37.305

IN THE SUPREME COURT OF FLORIDA

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 Dealware corporation authorized to do business in the State of Florida,	)	NO.__________
Petitioners,	)	
vs.	)	
UNITED STATES RUBBER COMPANY, a New Jersey corporation,	)	
Respondent.	)	

* *

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

* *

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PETITIONERS' STATEMENT OF THE CASE AND FACTS

Petitioners adopt the Statement of Facts as set forth in their Petition for Writ of Certiorari as their Statement of the Case and Facts in this Brief.

PETITIONERS' POINTS

POINT 1.

WHETHER OR NOT IT WAS PROPER FOR THE DISTRICT COURT TO REVERSE THE LOWER COURT'S POST TRIAL ORDER WHEN THE VALIDITY OF SAID ORDER WAS NEVER ARGUED BY APPELLANT IN ITS BRIEF.

POINT 2.

WHETHER OR NOT IT WAS PROPER TO ADD JEFFERSON PARENT CORPORATION AS A PARTY PLAINTIFF DURING THE COURSE OF TRIAL.

POINT 3.

THIS COURT'S RULE ON THE MEASURE OF RENTAL DAMAGES WAS NOT APPLIED BY THE DISTRICT COURT.

ARGUMENT

POINT 1.

WHETHER OR NOT IT WAS PROPER FOR THE DISTRICT COURT TO REVERSE THE LOWER COURT'S POST TRIAL ORDER WHEN THE VALIDITY OF SAID ORDER WAS NEVER ARGUED BY APPELLANT IN ITS BRIEF.

Since the conflict with existing Florida law on this point is not readily apparent from a cursory glance at the Opinion herein of the Honorable District Court of Appeal, Third District, it is incumbent upon Petitioners to demonstrate a conflict not readily apparent by bringing before this Honorable Court additional portions of the Record herein so that Petitioners' right to Certiorari may be demonstrated by consideration of both:

A. The Opinion of the District Court of Appeal, Third District;

and B. Those additional portions of the Record required to demonstrate a conflict not readily apparent by Item A. above, standing alone.

An examination of the Appellate Rules demonstrates the validity of the above procedure. For example, Rule 7.2(i.2) provides for

the following:

> "The decisions of the courts that are alleged to conflict with each other, where that provision is invoked. This may be by reference to the citation of said decisions where they have been reported in official records. In those instances when the alleged conflict is not apparent from the decisions, then so much of the record as shall be essential to demonstrate such conflict may be brought up with the petition for certiorari. The Court may, after granting the writ and setting the case for oral argument, order brought up such further portions of the record as it may deem necessary." Appellate Rule 7.2(i.2) (emphasis supplied).

The most pertinent portion of the Record herein that the Petitioners have submitted, in addition to the decision of the District Court of Appeal, is an Order of the Trial Judge which can be found at Page 349 of the Record herein. (See also Exhibit A. of Petition for Certiorari).

In short, simple language, this Order by the Judge who presided at trial held that JEFFERSON STORES, INC. (JEFFERSON PARENT CORPORATION) was the real party in interest and this was the reason that the Circuit Judge added JEFFERSON PARENT CORPORATION as party plaintiff during the course of the trial (R 349).

When the Honorable District Court of Appeal, Third District, reversed the Trial Judge, it obviously held that ... "permitting the entry of JEFFERSON STORES (JEFFERSON PARENT CORPORATION) into the case on the last day of testimony" and "... permitting it to go to the jury as a party plaintiff" was error (Page 2 of Opinion).

Inherent in the above holding is one of the following two alternatives that, of necessity, were part and parcel of the decision as the Record clearly reveals:

1. The District Court was reversing Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest.

2. The District Court was upholding Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest but still felt it was error to add JEFFERSON PARENT CORPORATION as a party plaintiff during the course of trial.

This portion of our Brief is only concerned with the first alternative above, to-wit:

> The District Court was reversing Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest.

Assuming the above alternative, the District Court, Third District was in complete conflict with Florida law wherein the Supreme Court of Florida annunciated the following basic principle:

> "The new Rule of this Court in Rule 36(9), 30 F.S.A., has re-stated a well established rule of law of appellate review as follows: 'Such assignments of error as are not argued in the briefs will be deemed abandoned * * *.' The assignment of errors constitute the basis for reversal and appellant's brief serves the purpose of pointing out specific errors or points within the scope of some specific assignment of error. Except for fundamental errors, an appellate Court will not reverse except for some well founded assignment of error that has been argued in the brief, and no point made in the brief will be considered unless it is found to be within the scope of an assignment of error." Redditt vs State, Fla. 1955, 84 So 2d 317, 320.

This error of the District Court of Appeal, Third District, in complete conflict with the Supreme Court of Florida, is clearly revealed by the undisputed record in this cause which

demonstrates first that the Trial Judge adjudicated in an Order that JEFFERSON PARENT CORPORATION was the real party in interest and, accordingly, it was proper to add JEFFERSON PARENT CORPORATION as party plaintiff (R 349).

The record goes on to reveal that in regard to the Trial Judge's Order re real party in interest, the Appellant, U. S. RUBBER, raised two Assignments of Error, as follows:

> "33. The court erred in denying defendant's Motion for Entry of Final Judgment by Order entered November 7, 1966.
>
> 34. The court erred in making Findings and conclusions in its Order denying defendant's Motion for Entry of Final Judgment entered November 7, 1966."

At no time did U. S. RUBBER, the Appellant, argue said Assignments of Error in its Brief as demonstrated by the following set forth in its Brief:

> "POINT ONE
>
> WHETHER THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S AND DENYING DEFENDANT'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 THE PLAINTIFFS.
>
> (Raised by Assignment of Error No. 1, 2, 3)

POINT TWO

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JOINDER OF A NEW PARTY PLAINTIFF AFTER ALL ORIGINAL PARTIES HAD RESTED THEIR RESPECTIVE CASES DURING THE TRIAL OF THE CAUSE.

(Raised by Assignment of Error No. 10, 11, 17, 18, 19, 30, 32, 35).

POINT THREE

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED ON INCOME AND SALES TO BE DERIVED FROM BUSINESS WHOLLY IN CONTEMPLATION AND PROSPECT AND WITHOUT ANY EVIDENCE OF FAIR RENTAL VALUE.

(Raised by Assignment of Error No. 4, 5, 6, 7, 8, 9, 12, 13, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32)"
(emphasis supplied)

When the Opinion of the Honorable District Court of Appeal, Third District, in this cause was submitted, it became blatantly apparent that the District Court of Appeal was setting aside the Post Trial Order of the Honorable Circuit Judge without any argument as to the validity of this Post Trial Order being submitted in the Briefs whatsoever.

In response to this apparent inequity, your Petitioners filed a Petition for Rehearing before the District Court

of Appeal, Third District, wherein they stated the following which was undisputed:

> "3. The finding of liability of U. S. RUBBER to JEFFERSON STORES was reversed, but this Court's Opinion forecloses a determination of that issue on remand.
>
> a. The aforesaid post-trial order shows a finding based upon evidence at trial that the Realty Corporations and JEFFERSON STORES were one and the same, and that Appellant was liable to JEFFERSON STORES for all damages under the leases.
>
> b. Appellant assigned as error, but did not argue, the entry of said Order (Assignment of Errors 33 and 34).
>
> c. This Court in effect reversed that order on a holding that the initial ruling at trial was made 'without any hearing' (Opinion, page 3).
>
> d. By failing to provide for a determination of Appellant's liability to JEFFERSON STORES for all elements of damage on remand, this Court has, without any hearing, found that Appellant is not liable to JEFFERSON STORES."

(Page 2 of Petition for Rehearing).

Needless to say, the District Court of Appeal denied the Petition for Rehearing, thereby demonstrating that if the

District Court of Appeal followed Alternative No. 1, to-wit:

> "The District Court was reversing Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest.",

then said District Court of Appeal was in direct conflict with the Supreme Court of Florida, to-wit:

> "The new Rule of this Court in Rule 36(9), 30 F.S.A., has re-stated a well established rule of law of appellate review as follows: 'Such assignments of error as are not argued in the briefs will be deemed abandoned * * *.' The assignment of errors constitute the basis for reversal and appellant's brief serves the purpose of pointing out specific errors or points within the scope of some specific assignment of error. Except for fundamental errors, an appellate court will not reverse except for some well founded assignment of error that has been argued in the brief, and no point made in the brief will be considered unless it is found to be within the scope of an assignment of error." Redditt vs State, Fla. 1955, 84 So 2d 317, 320.

ARGUMENT

POINT 2.

WHETHER OR NOT IT WAS PROPER TO ADD JEFFERSON PARENT CORPORATION AS A PARTY PLAINTIFF DURING THE COURSE OF TRIAL.

Point 1. of this Brief sets forth two alternatives inherent in the District Court of Appeal's decision, to-wit:

1. The District Court was reversing Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest.

2. The District Court was upholding Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest but still felt it was error to add JEFFERSON PARENT CORPORATION as a party plaintiff during the course of trial.

Point 1. further disposes of the first alternative demonstrating wherein opposition to the Trial Judge's adjudication of JEFFERSON PARENT CORPORATION as real party in interest was abandoned by U. S. RUBBER. This leaves us with the remaining alternative, to-wit:

> The District Court was upholding Judge Vann's adjudication that JEFFERSON PARENT CORPORATION was the real party in interest but still felt it was error to add JEFFERSON PARENT CORPORATION as a party plaintiff during the course of trial.

Even if the District Court of Appeal, Third District, followed this latter alternative, it would run afoul of and be in complete conflict with the following decisions of the Supreme Court of Florida re real party in interest:

> "The purpose of the statutory provision that 'any civil action at law may be maintained in the name of the real party in interest' is to relax the strict rules of the common law so as to enable those directly interested in, but not parties to, a contract, to maintain an action for its breach; and the statute should be so applied as to accomplish its salutary purpose." First National Bank vs Perkins, 81 Fla. 341, 87 So 912.

> "The statute law of this state recognizes the principle as applicable to civil actions at law providing that the real party in interest may at all times be substituted for the person who brings the action for the use of another." McCord vs Lee, 127 Fla. 65, 172 So 853 (emphasis supplied).

Furthermore, an additional direct conflict exists with the Supreme Court of Florida on the concept of alter ego:

> "As to the first contention we find no support whatever. It is quite true that under the law a corporation cannot be licensed to practice architecture, but Robert L. Weed, Architect, Inc., was nothing more than the alter ego of Robert L. Weed or a medium through which his

> business as an architect was transacted. The bill of complaint alleges that Robert L. Weed was at all times a licensed architect, that as such he performed the services in question and that the contract was executed by Robert L. Weed, Architect, Inc., for the benefit of Robert L. Weed. Throughout the entire transaction both parties recognized Robert L. Weed as the main party in interest, and that Robert L. Weed, Architect, Inc. was nothing more than a nominal party to the transaction." Robert L. Weed, Architect, Inc. vs Horning, Fla. 1947, 33 So 2d 648.

The similarity of the language cited above in the Robert L. Weed case with that of the Trial Judge in our case is so strikingly similar that it justifies repetition since it is blatantly apparent that Judge Vann was relying on the Robert L. Weed case:

Judge Vann held:

> "Throughout this entire transaction, all parties concerned recognized that JEFFERSON STORES, INC. was the main party in interest with the original plaintiffs, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC., and JEFFERSON FUNLAND, INC., being nothing more than nominal parties to the transaction."

(R 349)

In the Robert L. Weed case, the Supreme Court of Florida held:

> "Throughout the entire transaction both parties recognized Robert L. Weed as the main party in interest, and that Robert L. Weed, Architect, Inc. was nothing more than a nominal party to the transaction." Robert L. Weed, Architect, Inc. vs Horning, Fla. 1947, 33 So 2d 648.

The Florida law on this point is so clear that even the United States Court of Appeals for the Fifth District, interpreting Florida law, held:

> "Under circumstances, individual shareholder could sue on agreement executed by corporation wherein interest of corporation and shareholder was identical and corporation was alter ego of individual." Fontainbleau Hotel Corp. vs Crossman (C.A. 5th Cir. 1963) 323 F 2d 937.

Last, but not least, even the Honorable District Court of Appeal, Third District, finds itself in conflict with itself:

> "In the light of the authorities cited we hold that two alternatives are prsented where there is a transfer of the cause of action pending suit. The action may be continued in the name of the original party, or the court may upon application allow substition for the transferee." Miami Airlines vs Webb, Fla. 1959, 114 So 2d 361.

Finally, this Honorable Court is asked to examine the Rules of Civil Procedure it has promulgated. Under Rule 1.17(a) (New Rule 1.210(a)) of the Rules of Civil Procedure the Trial Judge has the discretion to add parties prior to a final determination of a cause. Cf., Bonded Rental Agency, Inc. vs City of Miami, Fla. App. 3rd Dist. 1966, 192 So 2d 305.

Rule 1.18 (New Rule 1.250) specifically provides that parties may be added "at any stage of the action". The purpose of these Rules is to allow a liberal joinder of parties. Miracle House Corp. vs Haige, Fla. 1957, 96 So 2d 417, 418. The corresponding Federal Rule (Rule 21) has been used to add a party pending appeal, where to grant the motion merely put the principal, the real party in interest, in the position of his agent. See Mullaney vs Anderson, 342 U.S. 415, 96 L. Ed. 2d 458, 72 S. Ct. 428.

POINT 3.

THIS COURT'S RULE ON THE MEASURE OF RENTAL DAMAGES WAS NOT FOLLOWED BY THE DISTRICT COURT.

In Moses v. Autuono, 56 Fla. 499, 47 So. 925 (1908), this Court held that the measure of damages, when a tenant sues the landlord for a breach of their contract, is the "difference between the stipulated rent and the value of the use of the premises". A tenant can recover damages even though the market value of the leasehold is less than the rent he is required to pay. Young v. Cobb, Fla. 1955, 83 So. 2d 417.

The District Court's opinion in this case is in direct conflict with the foregoing cases because the District Court held that the measure of damages was the difference between the rent reserved and rental value, and that petitioners could not recover damages where the use value was zero.

C O N C L U S I O N

It is respectfully submitted that a serious conflict with prior decisions of the Supreme Court of Florida lies in this cause. The similarity of the language of the Trial Judge with that of the Supreme Court on prior occasions indicates that the Trial Judge followed this precedent of the Supreme Court. The District Court of Appeal, Third District, departed from this precedent.

Respectfully submitted,

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By _____

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Brief in Support of Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District was mailed to:

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Attention: Richard S. Banick, Esq.

this 17th day of April, 1968.

By _____