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

* *

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

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BERNARD C. FULLER
1674 Meridian Avenue
Miami Beach, Florida 33139
and
FRATES, FAY, FLOYD & PEARSON
12th Floor, Concord Building
Miami, Florida 33130

Attorneys for Petitioners

I N D E X

TABLE OF CASES

OTHER AUTHORITIES CITED

RESPONDENT'S STATEMENT OF THE CASE

Petitioners must take exception to Respondent's Statement of the Case and to the following language contained therein. Said language not only indicates the confusion of Respondent, but most particularly this language is indicative of the thinking which led to error on the part of the District Court of Appeal, Third District, which error perpetrated the resultant conflict with prior decisions of the Supreme Court of Florida.

Respondent on Page 3 of its Brief states:

> "Final Judgment on the jury verdict was entered on November 4, 1966 in favor of Jefferson in the amount of $400,000.00, and Realty Corporations were 'found to have suffered no damages and that these plaintiffs take nothing by their suit except court costs***.' (R. 2048-2049)."

Respondent then states on Page 4 of its Brief that:

> "The Third District reversed the Final Judgment in favor of Jefferson and remanded the cause for a new trial. That Court first noted that the jury must have found that Realty

> Corporations had not proven any damage to themselves (by virtue of the zero verdicts) and that the damages, if any, from the defendant's alleged breach of the lease agreements related to a non-party to the cause, Jefferson Stores." (emphasis supplied)

It can be seen that Respondent continues to ignore that one item which is as clear as a stop sign at a railroad track, to-wit: that the reason the Circuit Judge found that the Realty Corporations (Jefferson's subsidiaries) suffered no damage was because JEFFERSON STORES (PARENT) was the real party in interest. It is blatantly obvious that any suffering of damages would be by the real party in interest and not by nominal parties to the transaction. See Robert L. Weed Architect, Inc. vs Horning (Fla. 1947) 33 So 2d 648 which case Respondent claims is inapplicable.

There is no doubt that the learned Trial Judge held that JEFFERSON STORES was the real party in interest, and in this regard the Court's Post Trial Order was merely a reaffirmation of his earlier rulings during trial (R 2034, T 801, R 349).

It is respectfully contended that Judge Vann's position on real party in interest was crystal clear and this was

the reason he stated that the nominal parties (Subsidiaries) suffered no damage. They suffered no damages because they were "paper corporations" incapable of suffering damage.

This basic reason as to why subsidiaries suffered no damages was converted into the erroneous statement by Respondent (and indeed by the District Court) that the Plaintiff had not "proven any damage".

The above error is further perpetrated by Respondent's admitted position on this point at Page 6 of its Brief:

> "(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 respectfully contended that there is not one iota of fact to support the contention that JEFFERSON STORES, INC. (the Parent Corporation) was ever a stranger to this litigation and the District Court of Appeal was squarely presented with the following two alternatives in rendering its decision in this cause:

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.

To avoid repetition, Petitioners refer to their original Brief herein where the above two alternatives and the clear conflict inherent therein are set forth at length.

A R G U M E N T

RESPONDENT'S POINT I.

THE RECORD IS INADEQUATE TO DEMONSTRATE CONFLICT CERTIORARI JURISDICTION.

In compiling the record herein, we have two stages, to-wit:

1) The uncertified record sufficient to demonstrate jurisdiction in the Supreme Court;

2) The certified record brought up from the District Court when the matter is heard on the merits.

At this juncture in seeking Certiorari, Petitioners are only concerned with this Court's jurisdiction. Once jurisdiction is accorded and the cause is set for oral argument, this Honorable Court may order brought up such further portions of the record as it may deem necessary.

At this juncture, in compiling a record, Petitioners are governed by Rule 7.2.i.2. which states:

> "Ordinarily the only portions of the record required to be attached to the petition for certiorari are:
>
> 2. 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 reports. 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."

Petitioners' Brief raised only two alternatives, 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

Judge Vann's adjudication re real party in interest was included in the uncertified record before this Court (R 349). Since this point has never been contested, it is respectfully submitted that a compilation of the entire record at this juncture

would have been premature when considering "conflict certiorari" from a jurisdictional standpoint.

The pertinent Assignments of Error by U. S. RUBBER (Appellant below) were included in the uncertified record before this Court. Furthermore, even Appellant's Brief was included in this uncertified record to demonstrate the abandonment of certain Assignments of Error.

The decision of the District Court, Petitioner's Petition for Rehearing and Order Denying Rehearing were also made a part of the record before this Court for jurisdictional purposes.

It is respectfully contended that Petitioners' record follows the letter and spirit of Rule 4.5.c.(6) wherein the following is stated:

> "Only so much of the record as shall be necessary to show jurisdiction in the Supreme Court shall be attached to or filed with the petition, and it may be in the form of conformed copies and need not be certified, except when a certificate of great public interest is made by the district court of appeal."

RESPONDENT'S POINT II.

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

RESPONDENT'S POINT III.

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

In order to avoid repetition, Petitioners refer to their original Brief herein, where the above items are discussed in detail. Petitioners are grateful that Respondent at Page 16 of its Brief finally admits that the Motion to add JEFFERSON PARENT CORPORATION as party plaintiff did not come at the end of trial as previously set forth. It might be added that the sole basis of the lower Court's reserving decision was the Court's desire to hear law on this matter but the Court forthwith advised all parties that it would grant the Motion.

By separating the wheat from the chaff, we can find that the entire gist of Respondent's Points II. and III. are

set forth on Page 17 of its Brief wherein the following is stated:

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

Petitioners implore this Honorable Court to examine the above statement and to then examine the opinion of the District Court of Appeal:

1) Where in this decision can we find the District Court even mentioning the fact that the Lower Court ruled that JEFFERSON STORES was the real party in interest?

2) Where in this decision are the words "real party in interest" mentioned by the District Court?

3) Where in this decision is the District Court's alleged holding quoted by Respondent that: "... there was no issue before the trial court nor any evidence to substantiate the proposition that JEFFERSON was the real party in interest"? (Page 17 of Respondent's Brief).

It is respectfully contended that rightfully or wrongfully the Circuit Judge added JEFFERSON solely because it was the real party in interest. At no time does the District Court of Appeal face this issue. Indeed, at no time did U. S. RUBBER (Respondent) argue this point but as stated in our original Brief herein, this point was abandoned by U. S. RUBBER in its Appeal.

Even if we assume that the Circuit Judge committed reversible error re the real party in interest, we still have the District Court reversing for the wrong reason and on the wrong point of law. Normally, this would not matter, but in our case a reversal by the District Court for the wrong reason constitutes a grave fundamental error.

To follow the above assumption, we must accept that which is obvious. It is obvious that the Circuit Judge treated this action as one action and treated the Plaintiffs as one Plaintiff:

> "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 350).

After the Subsidiaries received Zero (0) verdicts and JEFFERSON PARENT CORPORATION received a verdict for $400,000.00, U. S. RUBBER moved for entry of three (3) Final Judgments in its favor as far as Subsidiaries were concerned. The Trial Judge denied this motion because "the granting of said motion would create the erroneous impression that the defendant had won the law suit" (R 349). Finally, there was but one Final Judgment granted in favor of the Plaintiffs and against U. S. RUBBER (R 2048).

All of the above is merely illustrative of the fact that the Trial Judge treated the Plaintiffs as one. This writer

has tendered the above uncontroverted facts to illustrate that even if we play in Respondent's ball park and adopt its position that the Trial Judge was wrong because there was no "evidence to substantiate the proposition that Jefferson was a real party in interest" (Page 17 of Respondent's Brief), then, in that event, it is equally obvious that a reversal by the District Court should have included all four (4) Plaintiffs so that they could have a retrial of this cause as separate parties. The present status of this cause is that three (3) Plaintiffs are precluded from a new trial while the fourth Plaintiff, JEFFERSON PARENT CORPORATION (JEFFERSON STORES, INC.) may have a new trial on a limited basis wherein:

> "The only damages that JEFFERSON STORES may be entitled to recover, if any, were those based on loss of advertisement".

(Page 3 of District Court's Opinion).

The anomaly of this situation is that not only does the District Court reverse the Trial Judge in his treatment of the Plaintiffs as one party, but the District Court then seeks to forbid the real party in interest, JEFFERSON STORES,

from recovering its damages for loss of rental income under these leases. Admittedly, this cause does not present a simplified fact situation, but complicated facts have never justified fundamental error. The facts can be simplified as follows:

1. There were three (3) Plaintiffs who were wholly owned subsidiaries of JEFFERSON STORES.
2. These three Plaintiffs signed leases with U. S. RUBBER.
3. U. S. RUBBER breached the leases.
4. A suit for damages is filed by the three Plaintiffs.
5. The Trial Judge holds that JEFFERSON STORES rather than the three Plaintiffs is the real party in interest.
6. Accordingly, JEFFERSON STORES must stand in the place and stead of the three Plaintiffs.
7. JEFFERSON STORES is awarded a verdict for its damages.

8. U. S. RUBBER appeals this verdict.

9. The District Court of Appeal reverse the verdict but at no time even considers the Lower Court's adjudication that JEFFERSON STORES was the real party in interest since this issue appears abandoned by Appellant, U. S. RUBBER.

10. The basis for reversal of verdict by District Court appears to be its view that it was not proper for JEFFERSON STORES to be first granted a summary judgment at the conclusion of trial.

11. As part and parcel of its reversal, the District Court forbids JEFFERSON STORES at a new trial from recovering damages for loss of rental income under the breached leases. Furthermore, the damages at a new trial are limited to "loss of advertisement".

QUERY: Assuming that the Trial Judge was in error as to Points 5. and 6. above, could the District Court

reverse the judgment as to one Plaintiff only and then limit the damages of that one Plaintiff at retrial?

It is urged that a reversal of one verdict under these circumstances merits and demands a new trial on all four verdicts. The contrary assumption to the above is that the Trial Judge was not in error as to Points 5. and 6. above and that the District Court reversed for other reasons. Under these circumstances, it is clearly error to limit in advance damages of JEFFERSON STORES at a new trial. Obviously, JEFFERSON STORES, as the real party in interest, could proceed in the place and stead of its three paper corporation subsidiaries.

Respectfully submitted,

BERNARD C. FULLER
1674 Meridian Avenue
Miami Beach, Florida 33139
and
FRATES, FAY, FLOYD & PEARSON
12th Floor, Concord Building
Miami, Florida 33130

By Ray H. Pearson

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT was mailed to:

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
Attorneys for Respondent
501 City National Bank Building
Miami, Florida 33131

Attention: Richard S. Banick, Esq.

this 6th day of May, 1968.

By Ray H. Pearson