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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.

* *

PETITIONERS' BRIEF ON THE MERITS

* *

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and
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I N D E X

TABLE OF AUTHORITIES

EXPLANATORY NOTE

There will be of necessity in this Brief some repetition of those matters set forth in Petitioners' prior Brief, Petitioners' Petition for Writ of Certiorari, and Petitioners' Petition for Rehearing. The basis of this repetition is that this cause on the merits is so inter-twined with the conflict Certiorari heretofore set forth in the abovementioned documents that, of necessity, a Brief on the merits must refer to many of those same matters set forth in the prior documents listed above.

For purposes of clarify, the Respondent herein will be referred to as "U. S. RUBBER". The Petitioners, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. will be referred to as "JEFFERSON SUBSIDIARIES". The Petitioner, JEFFERSON STORES, INC., will be referred to as "JEFFERSON PARENT CORPORATION". The symbol "R" will be used to designate Record, and the symbol "T" will be used to designate that portion of the Record constituting the Transcript of Testimony. "PX" will symbolize Plaintiffs' Exhibits.

STATEMENT OF THE FACTS

Some time in August, 1962, one GEORGE KAMENS contacted JEFFERSON PARENT CORPORATION with regard to the possibility of establishing automotive centers at the locations of the three JEFFERSON SUPER STORES located in Dade and Broward Counties. (R 1280, 1743-1745, 1299). It is undisputed that KAMENS was acting as an agent of U. S. RUBBER (R 1299). KAMENS, after this initial contact, then presented the proposal to U. S. RUBBER (R 1745, 1751-1752). From this point on, expensive negotiations were then undertaken directly between U. S. RUBBER and JEFFERSON PARENT CORPORATION (R 210-214, 1310-1313, 1753).

It was these negotiations between JEFFERSON PARENT CORPORATION and U. S. RUBBER that resulted in the execution of Lease Agreements between U. S. RUBBER and JEFFERSON SUBSIDIARIES. (which were wholly owned by JEFFERSON PARENT CORPORATION) (R 194, 195, 52, 92, 132) (PX 1, 2, 3).

The record is clear that the choice of JEFFERSON SUBSIDIARIES to be party Lessors under these three Lease Agreements with U. S. RUBBER was solely a business decision made entirely by JEFFERSON PARENT CORPORATION. It cannot be emphasized enough that the three corporations referred to herein as JEFFERSON SUBSIDIARIES, to-wit: JEFFERSON REALTY OF FORT LAUDERDALE, INC.,

JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC., were wholly owned subsidiaries of JEFFERSON PARENT CORPORATION (JEFFERSON STORES, INC.).

In fact, U. S. RUBBER never dealt to this point with JEFFERSON SUBSIDIARIES, but dealt solely with JEFFERSON PARENT CORPORATION. Nowhere is this more clearly brought out than in the fact that U. S. RUBBER refused to sign the subject leases with JEFFERSON SUBSIDIARIES unless and until they received appropriate guarantees from JEFFERSON PARENT CORPORATION. (R 195).

The record is clear that all of the corporations, i.e., JEFFERSON PARENT CORPORATION and JEFFERSON SUBSIDIARIES, were treated as one party in its dealings with U. S. RUBBER. Not only were the subsidiaries wholly owned by JEFFERSON PARENT CORPORATION, but in fact the officers and directors of JEFFERSON PARENT CORPORATION and JEFFERSON SUBSIDIARIES were identical (R 349, 2034), (T 801).

The three Leases signed by the parties required a fixed rental. In addition thereto, payment of an additional five (5%) per cent of U. S. RUBBER's gross sales from the leased premises to the extent that it exceeded the guaranteed minimum rental was required. (R 69) (PX 1, 2, 3). The Leases also required that U. S. RUBBER spend three (3%) per cent of its gross sales on advertising to be conducted under the name of JEFFERSON

PARENT CORPORATION (R 83, 97). As stated previously, the Leases were not to become effective until U. S. RUBBER was furnished with appropriate guarantees from JEFFERSON PARENT CORPORATION and until U. S. RUBBER received and approved satisfactory title reports (R 194, 195).

When it became apparent that U. S. RUBBER suffered a change of heart and did not attempt to fulfill its obligations under these Leases suit was instituted for damages.

STATEMENT OF THE CASE

Suit was instituted for damages for breach of leases against U. S. RUBBER with the parties Plaintiffs being the three JEFFERSON SUBSIDIARIES. JEFFERSON PARENT CORPORATION was not a party Plaintiff. The issues in this lawsuit were formed by U. S. RUBBER's answer tothe Second Amended Complaint. At the hearing arguments on both Plaintiffs' and U. S. RUBBER's Motions for Summary Judgment, the Court entered an Order determining that the Defendant, U. S. RUBBER,was liable for its breach of said Lease Agreements to the Plaintiffs as a matter of law and the Court ordered trial on the issue of damages alone (R 248).

Discovery depositions were taken by both sides. Since the computation of damages involved economic principles, both sides hired economic experts or officials of competitive automotive centers selling automobile tires to testify on their behalf. For example, the Plaintiffs had as their experts, Dean James Leslie Buchan of Washington University (R 687), Dean Grover A. Noetzel of the University of Miami (R 735) and Basil M. Stewart, Jr., Certified Public Accountant. The Defendants took the depositions of each of these experts. Each of these experts testified as to the damages flowing to JEFFERSON PARENT CORPORATION. Furthermore, the Defendant took the deposition of Plaintiffs' officers, SAMUEL MUFSON (R 724) and JULIUS MUFSON (R 647), who also testified as

to the damages flowing to JEFFERSON PARENT CORPORATION.

The Plaintiffs took the depositions of the Defendant's experts, Professor Edward Jackson Fox (R 973), Bill Higginbotham (R 1063), and George D. Kamens (R 1736). Professor Fox minimized the economic damages flowing to JEFFERSON PARENT CORPORATION. Bill Higginbotham, the President of Pan American Tire Company, a leading chain of tire centers, testified as to the decline of profits in the eight Pan American Tire Company stores in Miami, Florida. George D. Kamens testified that automotive service centers usually experienced a decline in annual profits after the initial year or two of their opening.

In summarizing pretrial discovery, it is blatantly correct to state that all depositions and other discoveries herein as to damages were directed at the damages ultimately flowing to JEFFERSON PARENT CORPORATION.

When the cause came to trial, all of the aforementioned experts were called upon as witnesses by the respective parties. The witnesses for the Plaintiffs testified as to the damages flowing to JEFFERSON PARENT CORPORATION. The witnesses for the Defendant testified as to the alleged lack of damage flowing to JEFFERSON PARENT CORPORATION. In fact, the Defendant, U. S. RUBBER, brought forth additional expert witnesses, such as Rue R. Gewert, Tax Assessor of Dade County, Florida (R 1833), Russell A. Jones, an

executive of Burdine's Stores, a department store chain directly competing with JEFFERSON STORES, INC. (R 1872), and

All of the defense witnesses, as was indicated by the prior discovery depositions, testified as to the alleged lack of damage flowing to JEFFERSON PARENT CORPORATION. All of the defense witnesses disputed the Plaintiffs' experts on the issue of what damages flowed to JEFFERSON PARENT CORPORATION. Both the Plaintiffs (JEFFERSON SUBSIDIARIES) and the Defendant were prepared for the expert testimony because of the extensive pretrial discovery wherein both sides revealed to each other that the main issue at trial was to be the alleged damages flowing to JEFFERSON PARENT CORPORATION.

It was clear from the evidence adduced at trial that the real party in interest was JEFFERSON PARENT CORPORATION. Before the Plaintiffs rested their case, the motion to add JEFFERSON PARENT CORPORATION as a party and to amend the pleadings to conform to the evidence was made (T 480-481). The Trial Judge immediately indicated that the motion would be granted, but he wanted to see some law (T 648). On the last day of trial, the motion was formally granted (T 784).

The Trial Judge presented the jury with four verdicts, three for each of JEFFERSON SUBSIDIARIES, and one for JEFFERSON PARENT CORPORATION. The jury returned a verdict of $400,000.00

in favor of JEFFERSON PARENT CORPORATION, the real party in interest, and found that JEFFERSON SUBSIDIARIES suffered no independent damages.

In the Post Trial Order, the Trial Judge clearly explained his position as to JEFFERSON PARENT CORPORATION being the real party in interest (R 349).

Only one judgment was entered on the verdicts (R 2048). The judgment was appealed from by U. S. RUBBER (R 2050) and resulted in the District Court of Appeal, Third District, reversing the Trial Court.

JEFFERSON SUBSIDIARIES and JEFFERSON PARENT CORPORATION have petitioned for Certiorari to the Supreme Court of Florida and are now before that Honorable Body.

POINTS ON CERTIORARI ON THE MERITS

POINT I.

WHETHER OR NOT THE TRIAL COURT ERRED IN PERMITTING JOINDER OF THE REAL PARTY IN INTEREST AS A PARTY PLAINTIFF DURING THE TRIAL OF A CAUSE AFTER SUMMARY JUDGMENT HAD ALREADY BEEN ENTERED IN FAVOR OF THE ORIGINAL PLAINTIFFS.

POINT II.

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

A R G U M E N T

POINT I.

WHETHER OR NOT THE TRIAL COURT ERRED IN PERMITTING JOINDER OF THE REAL PARTY IN INTEREST AS A PARTY PLAINTIFF DURING THE TRIAL OF A CAUSE AFTER SUMMARY JUDGMENT HAD ALREADY BEEN ENTERED IN FAVOR OF THE ORIGINAL PLAINTIFFS.

The above point has been so thoroughly discussed in Petitioners' Petition for Writ of Certiorari, Petitioners' Brief, and Petitioners' Reply Brief heretofore filed, that this Honorable Court is referred to those instruments which are hereby incorporated in this Brief as though fully set forth herein.

It is respectfully contended that the error of the Honorable District Court of Appeal, Third District, in ruling that it was improper to add a party Plaintiff during the trial of the cause after Summary Judgment had already been rendered in favor of the original Plaintiffs, was based upon that Honorable Court not considering the plain fact that JEFFERSON PARENT CORPORATION is the real party in interest.

In its Brief before the District Court of Appeal (and, indeed, on Page 6 of its Brief in this cause) the Respondent stated the following:

> "(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, ...".

It is clear that the Honorable District Court adopted the reasoning of U. S. RUBBER that JEFFERSON STORES, INC. was a "stranger" when it held the following:

> "The Court by permitting the entry of JEFFERSON STORES into the case on the last day of testimony and by permitting it to go to the jury as a party plaintiff, adjudicated liability in favor of JEFFERSON STORES and against U. S. RUBBER without any hearing on that question as between these parties... and it is not proper to grant summary judgments in favor of either party at the conclusion of the evidence during trial. Accordingly, it was error for the trial court to enter summary judgment without previous notice under the rules."

It is blatantly apparent that both U. S. RUBBER and the Honorable District Court of Appeal ignored the fact that JEFFERSON PARENT CORPORATION was the real party in interest. Moreover, they ignore the adjudication of the Trial Court on this exact item:

> "2. It is undisputed that the three original plaintiffs, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. were wholly owned subsidiaries of the added plaintiff, JEFFERSON STORES, INC., which was the parent corporation. The relationship between the parent and the subsidiaries were shown not to be one of stock ownership alone since the three subsidiaries, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. were run by the parent corporation, JEFFERSON STORES, INC. in accordance with the parent's policies and objectives. 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. The lease and other evidence in this cause indicates this to be the case, but this is manifested most strongly in the four verdicts of the Jury, wherein JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. were awarded no damages. There is not the slightest suggestion throughout this cause that the defendant was deceived or suffered any injury by reason of the fact that JEFFERSON STORES, INC., the real party Complainant was doing business through three wholly owned subsidiary corporations. To the contrary, the evidence indicates that the subsidiaries were mere instrumentalities of the parent corporation, ..."

The above ruling of the Honorable Trial Judge was clearly in conformity with the Statement of Facts and the Statement of the Case set forth earlier in this Brief. Furthermore, it is noteworthy that the Trial Court's language is remarkably similar to that of the Supreme Court of Florida in a prior case:

> "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 (emphasis supplied).

Furthermore, in McCord vs. Lee, 127 Fla. 65, 172 So 853, Chief Justice Ellis stated:

> "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." (emphasis supplied)

In view of the fact that the discovery in this cause showed that all damages flowed to JEFFERSON PARENT CORPORATION, and in view of the fact that both parties prepared their case for trial with numerous experts showing damages or lack of damages to JEFFERSON PARENT CORPORATION, there is apparently no surprise whatsoever suffered by the Defendant, U. S. RUBBER, as a result of adding the real party in interest, JEFFERSON STORES, INC., as a party Plaintiff to this cause. Furthermore, the actions of the Trial Court were clearly in accordance with the doctrine of McCord vs Lee, supra, and other decisions of this Honorable Court set out in Petitioners' Petition for Writ of Certiorari heretofore filed.

It is respectfully contended that the meaning of allowing the adding of the real party in interest at all times as set forth in McCord vs Lee, supra, means exactly that and under these circumstances it would be proper to even add the real party in interest for the first time upon appeal as the Supreme Court of California stated:

> "Under proper circumstances, after trial has been concluded, judgment entered and motion for new trial denied, a motion for substitution of parties may be granted; and rule applies even if an appeal has been taken." Erickson vs Booth (Cal.) 203 Pac 2d 222.

Even the Federal Courts recognize this rule:

> "In action which had been instituted and proceeded in the names of various federal officials designated as administrators or officers of temporary controls, United States was the real party in interest from beginning and had a substantial need for continuing and maintaining cause and therefore could be substituted as plaintiff under statute and federal rule.
>
> Where there is no change in cause of action, and the parties substituted there is some relation of interest to the original party and to the action, the substitution may be allowed." United States vs Saunders Petroleum Co. (D. C. Mo. 1947) 7 F.R.D. 608.

It is recognized that in this cause the real party in interest was added as a party plaintiff rather than substituted. However, even Florida law is clear that the addition of a real party plaintiff is proper:

> "A corporate plaintiff's cause of action was improperly dismissed where amendment to the complaint added as party plaintiffs members of a partnership was made with the intention of adding partnership as a party plaintiff, without dropping corporate plaintiff, and such intention was evidenced by fact amended complaint sought damages for both the corporation and the partnership." Deauville vs Town & Beach Plumbing Co. (Fla. 1962) 137 So 2d 872, 873.

> "Section 4201 (2561), Compiled General Laws of Florida 1927, provides that a person in whose name a contract is made for the benefit of another may sue without joining with him the person for whose benefit the action is prosecuted, but this provision does not prevent joining with him the person for whose benefit the suit is instituted." Singleton vs Knott (Fla. 1931) 133 So 71, 75 (emphasis supplied).

The Trial Court's conclusion that JEFFERSON PARENT CORPORATION was the real party in interest instead of its wholly owned subsidiaries is entirely consistent with general principles of corporate law:

> "Courts may disregard legal fiction of corporate entity where relationship between parent and subsidiary is not one of stock ownership alone but the subsidiary is run by the parent in accordance with the parent's policies and objectives and with independent existence in form only." National Dairy Products Corp. vs United States (C. A. Mo. 1965) 350Fed 2nd 321.

> "Where automobile or sales corporation was subsidiary sales organization of automobile manufacturing corporation, and relationship of corporations was inter-related and entwined, acts of one corporation were acts of other corporation." Hughes vs Kaiser Jeep Corp. (D.C.S.C. 1965) 246 F. Supp. 557.

> "Where affairs, assets and equipment of corporations are intermingled and confused, the corporations conduct a single business insofar as persons who contract with them are concerned." Fire Association of Philadelphia vs Vantine Paint & Glass Co. (N.D. 1965) 133 N.W. 2nd 426.

> "Exceptions to concept of corporate entity exists when business is carried on by individual stockholders or a partnership of stockholders or by parent corporation, which so wholly dominates its subsidiary as in fact to operate its business." Alfred P. Sloan Foundation, Inc. vs Atlas (N.Y. 1964) 248 N.Y.S. 2nd 524.

It is respectfully contended that the Honorable Trial Court not only found that JEFFERSON PARENT CORPORATION was the real party in interest based upon U. S. RUBBER's dealings with JEFFERSON PARENT CORPORATION only, but said Trial Judge had an additional basis of his conclusion in that JEFFERSON PARENT CORPORATION by the clear record in this cause so wholly dominated its wholly owned subsidiaries so as in fact to operate its business. This was exactly the point in the Robert L. Weed case wherein 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." Fountainebleau Hotel Corp. vs Crossman (C.A. 5th Cir. 1963) 323 F. 2d 937.

In this cause, the sole stockholder herein was JEFFERSON PARENT CORPORATION. The interest between JEFFERSON PARENT CORPORATION and its three wholly owned subsidiaries was identical and it is quite obvious that the three wholly owned subsidiaries were the alter ego of JEFFERSON PARENT CORPORATION. Furthermore, throughout the entire transaction, U. S. RUBBER recognized that JEFFERSON STORES, INC. was the real party in interest and that the three subsidiary corporations were nothing more than nominal parties (R 195).

It was based upon this set of facts and circumstances that the Honorable Trial Judge ruled that it was proper to add JEFFERSON STORES, INC. (JEFFERSON PARENT CORPORATION) as a party Plaintiff during the trial of this cause. Since JEFFERSON STORES, INC. was the real party in interest, any prior adjudication in favor of the original Plaintiffs would automatically accrue to JEFFERSON STORES, INC. The ruling of the Honorable District Court of Appeal does not consider the fact that JEFFERSON STORES, INC. was the real party in interest but instead we have a ruling 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. We have no quarrel with the above set forth statement of the law, but the Honorable District Court of Appeal,

but said law does not apply to the facts in this cause, namely: a situation where the real party in interest, rather than a stranger, was added as a party Plaintiff to the cause at trial. As the Trial Judge stated:

> "There is not the slightest suggestion throughout this cause that the defendant was deceived or suffered any injury by reason of the fact that Jefferson Stores, Inc., the real party Complainant, was doing business through three wholly owned subsidiary corporations."

(R 350).

POINT II.

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

Petitioners have in Point I. herein demonstrated to this Honorable Court that the District Court of Appeal in reversing the Trial Court's action in adding JEFFERSON PARENT CORPORATION as a party Plaintiff during the course of trial ignored the fact that the Trial Court had also adjudicated that JEFFERSON PARENT CORPORATION was the real party in interest.

The purpose of Point II. herein is to demonstrate to this Honorable Court that there were two inherent alternatives that, of necessity, were part and parcel of the decision of the Honorable District Court of Appeal, to-wit:

1. 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.

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

Item 1. above was discussed thoroughly in Point I. of our Brief. This portion of the Brief will be only concerned with the second 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 of Appeal, Third District, was in complete disagreement 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. 2, to-wit:

> "The District Court was reversing the Trial Judge'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.

In summation, it is clear that Respondent herein, as Appellant below, did not at any time argue the issue as raised in its Assignments of Error wherein it claimed error in regard to the Trial Judge's Order re real party in interest. Since said Assignments of Error under Florida law were not argued, they then were abandoned and there was no basis for reversal in this cause.

C O N C L U S I O N

The judgments of the Trial Court herein should be affirmed and the reversal of the District Court of Appeal, Third District, should be set aside for the following reasons:

1. The formal joinder of JEFFERSON STORES, INC. during the trial was not reversible error because the joinder was authorized by Florida law and U. S. RUBBER has not shown, nor can it show that it was prejudiced.

2. The Trial Court's adjuciation re real party in interest was abandoned by U. S. RUBBER and never argued before the District Court of Appeal.

3. A clear case of conflict certiorari exists herein and the prior decisions of the Supreme Court of Florida should be deemed binding so that a Trial Court Judge may have clear guide lines before him in applying the law of Florida.

Respectfully submitted,

FULLER AND FEINGOLD
and
FRATES, FAY, FLOYD & PEARSON
Attorneys for Petitioners

By _____
B. C. FULLER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing PETITIONERS' BRIEF ON THE MERITS were mailed to RICHARD S. BANICK and MARVIN E. BARKIN, Attorneys for UNITED STATES RUBBER COMPANY, Respondent, 501 City National Bank Building, Miami, Florida, of Counsel: FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM, 501 City National Bank Building, Miami, Florida, this 9 day of October, 1968.

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