petition for Certiorari to a decision of the Court of Appeal for the Third District, reversing a final judgment in the amount of $400,000.00, entered in favor of Jefferson Stores, Inc. by the Circuit Court of Dade County, on a jury verdict in an action at law for the alleged breach of three agreements to lease. All emphasis in this brief is added unless otherwise indicated. The decision of the Third District is reported as United States Rubber Co. v. Jefferson Realty, Fla.App. 3rd Dist., 1968, 208 So.2d 110.

The original Plaintiffs, Jefferson Realty of Fort Lauderdale, Inc., Jefferson Realty of South Dade, Inc., and Jefferson Funland, Inc., will be referred to collectively as "Realty Corporations"; and United States Rubber Company, the defendant in the trial court and respondent in this Court, will be referred to as "U.S. Rubber". Jefferson Stores, Inc., which was joined as a party plaintiff during the trial of this cause, after Realty Corporations had rested their case and after U. S. Rubber had rested its case, will be referred to herein as "Jefferson".

The Second Amended Complaint filed by Realty Corporations, the original plaintiffs, alleged in sum that U. S. Rubber negotiated with each Realty Corporation to become a sublessee of certain property upon which U. S. Rubber was to operate an automobile service center; that lease agreements were executed which were not to become effective until U. S. Rubber was furnished with appropriate guaranties from Jefferson and a satisfactory title report; that the conditions were met and that U. S. Rubber prevented the construction of improvements and the commencement of the terms of the three lease agreements, and in so doing that U. S. Rubber breached the contracts with Realty Corporations. (R. 227-230)

Cross-Motions for Summary Judgment were filed by the Realty Corporations and by U. S. Rubber. By Order entered April 22, 1966, the trial judge granted summary judgment on the issue of liability in favor of Realty Corporations and denied U. S. Rubber's motion. The cause was ordered to proceed to trial on the issue of damages alone. (R. 248)

The cause was tried before a jury from October 17 to October 20, 1966. On October 19, 1966, after

Realty Corporations had rested their case and after U. S. Rubber had rested its case, Realty Corporations moved for leave to amend their Second Amended Complaint by adding Jefferson as a party plaintiff. This motion was granted over U. S. Rubber's objection and U. S. Rubber's motion for continuance, based on the joinder of Jefferson, was tacitly denied. (R. 2013-2017)

Jury verdicts were returned on October 20, 1966, in the amount of zero dollars for each original plaintiff, the Realty Corporations, and in the amount of $400,000.00 in favor of Jefferson, which had become a party plaintiff at the conclusion of the trial. (R. 320-323). Final judgment on the jury verdict was entered on November 4, 1966 in favor of Jefferson in the amount of $400,000.00, and Realty Corporations were "found to have suffered no damages and that these plaintiffs take nothing by their suit except court costs ***." (R. 2048-2049)

U. S. Rubber appealed from the final judgment in the sum of $400,000.00 in favor of Jefferson. Neither cross-assignments of error were filed nor any appeal taken by the Realty Corporations.

The Third District reversed the Final Judgment in favor of Jefferson and remanded the cause for a new trial. That Court first noted that the jury must have found that Realty Corporations had not proven any damage to themselves (by virtue of the zero verdicts) and that the damages, if any, from the defendant's alleged breach of the lease agreements related to a non-party to the cause, Jefferson Stores. The Court then held that by permitting Jefferson to enter the case on the last day of testimony the trial court adjudicated U. S. Rubber's liability in favor of Jefferson, without any hearing on that question, which constituted error. The Court also noted that it was plaintiffs' burden to prove each of the elements of damage and that without evidence of rental value there was no evidence from which the jury could determine the difference between rent reserved and rental value. The Court further held that Realty Corporations, by receiving zero verdicts, demonstrated the complete lack of evidence, and the only damage to which Jefferson may be entitled, if any, is that based on loss of advertisement (208 So.2d 112). Petitioners' Petition for Rehearing was denied, and this Petition for Certiorari followed.

POINTS INVOLVED

Petitioners raise the following points in this proceeding: (a) Whether the record is sufficient to invoke "conflict certiorari" jurisdiction, (b) whether a post-trial order was reversed by the District Court without said order having been argued by Respondent, even though that order was assigned as error, and if so, whether such reversal is in direct conflict with another District Court or Supreme Court decision, (c) whether a new party may be added after all original parties had rested during a trial on damages only, and if not, whether such joinder directly conflicts with another appellate decision of this State, and (d) whether there is any legal difference between "rent reserved and rental value" and "stipulated rent and value of use of the premises" and, if so, whether such difference creates a direct conflict with other appellate decisions of Florida.

Respondent's position with respect to each point is that (a) the record before this Court is inadequate and insufficient to confer jurisdiction, (b) the District Court did not reverse on the basis of the post-trial order in

question and there accordingly can be no "conflict", (c) a stranger to litigation is properly excluded therefrom unless the adverse party is accorded rudimentary due process, which does not conflict with any decision of this State, and (d) rental value is completely synonymous with value of use, which precludes any possible direct conflict with any other decision of Florida.

ARGUMENT

POINT I

THE RECORD IS INADEQUATE TO DEMONSTRATE CONFLICT CERTIORARI JURISDICTION.

Article V, Section 4(2) of the Florida Constitution, grants this Court jurisdiction to review by certiorari a decision of a district court of appeal that "is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law." It has been frequently said that this constitutional revision made the courts of appeal final appellate courts. See, e.g., Lake v. Lake, Fla. 1958, 103 So.2d 639; South Florida Hospital Corporation v. McCrea, Fla.1960, 118 So.2d 25. And the certiorari jurisdiction preserved to this Court under

Article V does not grant an appeal of right from decisions of the district courts. Seaboard Air Line Railroad Company v. Branham, Fla.1958, 104 So.2d 356, 358; Karlin v. City of Miami Beach, Fla.1959, 113 So.2d 551,553.

This Court has announced, in accepting "conflict certiorari" jurisdiction, that it is concerned primarily with the decision of a court of appeal as precedent, rather than in determining the rights of the particular litigants. This is so because this jurisdiction is aimed and directed toward obtaining uniformity in the case law and obviating confusion in the decisions of the various appellate courts of this state. This Court is the supreme arbiter, whose primary function in this area of "conflict certiorari" jurisdiction is that of maintaining uniformity of principle and harmony in the case precedence of this state. Ansin v. Thurston, Fla.1958, 101 So.2d 808; Seaboard Air Line Railroad Company v. Branham, supra; Board of Commissioners of State Institutions v. Tallahassee B. & T. Co., Fla.1959, 116 So.2d 762. The Ansin case, supra, establishes that this Court is concerned with the removal of real and embarrassing conflicts of opinion by which contrary decisions confuse the body of

precedent and case law in this state.

It is incumbent upon petitioners to establish this Court's jurisdiction by demonstrating a "direct conflict" between the decision of the Third District herein and other decisions. The test for determining the presence or absence of prerequisite conflict was succinctly stated in Florida Power & Light Co. v. Bell, Fla.1959, 113 So.2d 697,698:

> "* * * In order to find * * * conflict * * * it must be shown that the allegedly conflicting cases are 'in all fours' factually in all material respects."

In Kyle v. Kyle, Fla.1962, 139 So.2d 885, 887, this Court added:

> "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise."

And in Withlacoochee River Electric Coop., Inc. v. Tampa Elec. Co., Fla.1963, 158 So.2d 136,137, this Court said:

> "We have decided time and time again that this Court will not re-weigh or re-evaluate the testimony in order to determine its jurisdiction when it is sought to be invoked upon the theory of conflict in decisions. ..."

There was a voluminous record before the Third District of over 1,500 pages of testimony taken on four trial days, as well as various pleadings and orders. The "record" attached to the petition herein contains only a copy of the decision below, the respondent's brief in the court below, and the petition for and order denying rehearing. The pleadings, the transcript of testimony, and the record of the decisions made by the trial judge during the course of the trial are all conspicuous by their absence, and as a result the statement of facts set forth in the petition are not only unsupported by the record furnished but are wholly incomplete. The decision of the Third District obviously turned in large measure upon a consideration of the entire record; and, petitioners have failed to show that the Third District decided any particular point of law adversely to them on facts anywhere similar to those in the cases which they have cited, much less that the decision below is in direct conflict with any prior decision of this Court.

Rule 4.5(c)(6) of the Florida Appellate Rules requires that " * * * so much of the record as shall be

necessary to show jurisdiction in the Supreme Court shall be attached to or filed with the petition * * *."
Thus, even though a petitioner may go beyond the decision of the district court of appeal and into the record proper, the alleged conflict must appear from the record brought before this Court as opposed to the petition itself, and it is mandatory under the rules that the portions of the record necessary to show the conflict must be attached to or filed with the petition.

The petition in the instant case is jurisdictionally and fatally defective as a result of the petitioners' failure to comply with the clear and mandatory requirements of Rule 4.5(c)(6) and certiorari should be dismissed for that reason alone. See, e.g., Ex parte Jones, 92 Fla. 1015, 110 So. 532 (1926); Aris v. State, Fla.App. 1st Dist. 1964, 162 So.2d 760; McKenzie v. Board of Public Instruction of Dade County, Fla.App. 3rd Dist.1966, 188 So.2d 683, in each of which a petition for certiorari was dismissed for failure of the petitioner to supply a sufficient record in support of his application for the writ.

POINT II

THE DISTRICT COURT REVERSED ON THE BASIS OF AN ERROR OF THE TRIAL JUDGE PROPERLY ASSIGNED AND BRIEFED.

Under this point petitioners question the propriety of the District Court's reversing a post-trial order, on the basis that the validity of said order, although assigned by respondent as error, was never argued in respondent's brief and accordingly was abandoned. Petitioners suggest a conflict with Redditt v. State, Fla.1955, 84 So.2d 317, which simply holds that an appellate court will not reverse except on assignments of error that have been argued in the brief.

This argument is specious because the error assigned, argued and upon which the District Court reversed was the action of the trial judge, during the trial, in allowing the joinder of Jefferson as a party.

In its recitation of facts (208 So.2d 111-112), the District Court correctly observed that after Realty Corporations had rested their case and after U. S. Rubber had rested its case, Realty Corporations moved for leave to

add Jefferson as a party plaintiff, which motion was granted over the objection of U. S. Rubber. By its holding, of reversal, the District Court decided that the trial court erred by permitting Jefferson to enter the litigation on the last day of testimony and by permitting it to go to the jury as a party plaintiff, the error being the obvious adjudication of U. S. Rubber's liability to Jefferson without any hearing on that issue as between those parties. The District Court simply did not, as is hypothesized by petitioners, reverse any post-trial order. This is perfectly plain and clear from the opinion of the District Court.

The error of the trial court occurred prior to the entry of judgment, and was an error of law committed during trial. A gratuitous post-trial order could hardly have the effect of justifying or correcting an error of law committed during the course of the trial. Furthermore, it is completely unnecessary to the appellate review of such an error of law for the aggrieved party to move for a new trial. Judge Vann's order during the course of the trial adding Jefferson as a party was a question of law that he decided, just the same as a trial judge directing a verdict

on the basis of the legal insufficiency of the evidence. No post-trial motion to such an order is needed to present the point for appellate review. The First District, speaking through Justice Thornal, in Furr v. Gulf Exhibition Corporation, Fla.1959, 114 So.2d 27,29 stated:

> "We, therefore, conclude that the ruling of a trial judge directing a verdict for a defendant on the ground of the legal insufficiency of the evidence presented by the plaintiff is reviewable by an appellate court as a matter of law without the necessity of the presentation and disposition of a motion for a new trial by the offended party."

Additionally, in 6A, Moore's Federal Practice, ¶59.14 (2d Ed.1966), it is said:

> "A motion for a new trial is not essential to save objections, made prior to and during the trial, for appellate review; * * * The important matter to be observed by the parties is that proper and seasonable objection be taken to * * * joinder or non-joinder of parties, and summarily, during the trial to alleged error, usually done by way of immediate objection, * * * Once a proper objection is made, the court and adverse parties are thereby notified of the alleged error, and there is no further requirement to renew these objections on a motion for new trial in order to preserve them for the purpose of appeal."

It accordingly was completely unnecessary for the respondent to argue and for the District Court to consider the propriety of the post-trial order, the judicial act in question having occurred during the course of the trial. That judicial act indeed was assigned as error by U. S. Rubber and argued at length in its brief. (R. 18-20) It is manifest then, not only from the opinion of the District Court of Appeal, but as a matter of law, that the post-trial order assailed under this point was neither the subject of the District Court opinion nor was the validity thereof a necessary subject for argument.

The holding of Redditt v. State, supra, is patently inapplicable to the facts of this case and no conflict is present. Moreover, that case suggests that petitioner's remedy in the District Court was a motion to strike U. S. Rubber's Brief or dismiss the appeal, or limit the issues on appeal. No such step was taken by Jefferson. Even if Jefferson's argument had technical merit (which it does not), the constitutionally protected right to appeal should not be limited in the absence of a showing of prejudice by Jefferson. Greyhound Corporation v. Causewell, Fla.1966, 181 So.2d 638. Jefferson understood the joinder

argument in full, met it head on and even quoted the post-trial order in its brief in response to U. S. Rubber's argument. Jefferson lost and now seeks, but should not be allowed, a review of that decision on its merits without a showing of direct conflict.

POINT III

THE DISTRICT COURT CORRECTLY, WITHOUT CONFLICT, HELD THAT THE JOINDER OF A NEW PARTY PLAINTIFF AFTER ALL ORIGINAL PARTIES HAD RESTED DURING THE TRIAL OF THE CAUSE WAS REVERSIBLE ERROR.

The facts before the District Court which impelled it to conclude reversible error by permitting Jefferson to enter the case as a party plaintiff at the conclusion of the trial were these. This action was commenced and prosecuted by the three Realty Corporations for some eighteen months. These corporations and U. S. Rubber are the parties to and which had signed the "lease agreements". Discovery was conducted on the assumption that the issues were those made by the pleadings of these parties. Cross-motions for summary judgment were filed by these parties and the orders thereon related only to them. The case went to trial on the sole issue of damages, with only these parties participating therein.

During the trial it became clear to the Realty Corporations that they had proven no damages whatsoever to themselves, that the damages if any from the defendant's alleged breach of the "lease agreements" related to a non-party to the cause, Jefferson. At the conclusion of plaintiff's case Realty Corporations moved "to conform to the evidence in the case" and to amend their Second Amended Complaint by adding Jefferson as a party plaintiff. U. S. Rubber immediately objected on the grounds that the amendment came too late in the cause, Realty Corporations having concluded their case, all discovery having been completed, and Jefferson having no privity with U. S. Rubber. The Court reserved decision. (R. 481-483)

At the conclusion of all the testimony, both parties having rested, the question of amendment to add Jefferson as a party plaintiff was again raised by Realty Corporations. For the first time they contended that Jefferson was the "real party in interest" (R. 780). The Court then granted the motion and permitted Jefferson to enter the case. (R. 784)

At this point U. S. Rubber moved "for a continuance and for leave to file pleadings to the amended

complaint", stating that introduction of Jefferson into the case changed the subject matter of litigation and the principles of law involved, and was prejudicial and surprising. (R. 782-784) The impact of the addition of Jefferson into the litigation is clearly apparent from the verdict which absolved U. S. Rubber insofar as the three Realty Corporations were concerned, finding they had suffered no damages, but granted Jefferson a recovery of $400,000.00.

U. S. Rubber contended in the District Court and the District Court agreed that Jefferson, a stranger to the agreements, was not entitled to join as a party plaintiff during the trial since U. S. Rubber's liability to Jefferson had never been adjudicated; no issues had been made and no proof adduced that U. S. Rubber owed any legal duty to Jefferson. Likewise, there was no issue before the trial court nor any evidence to substantiate the proposition that Jefferson was a real party in interest or entitled to join in the cause and obtain a summary judgment at the conclusion of the trial.

Jefferson now argues that it was necessarily always clear to the parties and to the trial judge that it was the "real party in interest" to the agreements between

Realty Corporations and U. S. Rubber. In view of the fact that no such issue was raised by the pleadings and U. S. Rubber was afforded no opportunity to plead, discover or offer evidence on the new issues of law and fact, it was far too late for Jefferson to develop this fine-spun theory after the verdict and judgment. While U. S. Rubber had notice, a hearing, and opportunity to be heard with respect to a cause of action allegedly possessed by Realty Corporations, it had no notice of any cause of action against it by Jefferson and it was afforded no opportunity to defend the claim asserted by Jefferson. Nevertheless, the jury was permitted to return a verdict for money damages in favor of Jefferson, the eleventh-hour stranger to the suit. The District Court held in accord with governing law that such a result cannot survive the basic and rudimentary test of procedural due process.

In its certiorari petition Jefferson argues that it in fact proved at trial that it was the real party in interest. That portion of the record, however, was neither suggested nor submitted by Jefferson. Moreover, the question

is not whether Jefferson proved its status, but indeed is whether the trial court correctly adjudicated U. S. Rubber's liability on an issue which was not raised by any pleadings and of which U. S. Rubber had no notice and no opportunity to respond. The trial judge and Jefferson could not by post-trial fiat resolve issues that were not even before the Court during the trial. Nothing in the cases cited by the petitioners is to the contrary.

The cases on which petitioners have relied in an attempt to demonstrate "conflict certiorari" jurisdiction are factually distinguishable, and hence cannot conflict with the decision sub judice. In Robert L. Weed Architect, Inc. v. Horning, Fla.1947, 33 So.2d 648, a licensed architect was the sole stockholder of a corporation which had contracted to provide architectural services. That corporation sued to foreclose an architect's lien. This Court held that the corporation could not practice architecture but that it was the alter ego of Weed and the medium through which his business as an architect was transacted. Moreover, the complaint therein expressly alleged that Weed individually performed the services, was licensed and that the corporate

contract was for his benefit. Throughout the transaction both parties recognized the corporation as a mere nominal party. That complaint clearly alleged a third party beneficiary contract and the course of business between the parties as a practical matter disregarded the corporation. Here, the Realty Corporations were viable, were the lessees of the property and in turn contracted to sublet premises to U. S. Rubber. In the Weed case the other contracting party did not care with whom he was dealing; the stockholder and the corporation were completely interchangeable. But here, there is no pleading or evidence to indicate that U. S. Rubber was not in any way concerned with whom it was dealing. To the contrary, U. S. Rubber dealt by express written contracts with Realty Corporations and additionally insisted on separate written guaranties from Jefferson. In the Weed case a period of time passed and the practical operation under the contract was that the parties ignored the corporate entity. Here the agreements to lease never became effective and there was no operation by the parties under a contract. And finally, the record here that was

before the District Court in no way justifies the conclusion that U. S. Rubber was not harmed by the eleventh-hour joinder. There is no possible basis for any estoppel against U. S. Rubber from insisting that Jefferson honor the independent existence of the Realty Corporations.

Petitioners' reliance on Miracle House Corporation v. Haige, Fla.1957, 96 So.2d 417 is equally misplaced. We readily concede that the rules allow liberal joinder of parties; but this precept cannot justify the trial judge's allowing a new party plaintiff to join at the conclusion of the trial without any pleadings, factual predicate in the record and without the defendant ever having had a chance to discover or offer evidence as to its right to be in the case. Moreover that case holds only that it is proper to permit intervention in a case involving a contest as to the rights to real property where the intervenor had a contract to purchase the property executed by only one of the other parties.

The case of First National Bank v. Perkins, 81 Fla. 341, 87 So. 912 (1921) is not in point on its facts as in that case this court held that an alleged third party

beneficiary could not recover, noting that to be a third party beneficiary it must appear that there was a clear intent that the third party shall be benefitted. In the instant case no such issue was ever made by the pleadings, and no opportunity was ever given to discover or adduce evidence at trial as to Jefferson's status as a possible third party beneficiary of U. S. Rubber's contracts with Realty Corporations.

Finally, petitioners rely upon a concurring opinion in McCord v. Lee, 127 Fla.65, 172 So. 853 (1937). The facts in that case are completely different from the facts of the instant case. In addition, a concurring opinion is not a "decision" sufficient to confer "conflict" jurisdiction; that case was affirmed by an equally divided court, and this court has squarely held that such a result is not the type of "decision" which can be relied upon as a precedent or which creates "conflict certiorari" jurisdiction. Rainsford v. McArthur Dairies, Fla.1959, 114 So.2d 617.

There is no need to discuss those cases cited by petitioners, which were decided by the Third District

or the Federal Courts as conflict jurisdiction is constitutionally limited to cases when the decision of the District Court sought to be reviewed is alleged to be in conflict with decisions of this court or another district court. Shaw v. Puleo, Fla.1964, 159 So.2d 641.

The facts as set forth by the District Court of Appeal peculiarly bring this cause within the rule stated in Weston v. Nathanson, Fla.1964, 173 So.2d 451, 452:

> "The decision of the District Court of Appeal reveals that, within the limits of its authority, that court differed with the chancellor regarding a problem involving the exercise of a sound judicial discretion. Our jurisdiction will not be determined merely on a basis of whether our view on the merits is in accord or in disagreement with the view of the District Court of Appeal. ..."

The petitioners have demonstrated no direct conflict in the decisions relating to joinder of parties.

POINT IV.

THE DISTRICT COURT CORRECTLY DETERMINED, WITHOUT CONFLICT, THAT DAMAGES FOR BREACH OF AN AGREEMENT TO LEASE REQUIRE, BUT IN THIS CASE WERE NOT SUPPORTED BY EVIDENCE OF ACTUAL RENTAL VALUE.

The settled rule of the measure of damages recoverable for a lessee's breach of an agreement to lease is the excess, if any, of the agreed rent over the actual rental value of the premises, together with such special damages as the plaintiff may plead and prove. 32 Am.Jur. Landlord & Tenant, Sec. 33. The Florida cases have long agreed. See e.g., Hodges v. Fries, 34 Fla. 63, 15 So. 682 (1894); Leslie E. Brooks Co. v. Long, 67 Fla.68, 64 So. 452 (1914), Lanzalotti v. Cohen, Fla.1959, 113 So.2d 727; Brewer v. North Gate of Orlando, Inc., Fla.1962, 143 So.2d 358.

This is the rule which was recognized by the District Court of Appeal. The Petitioners choose to split hairs by contending that the proper measure of damage 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 is used because the cases are completely 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 and Phrases, 691 (1962) and 44 Words and Phrases, 110 (1962).

The District Court recognized that Realty Corporations did not prove their case as far as rental damages were concerned because the record was completely devoid of any evidence bearing directly or indirectly on the fair rental value of the premises. Without such evidence, it was simply impossible for the jury to determine the correct measure of damage.

We are hard-put to understand petitioners' citation to Young v. Cobbs, Fla.1955, 83 So.2d 417, as this Court specifically recognized therein that (83 So.2d 420):

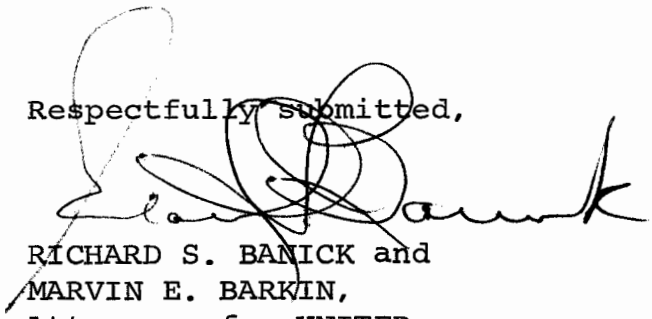
> "Since no evidence was offered by plaintiff as to the difference between the agreed rental and the market value of the leasehold for the unexpired term, it must be assumed that plaintiffs suffered no damage in this respect."

The burden was on the plaintiffs 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. See Branning Mfg. Co. v. Norfolk Southern R. Co., 138 Va. 43, 121 S.E. 74, 80 (1924) 51 C.J.S., Landlord & Tenant, Sections 200,201 (1947). Since Realty Corporations offered no evidence of this difference, it is presumed, in law (Young v. Cobbs, supra), that they have suffered no damage. The fact that Realty Corporations, contracting parties with U. S. Rubber, were returned zero verdicts demonstrates the complete lack of evidence on the issue. The petitioners cannot now lift themselves by their own bootstraps and contend that the use value of the premises was zero, when there is no evidence in the record to support this contention, and when common sense and the Young case, supra, require a conclusion to the contrary. The petitioners fail to demonstrate any possible conflict between the decision of the District Court on damages and any decision of this Court.

CONCLUSION

The petition filed in this cause patently fails to invoke conflict certiorari jurisdiction in this Court. Not only is the petition unsupported by a sufficient record, but petitioners have failed to demonstrate any direct conflict with another District Court or Supreme Court case. For obvious reasons petitioners have sought review of the District Court holding, but the essentials for such review are completely lacking. The petition, we submit, should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent, U. S. Rubber, in Opposition to Petition for Writ of Certiorari was mailed on this 29 day of April, 1968, to BERNARD C. FULLER, 1674 Meridian Avenue, Miami Beach, Florida 33139 and FRATES, FAY, FLOYD & PEARSON, 12th Floor, Concord Building, Miami, Florida 33130, Attorneys for Petitioners.

RICHARD S. BANICK