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.

RESPONDENT'S BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF CASES

TABLE OF CASES
(Cont'd)

OTHER AUTHORITIES CITED

INTRODUCTION

Respondent, U. S. RUBBER, will adopt the party and record references designated in Petitioners' Brief.

In their Brief Petitioners argue two points: first, that the District Court erred in ignoring the fact that Jefferson Parent Corporation was the alter ego of Jefferson Subsidiaries and accordingly was and is the real party in interest; and second, that the District Court erred in reversing a post-trial order of the trial court which was assigned, but not argued in U. S. Rubber's brief.

Inherent in the decision of the District Court are two additional points which were briefed and argued before that Court, but which Petitioners have not argued in this Court.

The question of damages was extensively briefed and argued in the District Court, but is conspicuously absent from Petitioners' Brief. The proper measure of damages and the speculative nature of the evidence adduced at trial are discussed and dealt with in the District Court opinion. Additionally, the question of damages is interrelated to the joinder argument of Petitioners herein. U. S. Rubber has accordingly included a point in its brief directed to the total inadequacy of damage evidence which, we submit, is material to a complete determination of this cause. Should Petitioners elect to reply to U. S. Rubber's argument on this point, we shall

ask leave of this Court to file a responding brief limited to their reply.

Whether the trial court erred in granting summary judgments against U. S. Rubber and in favor of Jefferson Subsidiaries was likewise briefed and argued in the District Court. Because of the evidentiary void of rental value as to Jefferson Subsidiaries and the resultant correctness of zero verdicts returned for them, and since the District Court reversed as to Jefferson Parent Corporation due to its erroneous entrance into the litigation, it was completely unnecessary for the summary judgment question to have been decided. Accordingly, should this Court determine Jefferson Parent Corporation to be the real party in interest and in some fashion permit it to occupy any status in this cause other than as in the shoes of its subsidiary corporations, it is respectfully requested that this cause be remanded to the District Court for the purpose of having that Court decide the summary judgment question or, alternatively, that this Court inquire into that issue, permit the parties to brief and argue it and render a decision thereon. With respect to the summary judgment point, this Court's attention is respectfully directed to that point contained in U. S. Rubber's Brief as filed in the District Court, which was included by Petitioners in the Record Transcript (pages 5-33) as filed in this Court with their Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Second Amended Complaint, on which the cause proceeded to trial, alleged that Jefferson Subsidiaries were the operators of three Jefferson Super Department Stores, were the lessees of the entire premises constituting the Jefferson Department Store, and that each subsidiary corporation had the right to sublease portions thereof. It further alleged that U. S. Rubber contracted to become the sublessee of each subsidiary corporation and that executed lease agreements were delivered in escrow which agreements were not to be released until U. S. Rubber was furnished with appropriate guarantees from Jefferson Parent Corporation and was also furnished with a satisfactory title report. It alleged that conditions precedent had been performed, that U. S. Rubber had breached the agreements and that in consequence thereof Jefferson Subsidiaries were damaged in a sum in excess of $5,000.00. No special damages were pled. (R 227-230)

Cross-motions for summary judgment were filed and by order of the trial court (R 248) summary judgment on the issue of liability was granted to Jefferson Subsidiaries and U. S. Rubber's motion was denied. The cause was ordered to proceed to trial on the issue of damages. U. S. Rubber's motion for rehearing was denied. (R 250-260)

The cause was tried before a jury commencing on October 17 and concluding on October 20, 1966. On October 19, after Jefferson Subsidiaries (original plaintiffs) and after U. S. Rubber had rested their respective cases, Jefferson Subsidiaries moved for leave to amend their Second Amended Complaint by adding Jefferson Parent Corporation as a party plaintiff. (R 296) The motion simply alleged that original plaintiffs were wholly owned subsidiaries of Jefferson Parent Corporation, that Jefferson Parent Corporation operated the business at the three Jefferson locations, and that accounting and income tax reports for Jefferson Parent Corporation and Jefferson Subsidiaries were consolidated. The motion was granted over U. S. Rubber's objection and U. S. Rubber's motion for continuance based on the joinder of Jefferson Parent Corporation was tacitly denied. (R 2013-2017)

U. S. Rubber moved for a directed verdict at the close of Jefferson Subsidiaries' case and renewed that motion at the close of all evidence, on the ground, among others, that the evidence adduced was insufficient and incompetent to support any award of damage. Both motions were denied. (R 1721-1735, 2032)

On October 20, 1966, jury verdicts were returned in the amount of zero dollars for each original plaintiff,

Jefferson Subsidiaries, and in the amount of $400,000.00 for Jefferson Parent Corporation. (R 320-323) Final judgment on the jury verdict was entered on November 4, 1966 in favor of Jefferson Parent Corporation and against U. S. Rubber, in the amount of the verdict, and Jefferson Subsidiaries were "found to have suffered no damages" and were adjudged to "take nothing by their suit except court costs ..." (R 2048-2049).

U. S. Rubber moved for a new trial (R 324-328) which was denied (R 348). Additionally, U. S. Rubber moved for relief under Rule 1.38(b), 1954 Florida Rules of Civil Procedure, wherein it again drew to the Court's attention the improper joinder of Jefferson Parent Corporation and the result that U. S. Rubber was deprived of discovery prior to trial with regard to the factual and legal status and relationship between Jefferson Parent Corporation, Jefferson Subsidiaries and U. S. Rubber (R 332-346). That motion was denied. (R 362)

In response to Petitioners' statement that the computation of damages involved "economic principles", U. S. Rubber does not now, nor has it ever agreed that damages are to be computed on that basis. We do strongly suggest, however, that damages indeed should and must be computed on the basis of recognized, settled and accepted <u>legal</u> principles.

Additionally, Petitioners' statement that damages flowed to Jefferson Parent Corporation is completely incorrect.

Testimony of expert witnesses can hardly supersede elementary legal principles establishing the identity and right of a contracting party to sue and recover damages as the result of a breach of that contract.

STATEMENT OF FACTS

Under date of August 1, 1963 lease agreements were executed between U. S. Rubber and each Jefferson subsidiary. The agreements were not to become effective until U. S. Rubber was furnished with appropriate guarantees by Jefferson Parent Corporation and received satisfactory title reports (R 194,195). Each lease agreement provides (R 52,92,132):

> "On or before the first day of the term hereof sublessor shall procure and furnish to sublessee a policy of title insurance issued by Lawyers Title Insurance Company insuring sublessee's right to possession ..."

The record is clear and uncontroverted that Lawyers Title was never requested by Jefferson Subsidiaries to issue the title policies and that such policies were never in fact issued by Lawyers Title.

The lease agreements, being duplicates in their basic provisions, specify fifteen-year terms, including two five-year renewal options. Minimum rental was established at $15,000.00 per year, plus percentage rental in excess thereof calculated at 5% of U. S. Rubber's gross sales. It was also specified

that U. S. Rubber was to spend at least 3% of its gross sales on advertising. Buildings were to have been constructed by Jefferson Subsidiaries.

The cause proceeded to trial solely on the issue of damages, U. S. Rubber's liability to Jefferson Subsidiaries having theretofore been adjudicated by the trial court. Jefferson Subsidiaries offered no evidence of the fair rental value of the premises to be subleased to U. S. Rubber. The total of their damage evidence consisted of anticipated profit to be derived from the contemplated businesses and advertising benefits based upon estimated sales of U. S. Rubber.

Jefferson Subsidiaries offered evidence (over U. S. Rubber's objections) that George Kamens (acting for U. S. Rubber) discussed lease terms, projected sales, etc. with reference to the proposed businesses (R 1280-1287). Mr. Kamens estimated that sales to be generated at each location would be anticipated in the amount of $400,000.00, $500,000.00 and $600,000.00 in the first, second and third years of operation. (R 1280-1281,1353)

Other than the sales estimates which Kamens made approximately one year prior to the leases being executed, Jefferson Subsidiaries offered no evidence, of any nature, as to sales or net income to be obtained from the operation of the proposed businesses.

Jefferson Subsidiaries then offered extended testimony of economists, to the effect that the economy of South Florida would grow at a minimal rate of 6% per year and that the contemplated businesses would have likewise experienced sales growth of at least 6% per year over the term of the leases. (R 1432-1433)

This economic concept was then presented to a CPA for the purpose of calculating money damages. (R 1400,1401)

The testimony of the CPA and that of the economists was predicated entirely on a "starting point" of Kamens' pre-contract projections or estimates of sale.

With reference to profit damages the CPA used Kamens' projections as sales for the first three years and then applied the 6% growth factor to each year from the fourth year to the end of the lease term. (R 1443-1444) Estimated or anticipated expenses were deducted from projected sales so as to arrive at net income to be received by Jefferson Subsidiaries. Net income was projected over the term of the leases and reduced to present worth (R 1566-1571; Plaintiffs' Exhibit 6) and presented to the jury.

With reference to advertising damages, Jefferson Subsidiaries offered testimony of economists that the failure of U. S. Rubber to have made the required expenditure of 3% of gross sales resulted in economic loss to the consolidated

Jefferson unit (the Jefferson Shopping Center) in the form of revenue. (R 1406,1519-1522). It was testified that the Jefferson complex would receive a dollar of revenue for each dollar of advertising to have been spent by U. S. Rubber (R 1527,1529-1530, 1539-1541) and the failure of U. S. Rubber to make that expenditure resulted in a comparable loss of revenue to the Jefferson complex. The loss of revenue, however, was not the loss of net profit. (R 1527,1529-1530) Jefferson Subsidiaries offered no evidence as to any net profit lost by them as a result of the advertising expenditure not having been made. (R 1621-1622) Advertising damages were then calculated by the CPA applying 3% to the estimated gross sales during the term of the leases (R 1571-1573) reduced to present worth. The estimated gross sales were founded on the Kamens projections for the first three years, and compounded from the fourth year at 6% in accord with the economic concept of growth, just as profit damages were calculated.

The record is uncontroverted that Jefferson Subsidiaries were the contracting parties with U. S. Rubber, that they and not Jefferson Parent Corporation were lessees of the real property in question and accordingly were possessed with the right to sublease to U. S. Rubber, that they contracted to construct buildings under the agreements, that they would have received

rental payments under the agreements in question and that they were distinct, existing and viable corporations. As such, Jefferson Subsidiaries were the only parties having the capacity to sublease to U. S. Rubber, and the statement of Petitioners that this was solely a business decision to be made entirely by Jefferson Parent Corporation is completely contrary to the undisputed facts and totally unsupported by the record. Furthermore, U. S. Rubber executed lease agreements with Jefferson Subsidiaries and in connection therewith insisted upon a separate guarantee of Jefferson Parent Corporation. The separate agreements with Jefferson Subsidiaries and Jefferson Parent Corporation do not support, but indeed contradict, Petitioners' statement that U. S. Rubber never dealt with Jefferson Subsidiaries, but dealt solely with Jefferson Parent Corporation.

Finally, the record completely refutes Petitioners' statement that U. S. Rubber suffered a change of heart which resulted in the filing of suit. The record makes crystal clear the obligation of Jefferson Subsidiaries to procure and furnish policies of title insurance and is likewise uncontroverted that title policies were neither requested by Jefferson Subsidiaries nor issued by Lawyers Title Insurance Company.

POINTS INVOLVED ON CERTIORARI

POINT I

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.

POINT II

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

POINT III

THE DISTRICT COURT, WITHOUT CONFLICT, CORRECTLY DETERMINED THAT THE JURY WAS ERRONEOUSLY PERMITTED TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED ON INADEQUATE AND SPECULATIVE EVIDENCE.

ARGUMENT

POINT I

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.

Petitioners concede that "a stranger to litigation cannot be added during the course of trial after summary judgment had already been rendered in favor of the original plaintiffs." (Petitioners' Brief, page 17).

The thrust of their argument is that Jefferson Parent Corporation was the real party in interest and as such

was properly admitted into the case after the original subsidiary plaintiffs and U. S. Rubber had rested their respective cases. Petitioners contend that Jefferson Parent Corporation may at its whim discard its subsidiary corporations which contracted with U. S. Rubber and elevate its status to that of the real party in interest.

This point was briefed and argued in the District Court of Appeal and their argument was rejected by the decision of that Court which found it error for the trial court to have permitted Jefferson Parent Corporation to enter the case as and when it did. The issue there, as it is here, is not whether a real party in interest may enter litigation, but whether Jefferson Parent Corporation in law occupied the status of a real party in interest under the facts of this case and in light of the pleadings and issues before the trial court.

In considering the status of Jefferson Parent Corporation it must be remembered that each Jefferson subsidiary was the contracting party with U. S. Rubber and Jefferson Parent Corporation was not a party to those agreements. Jefferson Subsidiaries and not Jefferson Parent Corporation owned the interests in three real property locations which were to be subleased to U. S. Rubber and it was Jefferson Subsidiaries who were to be paid rental by U. S. Rubber under the agreements.

Additionally, Jefferson Subsidiaries likewise leased premises to Jefferson Parent Corporation, which transacted business on the premises leased from its subsidiaries.

The Second Amended Complaint, upon which this case was tried, alleges that Subsidiaries "are the operators of the three Jefferson Super Department Stores" and "has the right to sublease portions" of the premises; that U. S. Rubber contracted with the Subsidiaries to be a sublessee; and that as a result of U. S. Rubber's breach the Subsidiaries had been damaged. The motion at trial to amend this complaint by adding Jefferson Parent Corporation as a party plaintiff added only one substantive allegation to the Second Amended Complaint: that Subsidiaries "are wholly owned subsidiaries of the plaintiff Jefferson Stores, Inc. which is the operator of the business known as Jefferson Super Department Stores in the three above set forth locations. Accounting and income tax reports for all four plaintiffs are consolidated."

The Second Amended Complaint, even as amended during trial, does not allege (a) any cause of action by Jefferson Parent Corporation against U. S. Rubber or (b) that it is the real party in interest or (c) that it is or was intended to be a third party beneficiary, or (d) that Subsidiaries are its alter egos and that fraud or injustice would result if they were not disregarded.

On the last day of trial Jefferson Parent Corporation was permitted to enter the suit as a plaintiff with no issue having been made and joined as to any contractual or other duty or obligation owing by U. S. Rubber to Jefferson Parent Corporation and indeed without any pleading or other notice to U. S. Rubber of the claim that the Subsidiaries were its alter egos. Under traditional rudimentary concepts of due process Jefferson Parent Corporation indeed was a stranger in the litigation, had established no right to be in the litigation, and its admission into the suit was patent error.

The pivital point of Petitioners' argument, in an effort to overcome the deficiencies of Jefferson Parent Corporation having been joined as a plaintiff as and when it was, is simply that Jefferson Parent Corporation so completely dominated and owned Jefferson Subsidiaries that Jefferson Parent Corporation was their alter ego and could disregard their existence and substitute itself in their place and stead. The cases relied upon by Petitioners in support of this theory simply do not stand for this proposition. Each of the cases that they cite involves an action by a creditor or third party as compared with a stockholder or parent corporation attempting to disregard a corporate entity and pierce the corporate veil. Petitioners have not cited one case to support their contentions that a parent corporation may discard the subsidiary corporate

entities which it has established with respect to dealings with third persons. To the contrary, the law permits the use of a corporation as a shield but does not permit corporate existence to be cast aside at the whim of the owner or creator.

It is the law in Florida that a corporate veil may be pierced or a corporation determined to be the alter ego of its stockholders or parent corporation, not by its stockholders or its parent corporation, but by creditors or third persons suffering injury as the result of the corporate entity being used as a cloak or cover for fraud or illegality. This remedy enables such creditors or third persons to obtain redress from the persons unlawfully utilizing the corporate entities. See 7 Fla.Jur. Corporations, §§ 31-38, pp. 378-388. It is not inherent in, but contrary to the general principles of corporate law that a parent corporation may, as, when and if it suits its pleasure, disregard the very subsidiary corporations that it has established and to unilaterally determine itself to be the alter ego of its subsidiaries.

The appropriate use of the alter ego doctrine, which demonstrates the fallacy of Petitioners' argument, is stated in Barnes v. Liebig, 1 So.2d 247 (Fla.1941):

> "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing men and women shareholders, and will do justice between real persons." 1 So.2d at 254.

To the same effect, Riley v. Fatt, 47 So.2d 769 (Fla.1950) held that:

> "The rule is that the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them. (Citations omitted) There is no indication in the record that the corporation was organized as a subterfuge or for the purpose of enabling its members to escape, avoid or evade personal responsibility other than in a proper and legal manner. *** In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate, Fatt cannot be heard to question the corporate existence but must confine his efforts to the remedies provided by law for satisfying his judgment from the assets of the corporation, if any can be found." 47 So.2d at 773.

See also Advertects Inc. v. Sawyer Industries, 84 So.2d 21 (Fla.1955). There is no showing in the instant record that the existence of Jefferson Subsidiaries is a fraud or injustice upon or illegal as to their stockholder, Jefferson Parent Corporation. The corporate veil is pierced only "after notice to and full opportunity to be heard by all parties"

Roberts' Fish Farm v. Spencer, 153 So.2d 718,721 (Fla. 1963). Here Jefferson's present contention was not even hinted at until all evidence had been offered and the parties had rested. A party cannot disregard the existence of its subsidiary corporation in litigation when it has not pleaded and the case was not tried with the alter ego doctrine in issue. Hecks v. Sapp, 40 Cal.Rptr. 485 (Cal.App.1964).

Petitioners' argument that Jefferson Parent Corporation is the alter ego of its subsidiaries, and that it thus is elevated to the status of a real party in interest, is not only contrary to the general application of the alter ego principle, but has heretofore been rejected in Florida and other jurisdictions. The rule is stated in 18 C.J.S. Corporations, § 110, p. 509, that:

> "...if an association of persons undertakes to do business in a name which necessarily implies a corporate body, or otherwise holds itself out and acts as a corporation, and enters into any contract as a corporation, or otherwise deals as such, the members are estopped, collectively and individually, to deny its corporate capacity in any action or proceeding arising out of or involving such contract or dealing."

In Marks v. Green, 122 So.2d 491 (Fla.App.1960), the First District Court of Appeal was confronted with the proposition that:

> "Appellant asks the court to indulge in this assumption on the theory that for tax purposes the separate identity of the corporation should be disregarded, and that he as an individual should be adjudged the owner of the intangible property held by the corporation on which the tax has already been paid." 122 So.2d at 493.

The Court disposed of that attempt by a stockholder to alter ego his corporation by holding:

> "Appellant has seen fit to organize a domestic corporation and own all its outstanding capital stock. He has elected to do business through his corporate entity. The benefits of conducting one's business in such manner are obvious and too numerous to mention in this opinion. Having so elected, appellant is in no position to claim all benefits accruing to him by virtue of doing business as a corporation, and at the same time seek to disregard the existence of the corporate entity in order to avoid payment of a tax otherwise chargeable to him. *** In adopting the latter course appellant would lose the many benefits he now enjoys by conducting his business through a fictitious legal entity. The choice of alternatives is the appellant's, <u>but he cannot eat his cake and have it too</u>." 122 So.2d at 493-494. (Emphasis supplied)

In <u>Soclof v. State Road Dept.</u>, 169 So.2d 510 (Fla.App.1964), stockholders sought to claim damages to which their corporation was entitled (but which could not be asserted by the corporation because of its failure to appeal a prior ruling). In rejecting the theory of those stockholders, the First District Court of Appeal held that:

> "Although the corporate veil may be pierced or removed when necessary in order to prevent the corporation from being used for the perpetration of fraud or wrongdoing, such will not be done in considering the rights of the corporation in a legitimate commercial transaction." 169 So.2d at 512. (Emphasis supplied)

Florida Industrial Commission v. Schwob Co., 14 So.2d 666 (Fla.1943) involved a claim by the sole stockholder of his corporation that the experience of the corporate business for rating purposes under the Florida Unemployment Compensation Act should be on the basis of his individual experience and not on the corporate experience (which obviously would have resulted in a rate reduction or a financial gain to the stockholder) since he exercised absolute control and supervision over the business. This Court rejected the contention and held:

> "Even a court of equity ordinarily will not pierce the corporate veil in the absence of fraud. The person holding himself out as the alter ego of a corporation may not ask that the corporate identity be cast aside to avoid payments required by law." 14 So.2d at 667.

In DeSilva Constr. Corp. v. Herrald, 213 F.Supp.184 (M.D.Fla. 1962), Judge Lieb held:

> "The plaintiff further claims, in support of this contention, that there existed such community of interests and identity between the two corporations that it would be unjust to apply the law as cited; and in spite of any lack of provision in said assignment, it should be permitted to maintain these actions. *** With regard to plaintiff's argument, it will suffice to
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> state that the individual officers and stockholders have voluntarily chosen to conduct their business in a corporate form, both in New York and Florida, and the individual stockholders and directors cannot avail themselves of the corporate shield when it suits their purpose and discard the same when it does not appear advantageous." 213 F.Supp. at 193. (Emphasis supplied)

Other holdings of the Federal Courts to the same effect are Terry v. Yancey, 344 F.2d 789 (4th Cir.1965); Bradbury v. Dennis, 310 F.2d 73 (10th Cir.1962); Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 Fed.2d 383 (6th Cir.1962) and Charles Keeshin, Inc. v. Farmers & Merchants Bank, 199 F.Supp. 478 (W.D.Ark.1961).

Even if Jefferson Parent Corporation were the alter ego of its subsidiary corporations, the record is perfectly clear that no evidence of fair rental value was offered by Jefferson Subsidiaries and there was therefore nothing before the jury from which they could determine the difference between rent reserved and rental value. The complete lack of evidence was demonstrated by the jury returning zero verdicts for Jefferson Subsidiaries, the original plaintiffs and the parties to the agreements with U. S. Rubber who were entitled to recover any rental damages. The Final Judgment recites that they "have suffered no damages and that these plaintiffs take nothing". (R 2048-2049) Jefferson Parent Corporation, if it is determined to be the real party in interest, must

stand in the shoes of Jefferson Subsidiaries who have had their day in Court and were adjudged to have suffered no damage and this determination would necessarily be binding on the alleged real party in interest. In the recent case of Calhoun v. Louisiana Materials Co., 206 So.2d 147 (La.App.1968), it was held that a defendant subsidiary corporation, against whom plaintiff sought recovery under an employment contract in connection with plaintiff's sale of business to the parent corporation of defendant, had no standing to urge as offsets against plaintiff alleged breaches of warranty running in favor of the parent corporation. In addition to rejecting the theory advocated by Petitioners herein, that Court went on to hold that:

> "Even if defendant could claim the breaches of warranties as offsets, it could do so only as one who stands in the shoes of American Marine (Parent Corporation), and by virtue of the rights it acquired from American Marine. If defendant can assert such breaches of warranties at all, it has to be bound, just as American Marine is bound, by the final decision of this court in Calhoun v. American Marine Corporation, supra." 206 So.2d at 150.

Jefferson Parent Corporation cannot "eat its cake and have it too". If it is the alter ego of its subsidiaries, it is bound by the judgment against them that was not cross-appealed. See also Inn Operations, Inc. v. River Hills Motor Inn Co., 152 N.W.2d 808.

Additionally, Jefferson Parent Corporation cannot elevate its status in this cause to that of a real party in interest because it cannot demonstrate that Jefferson Subsidiaries are mere nominal parties. The law defines nominal parties as those in whose names suit might be brought for the benefit of others; they have no interest in the suit; they derive no benefit therefrom, and no account, payment, conveyance or other relief is sought against them. See 24 Fla.Jur. Parties, § 3, p. 185; 18 F.L.P., Parties, § 10, p.493. It is ludicrous to even suggest that Jefferson Subsidiaries, the contracting parties with U. S. Rubber, and the record title holders of the land to be sublet, had no interest in the litigation which they initiated and that they expected no recovery therefrom. Jefferson Subsidiaries and not Jefferson Parent Corporation had the contractual right to claim damages for an alleged breach of their agreements with U. S. Rubber and they alone exercised that right without the appearance of Jefferson Parent Corporation until the last day of trial. Indeed Jefferson Subsidiaries were the only parties having a right to sue for breach of those agreements. As stated in White v. Exchange Corp., 167 So.2d 324 (Fla.App. 1964) at page 326:

> "It is elementary that a person not a party to nor in privy with a contract does not have the right to sue for its breach. See Woodbury v. Tampa Water Works Co., 57 Fla.249, 40 So.556, 21 L.R.A.,

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N.S., 1034; Seaboard Airline Ry. Co. v. Tampa Southern R. Co., 97 Fla. 340, 121 So. 477; 18 F.L.P., Parties, Section 4."

Since Jefferson Parent Corporation was neither a party nor a privy to the contracts, the only conceivable theory under which it could have any interest in this litigation is that it was a third party beneficiary of the contracts between its subsidiaries and U. S. Rubber. This theory is untenable because no such rights were ever asserted in this cause by pleading or proof, no issue was joined on any claim to such rights, U. S. Rubber was not accorded notice and an opportunity to defend in connection with any such claim, but a stranger, Jefferson Parent Corporation, was permitted to enter the suit on the last day of trial and go to the jury as a party plaintiff without pleading the breach of a duty owed by U. S. Rubber to it. U. S. Rubber never had a chance, nor indeed any reason, in discovery to explore the relationship between Jefferson Parent Corporation and its subsidiaries. In the absence of pleading and proof that the contract shows a clear intent and purpose to confer a direct and substantial benefit, the third party has no legal right to sue for breach of the contract. See 7 Fla.Jur. Contracts, § 101, p. 169.

Petitioners place great reliance on the similarity of the post-trial order of the trial court with the case of

Robert L. Weed, Architect, Inc. v. Horning, 33 So.2d 648 (Fla.1947). In fact, the dissimilarity of the Weed case to the post-trial order of the trial court emphasizes the correctness of U. S. Rubber's argument and of the decision of the District Court of Appeal. In that case a licensed architect was the sole stockholder of a corporation which had contracted to provide architectural services. The corporation sued to foreclose an architectural lien. The complaint in that case alleged that Weed was the real party in interest and had individually performed the services and the corporate contract was for his benefit. Presumably issue was joined on these allegations and Weed was determined the alter ego of the corporation and it was allowed to recover though not licensed. This record is devoid of any such pleading of Jefferson Parent Corporation. In the Weed case the alleged nominal party was without capacity to render the service for which suit was brought; here, the record makes crystal clear the fact that Jefferson Subsidiaries and not Jefferson Parent Corporation were the only parties who could perform the sublease agreements with U. S. Rubber, as they were the lessees of record of the real property; and therefore, by definition, not nominal parties. By contract they had the sole right to rental income under the sublease agreements and were viable corporations. It can hardly be argued that they were

not interested in the cause and sought no recovery herein, the record establishes the contrary.

Petitioners' reliance on Fontainebleau Hotel Corp. v. Crossman, 323 F.2d 937 (5th Cir.1963) is equally misplaced. There, a plaintiff was permitted to sue on an unsigned lease between the defendant hotel and a corporation. The corporation involved therein, however, was never in possession of the premises, never actively engaged in any business, did not even have a bank account, and the hotel regarded the plaintiff and the corporation as inseparable and interchangeable. The Court held the interest of the corporation and the shareholder to be identical and in view of the disregard of the corporate entity by all parties held the corporation to be the alter ego of the individual. Here, Jefferson Subsidiaries were in possession of the premises to be leased to U. S. Rubber, contracted with U. S. Rubber for the use of the premises, would have received the rentals accruing under those contracts, were obliged to construct buildings on the premises, and indeed leased premises to Jefferson Parent Corporation. There was never a time in the instant case when the parties so conducted their affairs as to demonstrate that Jefferson Subsidiaries were deemed not to in fact exist. There is no pleading or proof here to suggest that U. S. Rubber was not concerned with whom it was dealing.

To the contrary, it indeed was concerned with whom it was dealing as it in fact required appropriate guarantees from Jefferson Parent Corporation incidental to the agreements with Jefferson Subsidiaries.

Petitioners argued in the District Court that Jefferson Parent Corporation was the real party in interest, but that Court rejected their argument and held it error to admit that party as a plaintiff at the close of the trial, with the predicate for that party's claim against U. S. Rubber never having been asserted or adjudicated. Jefferson Parent Corporation was neither the contracting party with U. S. Rubber nor privy to the contracts between U. S. Rubber and Jefferson Subsidiaries, and Jefferson Parent Corporation has never alleged that it was a third party beneficiary under the agreements between its subsidiaries and U. S. Rubber. The law precludes, as was obviously recognized by the District Court, Jefferson Parent Corporation from discarding its wholly owned subsidiaries to serve its interests. There was no showing that the subsidiaries never had independent existence and were mere shams, that U. S. Rubber considered them interchangeable with Jefferson Parent Corporation for all purposes or that U. S. Rubber in any way ignored the separateness of Jefferson Parent Corporation and its subsidiaries.

Finally, Petitioners have neither pointed to nor have they cited any Florida case which conflicts in any manner with the opinion of the Third District herein. That reason alone compels discharge of the Writ.

POINT II

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

Petitioners' argument hereunder is predicated on an assumption that the District Court reversed Judge Vann's post-trial order stating that Jefferson Parent Corporation was the real party in interest; and since U. S. Rubber assigned, but did not argue in its brief, the propriety of this order the District Court decision conflicts with Redditt v. State, 84 So.2d 317 (Fla.1955), which 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 Judge Vann's post-trial order was not an adjudication of the status of Jefferson Parent Corporation. Adjudication means the exercise of judicial power in determining rights and interests of parties on issues made by the pleadings or on evidence taken and submitted, Street v. Benner, 20 Fla. 700, 713 (1884).

This requires notice, an opportunity to be heard and a determination of disputed issues, the elements of rudimentary due process not present here.

Following the jury verdicts rendered on October 28, 1966, U. S. Rubber moved for the entry of final judgments on the zero verdicts returned for Jefferson Subsidiaries. On November 7, 1966, without the further taking of any evidence or the further amendment of pleadings, the trial judge denied this motion and entered the order now relied upon by Jefferson Parent Corporation to the effect that it was the real party in interest. It is significant that U. S. Rubber's motion did not require any such determination and the portion of the order now quoted and relied upon by Jefferson Parent Corporation was gratuitous and irrelevant to the matters before the trial court for decision.

With respect to the status of Jefferson Parent Corporation, there was no pleading directed to that issue and U. S. Rubber was never accorded notice of the real party in interest contention and an opportunity to be heard thereon. Jefferson Parent Corporation was permitted to join as a plaintiff on the last day of trial, over U. S. Rubber's objections, and the post-trial order can hardly substitute for the deficiency of pleadings or notice to U. S. Rubber of that issue and the lack of an opportunity to meet it.

Petitioners' total argument is founded upon the assumption that the District Court reversed the trial court's post-trial order. Their argument is patently erroneous 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 Parent Corporation. Therefore Redditt v. State, supra, is completely inapplicable and not in point.

In its recitation of facts (208 So.2d 111-112) the District Court correctly observed that Jefferson Parent Corporation was permitted to join as a plaintiff after Jefferson Subsidiaries and U. S. Rubber had rested their respective cases. The opinion of that Court expressly holds that the trial court erred in permitting the joinder and in permitting Jefferson Parent Corporation to go to the jury as a party plaintiff in the complete and total absence of any issue on or adjudication of U. S. Rubber's liability to that party or its right to be a plaintiff. The District Court simply did not, as is hypothesized by Petitioners, reverse any post-trial order.

The validity of the post-trial order was not a necessary portion of the reversal, since Judge Vann's error occurred at trial and was purely a question of law. No post-trial motion to such order is needed to preserve the point for

appellate review. As Mr. Justice Thornal, speaking for the First District, observed in Furr v. Gulf Exhibition Corp., 114 So.2d 27,29 (Fla.App.1959) at page 29:

> "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 new trial by the offended party."

Additionally, in 6A, Moore, Federal Practice, § 59.14 (2nd ed. 1966), it is stated:

> "A motion for 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 to be taken to *** joinder or nonjoinder 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."

Also, Petitioners understood the joinder argument in the District Court, met it head on and even quoted the post-trial order in their brief in that court. Even if Petitioners' argument had merit, the constitutionally protected right to appeal should not be limited in the absence of a showing of prejudice which Petitioners cannot make. Greyhound Corp. v. Carswell, 181 So. 2d 638 (Fla.1966).

POINT III

THE DISTRICT COURT, WITHOUT CONFLICT, CORRECTLY DETERMINED THAT THE JURY WAS ERRONEOUSLY PERMITTED TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED UPON INADEQUATE AND SPECULATIVE EVIDENCE.

Petitioners herein seek a reversal of the District Court opinion and the reinstatement of the judgment entered in the trial court in favor of Jefferson Parent Corporation. In seeking that relief, however, Petitioners have conspicuously refrained from arguing or briefing the question of damages, of pointed significance in the District Court opinion and indeed related directly to the erroneous joinder of Jefferson Parent Corporation. The unchallenged holding of the District Court compels affirmance by this Court irrespective of whether Jefferson Parent Corporation is or is not the alter ego of Jefferson Subsidiaries. As demonstrated under Point I, supra, it makes absolutely no difference whether "plaintiff" is Jefferson Parent Corporation or Jefferson Subsidiaries, as "plaintiff" is bound completely by the evidentiary void of rental value and "plaintiff" is presumed in law to have suffered no "rental" damage.

The District Court correctly determined the measure of damage to be the difference between the rent reserved and the rental value of the premises. Petitioners have not in

this Court challenged that determination, and indeed they could not, as the Florida cases are legion in support thereof. 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, 113 So.2d 727 (Fla.1959); Brewer v. Northgate of Orlando, Inc., 143 So.2d 358 (Fla.1962). Petitioners likewise have not, and indeed cannot, challenge the factual holding of the District Court that plaintiffs failed completely to offer any evidence of rental value and that therefore the jury was afforded no opportunity to determine the difference between rent reserved and rental value. The only evidence admitted which had any relevance to the correct measure of damage is the lease agreements between Jefferson Subsidiaries and U. S. Rubber. The leases indeed set forth contract rent or rent reserved, but the law requires evidence of rental value and in the absence thereof it is assumed that plaintiffs have suffered no damage. Such was the holding of this Court in Young v. Cobbs, 83 So.2d 417, 420 (Fla.1955) that:

> "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 plaintiff suffered no damage in this respect."

The record is perfectly clear that plaintiffs' damage evidence fell into two categories, namely: (a) Loss of profit, and (b) Loss of advertising benefits. (Plaintiffs' Exhibit 6, T. 341).

Loss of profit was computed by starting with the Kamens pre-contract estimates of sales for the first three lease years and by applying the economic growth factor of 6% per annum thereafter to the end of the lease terms, subtracting therefrom estimated expenses of sublessors and reducing the balance to present worth. The base upon which profit damages were calculated related exclusively to anticipated sales and estimated expenses of the businesses in prospect and contemplation. It is uncontroverted that U. S. Rubber never went into possession, that construction of the improvements was never commenced and that U. S. Rubber never opened the contemplated businesses and accordingly never produced the first dollar in sales.

Value of advertising was computed by applying three per cent (the advertising expenditure agreed upon in the lease agreements) to Kamens pre-contract estimates of gross sales of U. S. Rubber at the contemplated locations and reducing that figure to a present worth. Plaintiffs' economic experts testified that the Jefferson Shopping Center

would have received a dollar in revenue (as compared with the obtaining of a dollar in a net profit) for each dollar to have been spent by U. S. Rubber on advertising. This economic principle was translated into dollars by the CPA following the computations aforesaid. It is with respect to the advertising loss, we suggest, that Jefferson Subsidiaries erroneously injected Jefferson Parent Corporation into the litigation, since Jefferson Subsidiaries transacted no business at the leased locations and accordingly had no customers, sold no merchandise, offered no merchandise for sale, had no reason to advertise and attract customers and accordingly could not establish any injury related to the loss of any advertising benefits.

Both profit and advertising damages were predicated on estimated sales to be generated at non-established businesses and anticipated profits to be generated therefrom in the form of net rental income. By permitting the jury to consider and award damages thereon, as was correctly held by the District Court, the trial court ignored firmly settled principles of Florida law which prohibit an award of damages founded on speculation and conjecture. Thus, in Leslie E. Brooks v. Long, 64 So. 425, 453 (Fla.1914) it was held that:

> "The general rule applicable ... is that the lessee can recover from the lessor, for breach of a contract to deliver possession of the leased premises, the difference, if any, between the rent contracted to be paid and the actual rental value of the premises. Prospective profits from the businesses that the lessee expected to conduct in said premises are too remote and speculative, dependent upon too many contingencies to be permissible as an admeasurement of damages in such a case."

So, too, in Young v. Cobbs, supra, this Court decided that:

> "*** It is well settled that profits anticipated from a business which has not yet been established at the time possession of the leased premises is wrongfully withheld from a lessee cannot be recovered by such lessee, since they are too remote and speculative."

Loss of profit from the interruption of an established business, under appropriate circumstances, may of course be recovered. This was the holding in New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co., 166 So. 856,860 (Fla.1935), as follows:

> "The general rule is that the anticipated profits of a commercial business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule, however, to the effect that the loss of profit from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was. Proof of the income and the expenses of the business for a reasonable time anterior to the interruption charged, or facts of equivalent import, is usually required."

But the law is perfectly clear and well settled that losses of profits wholly in prospect and contemplation are too uncertain and speculative upon which to ground damages. Lanzalotti v. Cohen, 113 So.2d 727 (Fla.App.1959). And this, as a matter of law, is the rule where the business is new and yet to be established. See also Rogers v. Standard Oil Co., 178 So. 427 (Fla.1938); All Florida Surety Co. v. Vann, 128 So.2d 768 (Fla.App.1961); 25 C.J.S. Damages, §42(b); 22 Am.Jur., Damages, §§ 172,173,244; and 88 A.L.R.2d 1029.

The District Court indeed recognized the total inadequacy of evidence of the correct measure of damage and the purely speculative nature of the evidence that was offered. Those holdings of the District Court are unchallenged in this proceeding by Petitioners. This can only be interpreted as their complete agreement with that holding or as an intentional avoidance of the damage question with the hope that it will be overlooked by this Court.

CONCLUSION

The judgment of the trial court was correctly reversed by the District Court of Appeal and the opinion of that Court should be affirmed and the Writ herein discharged for the compelling reasons that:

1. The opinion of the District Court is not in conflict, in any respect, with any other decision of another Florida appellate court which is either cited or referred to by Petitioners.

2. Jefferson Parent Corporation, indeed a stranger to the litigation involving its subsidiaries, contracting parties with U. S. Rubber, was erroneously joined as a party plaintiff and permitted to go to the jury in that capacity, in contravention of elementary principles of due process. The alter ego argument of Petitioners is not only totally refuted by Florida law but is totally crumbled by the holding of the White case, supra, and the undisputed facts that Jefferson Subsidiaries were the contracting parties, pled their case, obtained summary judgments, sought substantial

money damages, were the only parties capable of subleasing to U. S. Rubber and were found by the jury to have suffered no damage. The error in permitting the joinder of Jefferson Parent Corporation was correctly determined by the District Court of Appeal.

3. The judgment of the trial court was reversed on error assigned, briefed and argued, and not on the basis of any post-trial order which could not have had the effect of curing a patent error committed during the trial of the case.

Even if Jefferson Parent Corporation is determined by this Court to be the real party in interest, it can only occupy the shoes of its subsidiary corporations and as such must be bound by the zero verdicts returned by the jury and the unappealed final judgment of the trial court that those plaintiffs suffered no damage and take nothing by their suit.

Should this Court determine Jefferson Parent Corporation to be the real party in interest and in some manner permit it to occupy any status other than the position of its subsidiaries, it is respectfully requested that this cause be remanded to the District Court for decision on the summary

judgment point or, alternatively, that this Court inquire into the propriety thereof, permit briefing and argument, and render a decision thereon.

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, On the Merits was mailed on this 24 day of October, 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.

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