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IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida
CASE NO. 65,360

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WINN-DIXIE STORES, INC.,

Petitioner,

vs.

GILBERT ROBINSON,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

The Plaintiff agrees with the Statement of Facts set forth by the Defendant, except to the extent that those facts are disputed or supplemented here.

On 5 December 1978 the Plaintiff shopped in the Defendant's Store No. 260 located in Broward County, Florida. That morning his automobile was loaded with groceries and merchandise which he had purchased the previous day. (R.88) One receipt therefor was introduced into evidence. (R.1033) He had receipts for all of his other purchases, but those receipts were removed from his person, or from his automobile, by the police or by Winn-Dixie personnel after his arrest.

On his initial excursion into Store No. 260 that morning Mr. Robinson purchased approximately $33 worth of grocery items. The receipt was entered into evidence. (R.1033) At his request, his groceries were placed in boxes by a Winn-Dixie employee, Mr. Chris Wolfe. (R.94, 239, 316)

Mr. Wolfe accompanied the Plaintiff to his automobile. The Plaintiff asked Mr. Wolfe to place the boxes in the back seat of the car. (R.94)

Mr. Robinson then got in the back seat of his automobile and began to package up other sundry items of merchandise into those boxes, as he intended to go next to the airport and transport his materials back to the Bahamas. (R. 127, 128) Mr. Wolfe returned to the store.

According to the Defendant, Mr. Wolfe observed all of the merchandise in the back seat of Mr. Robinson's automobile, returned to the store and reported to the manager, Mr. Williams, what he had observed and told Williams that the other merchandise looked like

Winn-Dixie goods. That's not clearly Mr. Williams' version of what happened,

> Q. All right, sir. Chris Wolfe came back in and he told you that Mr. Robinson had some merchandise, some Winn-Dixie merchandise in the back of his car; didn't he?
> A. I don't remember. (R.228)

Mr. Wolfe absolutely denies that he observed any other Winn-Dixie merchandise in the back of the Plaintiff's automobile. He absolutely denies that he told Mr. Williams that he had made such an observation. Here is what Wolfe testified to at trial,

> Q. Did you, sir, when you put his boxes into the back of his car, observe that there was other merchandise in his car?
>
> * * *
>
> A. Not from Winn-Dixie, no.
>
> * * *
>
> Q. Did you tell Mike Williams, when you came back in, that you had been out to the guy's car; that you saw that it was loaded with merchandise, that he definitely hadn't paid for because you had boxed his groceries, and therefore, you thought he had stolen it? Did you tell Mike Williams that?
> A. No, I sure didn't, not that I can remember.
>
> * * *
>
> A. No, not at all, to tell you the truth. .... there was nothing in the back seat of his car, that I saw, besides some tools on the floor. That's all I saw. (R.388, 389)

Next, according to Winn-Dixie, it is a fact that Mr. Wolfe was a bagboy at the store. The reason for giving him this job description is to play down his authority. Both Mr. Wolfe and his manager, Mr. Williams, swore at trial that Wolfe was not a bagboy. This testimony doesn't deter Winn-Dixie, and it referred to him as their "bagboy" or "bagboy Wolfe" no less than thirty-three times in its Brief in the District Court. Even though the error was pointed out in our District Court Briefs by reciting the verbatim testimony, Winn-Dixie refers to him as a bagboy nine times in the two Supreme Court Briefs.

This is the testimony in that regard,

Q. What was your employment at the time, in Store No. 260?
A. Well, my job title was frozen food and dairy manager.
Q. You remember, now, of course, when I took your deposition, don't you, sir?
A. yes.
Q. Let me ask you if you remember this question and this answer, page 4 thereof:
   Q. What was your job title at that time?
   A. Security.
A. That's just what the --
Q. Do you remember that?
A. Yeah. That's more or less what the employees call me in the store.
Q. They called you, your job title, security?
A. Did I say they said my job title was security? I said that's what they called me, the employees in the store.
Q. Listen to it again, please sir.
   Q. What was your job title at that time?
   A. Security.
   Do you remember that question and answer series?
A. Yes.
Q. That wasn't your job title at all, was it?
A. No, it wasn't, not through, you know, my payroll, as far as that is concerned; but as far as the people in the store was concerned, it was.

* * *

Q. Also bagged people's groceries and carried them out to their cars, didn't you?
A. Very rarely. (emph. supplied) (R.284-6)

Mr. Williams also denied that Wolfe was a bagboy. This is his testimony,

Q. What were Mr. Wolfe's duties and responsibilities on December 5th of 1978?
A. He was either a stock clerk or in the produce food department, one or the other. He was in the grocery department; they are both considered grocery departments.
Q. Stock Clerk or frozen food?
A. Yes, sir. If he was a stock clerk, he was the head of my stock crew, at the time.
Q. Did he have any other type duties other than being a stock clerk or working in the frozen food?
A. No. That was it, unless someone needed package help and carry-out, and we would call him, if we don't have a bagboy on hand, and a customer would like their groceries taken to their car.
Q. Weren't there any other duties he had, any other things that he was told to do?

A. He was probably responsible for our <u>frozen food</u> section, keep it full. He was <u>in charge</u> of it.
Q. Yes, sir, anything else?
A. That's about it.
Q. How about with regard to <u>security?</u>
A. Security?
Q. Yes, sir.
A. Well, it wasn't his job, <u>but he did.</u> (R.216, 217)

Mr. Wolfe portrays himself as one of the small department managers, either frozen food or dairy. His manager, Mr. Williams, confirms it. His title among employees was security.

As Winn-Dixie persists in referring to Mr. Wolfe as a bagboy, notwithstanding the sworn testimony, and repeats it until he becomes "bagboy Wolfe" in the reader's mind, we shall refer to Wolfe throughout this Brief as "security man Wolfe" to keep perspective. That is what he said he was, that is what his manager said he was, and that is how he was known and introduced himself to the police officers in Oakland Park on the numerous times they came to that store. (R.514, 515) The arrest form describes Wolfe as "security man" eight times in the narrative. (R.725-728)

According to the Defendant, it appeared to manager Williams and security man Wolfe that Mr. Robinson was "unloading things which had been stuffed in his pants". The truly accurate testimony thereon is contained at R.244, 245, as manager Williams testified,

Q. He (Robinson) is <u>stretching</u> or leaning back; and because of that, you felt that he was going into his pants?
A. That's the impression I had, sir.
Q. At that point, no one had ever told you, either Chris Wolfe or any employee at Winn-Dixie, he had ever stuffed anything down those pants; had they?
A. No, just other than Chris saying that he had merchandise in the car, when he got out there, that he didn't have in the store. So, <u>I thought maybe possibly</u> he was unloading this.

* * *

Q. You <u>didn't see</u> this gentleman pulling out jump ropes and pulling out potato peelers and pulling out nut

crackers and pulling out gosh-knows what else; did you, sir?

A. No, sir.

Q. But you did see a gentleman stretch?

A. I saw his stretch like I showed you. (R.246, 247)

No matter how Robinson's activities appeared to manager Williams and security man Wolfe, he was doing absolutely nothing that any normal person would call "suspicious". Mr. Robinson explained precisely what he did,

Q. All I'm asking is whether or not you actually got into your car.

A. I opened the door, and I have rearranged the stuff. I didn't put the stuff in the car. I was there. I have arrange it, because the back of the car was a bit full, so I arranged a few things, that was unable to fit with the boxes.

I took them out and I placed the various places in the car, that would fit. (R.127, 128)

This, according to Winn Dixie, was suspicious. Incidentally, Robinson thought security man Wolfe was a bagboy simply because he carried out Robinson's groceries. He and Williams testified later, revealing his actual job description.

Mr. Robinson was originally charged with having stolen all of the items contained in the retail theft affidavit. (R.725-728) After this office deposed Messrs. Wolfe and Williams, the state attorney filed an Amended Information charging Robinson only with the theft of a potato peeler. (R.1033) On the third occasion that Mr. Robinson appeared ready for trial, the state attorney nolle prossed the case.

According to Winn-Dixie, this potato peeler looked like it was new. In fact, and it is an important distinction, the arresting officer testified that it "looked like it hadn't been used". (R.536) Of course it hadn't been used; Mr. Robinson carried it inside his soft leather boot, against his stocking. Common sense dictates that under

such circumstances it would not receive wear. That is the extent of the officer's observations.

After the potato peeler was discovered on Mr. Robinson's person, security man Wolfe adapted his testimony to the facts and said that he had seen Mr. Robinson place it in his boot. That never happened. Security man Wolfe thought that Robinson had different stolen items, and that he had them in his pocket. When the police officer frisked Mr. Robinson, Wolfe told him to look in the pocket. This is what Robinson remembered,

> Q. What did you have in your pocket?
> A. Well, money, receipts and my nitroglycerin, what I was taking every hour. I have a little bulge.
>
> * * *
>
> A. After putting the next receipt in the pocket, I reached about three or -- three to six feet from the cashier, and there were policemen who grabbed me. And there were about two or three police cars, came with about four policemen and the young man. I don't know his name (security man Wolfe). He said, 'In that pocket, in that pocket'. (R.96, 97)
>
> * * *
>
> Q. What happened then?
> A. Well, they searched me. They said, 'In that pocket?' Then he touched my pocket, the young man (security man Wolfe) who loaded.
>
> So, the police turned my pockets out and they found cash, medication, traveling documents, tickets and receipts.
>
> Q. Anything else?
> A. In -- they shake me down, rolled up my pants and they found my comb, my pen and a potato peeler. (R.98)
>
> * * *
>
> A. He was there among them, too, because he was the one saying, 'In this pocket,' when they were shaking me down. He and the other gentlemen from Winn-Dixie, could have been the manager -- they all was crowded around me.
>
> * * *
>
> A. If I can recall -- it's been -- well, I know he (security man Wolfe) said, 'In that pocket.' (R.99)
>
> * * *
>
> A. There were three or four officers. I can't remember. They surrounded me. And Mr. Wolfe said, 'The left pocket. That's where he has it. You know, he has the

stuff.' So, he touched the pocket. (R.132)

Robinson spoke the truth, the perjured testimony of manager Williams and security man Wolfe was rejected. They thought that he had stolen items in his trouser pocket. When that pocket was turned inside out, it was seen that the contents were all personal property of Robinson's. The police officers continued to shake him down and discovered his pen, comb and potato peeler. No matter how discredited is the testimony of the employees, Winn-Dixie continues to adopt it as fact in the appellate courts.

Winn-Dixie argues that Mr. Robinson did not explain, at the time of his arrest, that he had been carrying the potato peeler for many months. Of course he did not. No one asked him any questions. Mr. Robinson's pockets had been turned inside out, people had taken from him receipts, travel documents, cash, pen, comb, potato peeler, nitroglycerin tablets, etc. Robinson had absolutely no idea what he was being arrested for. <u>If</u> he had just stolen one of those items, one could be expected to direct an explanation to that particular item. It is entirely consistent with his innocence and confusion that he did <u>not</u> single out the potato peeler, or any other item, for explanation.

According to Winn-Dixie, Mr. Robinson carried the potato peeler to use as a "weapon". This is a subtle distortion. It has been carefully excerpted from the record to create a negative impression of Mr. Robinson. His actual reason for carrying the potato peeler was explained by him as follows,

> Q. If you would, would you tell me why you carried a potato peeler in your boots, ...
> A. I am a non-violence man. I come over here, lots of cash, and its against the law, being a foreign, and all -- I am not supposed to carry a gun or a knife. So, I carry a potato peeler, which <u>look</u> like a weapon, can <u>frighten</u> someone off, if they try to attack me.

> Because in the past few years, things have changed so much here, you just don't know when you might be attacked. That's why, the reason I carry it. (R.91)

The Plaintiff's reasoning was very sound. Things have changed so much in the past few years. Being a black businessman, who stayed in the black community when he visited the United States, who was known to carry cash with him, a "non-violence man" who had a heart problem additionally, it is reasonable, even poignant, that he should carry this little potato peeler with him for defense.

The next one of the Defendant's facts which has not been set forth accurately regards the Plaintiff's cousin. According to the Defendant, "He had never known Plaintiff to carry a potato peeler in his boot... ." What has been left out is the reason that Mr. Sands had never before observed the potato peeler. As he testified,

> A. I said I saw him reach into his boots one time, pull out a comb to comb his hair.
> Q. You have seen him take his boots off and pull out a comb?
> A. Yes, sir.
> Q. Anything else that might be in his boots?
> A. I would not know.
>
> * * *
>
> ... yes, I have seen the boots off his feet at my house. As far as looking at him taking them off, no. I guess what I am trying to say, sir, is that I didn't pay any particular attention to him taking his boots off ... .
>
> * * *
>
> That's the same thing I am saying, sir, that I saw him with his boots off his feet; but as far as anything in his boots, I do not know. (R.174, 175)

The last additional fact presented by the Defendant has been so delicately extracted from the record as to inadvertently mislead the reader. The Defendant states "He (Plaintiff) was examined in June of 1981 and his heart was worse due to natural causes". (R.560) (For

clarification, those comments are not found on page 560. They are found at a later point.) And "There was no evidence of any substantial physical injury resulting from this incident." No record citation is given for this. It's false; the evidence of injury is next.

The true facts from the record are that the source of this quote, Dr. Meyerburg, saw Gilbert Robinson but twice in his life. The visits were three full years apart. Mr. Robinson was never a patient of Dr. Meyerburg's. Dr. Meyerburg's only observations were that he would have expected the deterioration which he observed in Robinson's condition over three years. Nothing more, nothing less.

What the Defendant has omitted is the testimony of Mr. Robinson's own physician, Dr. Gerard Barrios, who is a heart surgeon (now Chief of Internal Medicine at Mercy Hospital). This is what Dr. Barrios testified,

> Q. When was he (Robinson) next seen?
> A. November 20, 1978. He was doing very well on his treatment, therapy was continued.
> Q. Same medications?
> A. Yes.
> Q. When you say he was doing well --
> A. He was stable.
> Q. Stabilized. When was he next seen?
> A. He was seen December 12th, 1978. At that time he was very upset. He was very short of breath; his lungs were very congested and he gave a story of false arrest and imprisonment for shoplifting.
>
> He was then -- he was -- again, he had deteriorated back to the state that he appeared to be in on October of 1977 when he was almost in frank pulmonary edema.
>
> * * *
>
> Q. Did he give any indication as to whether or not he had continued taking his medication from when you last saw him on November 20th?
> A. Well, he said that he was imprisoned, they refused to give him his medications appropriately, and I think I have a subsequent report on that.
> Q. Do you feel that it was this deprivation of medication that contributed in some way to the condition that you saw when you visited with him on December 12th, 1978?
> A. I think there was combination of the deprivation in

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medication which allowed for a set-back, plus the fact that he was tremendously upset .... (R.338, 339, 340)

* * *

Q. Let's backtrack and let's talk about the different factors.

A. The different factors was, number one, okay, that there was obviously an emotional strain, an excessive emotional strain and we know that people with heart failure can't suffer. It's like he had to run a mile when he wasn't able to run a mile. That, in itself, would have thrown him into heart failure, and he was obviously distraught over that, and <u>he had a tremendous cataclysmic response,</u> and adrenaline type response just as you or I would, you know, to a distressing event. You and I can handle a distressing event, given the fact we have a normal heart.

The fact is that he did not have a normal heart. He had very little cardiac reserve, and this was a <u>terribly distressing event to him;</u> and if he did not, even if his medication were not deprived, he could have gone into heart failure. The combination of both things, I felt, <u>could have killed him.</u> (R.441, 442)

Dr. Barrios personally treated Mr. Robinson from 1974 on. He testified that Mr. Robinson never again achieved the level of improvement and stability that he had prior to the date of his arrest.

Finally, Winn-Dixie says that Robinson's diagnosis may not have been reliable, in that he has substantially outlived the estimates of his life expectancy. Gilbert Robinson died of heart failure four months after trial. Winn-Dixie probably would not have known that.

His widow and young children survived him.

With these exceptions or additions the Plaintiff accepts the Defendant's Statement of the Facts.

ARGUMENT

POINT I. THE TRIAL JUDGE WAS CORRECT IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND IN FINDING THAT THE DEFENDANT HAD NO PROBABLE CAUSE TO ARREST THE PLAINTIFF

There are multiple errors in this POINT. The facts upon which it is theoretically based are either not to be found in the record, or

were resolved by the jury, the trial court and the District Court in favor of the Plaintiff. This POINT makes no reference to any error at all by the District Court; it leaps from trial court directly to Supreme Court. The directed verdict referred to is not identified. The denial of that directed verdict is not suggested to be in conflict with any other case, and, again, the District Court's decision is not mentioned. This POINT is not referred to in either of the two issues which were set forth in Petitioner's Brief on Jurisdiction in attempt to show conflict jurisdiction. In other words, as far as we can tell, this court accepted jurisdiction based on one or both of two other issues and once jurisdiction was accepted the Petitioner unilaterally added a third issue.

The directed verdict alluded to is probably the one that formed Winn-Dixie's only issue on cross-appeal in the District Court, i.e., the trial court should have granted a directed verdict on malicious prosecution. Winn-Dixie had failed to make that argument in its MOTION FOR NEW TRIAL (R.987) and made no mention of malicious prosecution.

Winn-Dixie lost that cross-appeal but can't find any conflict, so it asks the Supreme Court for a de novo review of the trial court's decision, including a de novo review of all of the evidence which the trial judge had heard when he ruled against Winn-Dixie. This procedure would nicely obviate any District Court function at all.

Winn-Dixie is also wrong on its legal foundation regarding probable cause. It asserts that the determination of probable cause is always a question of law. But this court has stated in Glass v. Parrish, 51 So.2d 717 (Fla. 1951), that the existence of facts which constitute probable cause are exclusively for the jury. Winn-Dixie's prime fact here is that Mr. Robinson had merchandise in the back seat of his

automobile which he admittedly had previously paid for in full. Winn-Dixie argues that it was "suspicious" for a man to have merchandise which he had bought in his automobile. Having put his groceries in his automobile Mr. Robinson thus created probable cause for his arrest. Defendant doesn't answer the burning question: where was he supposed to put his groceries? Winn-Dixie solved that, in a way; they put his groceries back on the shelves and re-sold them.

Winn-Dixie also argues that, according to security man Wolfe, Mr. Robinson was acting in a suspicious manner. However, Winn-Dixie also admitted on argument in the District Court that Mr. Wolfe may be a "pathological liar" and the jury, the trial judge, and the District Court of Appeal have all refused to believe Mr. Wolfe's testimony. Ironically, among his many perjuries, Mr. Wolfe categorically denied ever having seen any merchandise in Mr. Robinson's automobile before Robinson was arrested. He only saw "some tools". (R.388, 389).

The third element of probable cause according to Winn-Dixie was that Mr. Robinson carried a potato peeler in his boot. Mr. Robinson gave a very plausible explanation for that. The jury, the trial judge, and the District Court believed him. Of course, Winn-Dixie didn't know that Mr. Robinson carried a potato peeler in his boot until after the police searched him. After the potato peeler was discovered, along with a pen and a comb which Mr. Robinson always carried in his boot, Mr. Wolfe, as is his wont, adapted his testimony to the facts and swore that he had seen Robinson steal the potato peeler and place it in his boot. Nobody, except Winn-Dixie, has ever believed that. It should be added that the state attorney's office never believed that either, and the charges against Robinson were nolle prossed.

There we have it. There is Winn-Dixie's argument that it had

probable cause, raised directly from the trial court this time to the Supreme Court. The "facts" relied upon have been repudiated by a host of people so far.

Incidentally, although Winn-Dixie hasn't raised it in POINT I, it previously raised as trial court error the refusal to grant a directed verdict on conversion. It never briefed that point on appeal in the District Court, however, and thus waived it. Winn-Dixie has never (trial or appeal) argued that it didn't convert Mr. Robinson's own merchandise when it removed the merchandise from the back of his automobile and stocked it on Winn-Dixie shelves for resale. (R.262) That act would justify hefty punitive damages, so that is an issue that Winn-Dixie avoids.

Winn-Dixie's de novo trial court review contained in POINT I, which cites no conflict, was not one of the two issues accepted by this court, is based upon non-existent facts wedded to incorrect legal principles and upon Winn-Dixie's version of the facts which has been rejected time and again, must be rejected by this court. One cannot say that the District Court should be affirmed because no action by the District Court is complained of.

POINT II. WINN-DIXIE ITSELF WAS GUILTY OF FLAGRANT MISCONDUCT AND THIS CASE IS NOT COMPARABLE TO MERCURY MOTORS EXPRESS v. SMITH, 393 So.2d 545 (Fla. 1981) NOR DOES IT CONFLICT THEREWITH

Although Winn-Dixie phrases its POINT II somewhat differently, the heart of this issue is whether or not there is conflict with Mercury Motors.

Even though this issue is apparently the reason that the court has accepted jurisdiction, Winn-Dixie does not provide analysis of the similarities between the two cases. There are none. Robinson was

pled, tried, and submitted to the jury as involving direct corporate activity. Throughout this brief, where appropriate, we will try to demonstrate that in every particular Winn-Dixie treated the actions of its employees and agents as actions of the corporation. The jury was instructed, not that it could assess punitive damages against Winn-Dixie if it found that Winn-Dixie's employees had acted in a malicious, wanton or outrageous manner, but that it could only assess punitive damages upon a finding that Winn-Dixie itself had acted in such an improper manner. This instruction was approved by the Defendant.

A. THE FACTUAL DISTINCTIONS: Robinson and Mercury Motors are so factually disparate as to make comparisons meaningless. In Mercury Motors, Richard Welch lost control of his vehicle, drove off the road, and killed David Faircloth. Welch was intoxicated, was speeding, and was driving recklessly. "Mercury Motors does not dispute these factual allegations ...". (393 So.2d 546) This court accepted jurisdiction on conflict with Alexander v. Alterman Transport Lines, Inc., 350 So.2d 1128 (Fla. 1st DCA 1977). In reversing the Third District, this court quoted with approval, and adopted, the view taken in Alexander, especially approving this language " ... Alterman's gross negligence was solely the act of operating a trucking business". (393 So.2d 546)

Mercury Motors Express Company recognized that it was Welch who had caused the accident. It did not appeal the compensatory damage award, or even contest the facts of the incident.

Robinson is not a negligence case. One does not negligently or accidentally arrest and pursue a prosecution. This fact is admitted by Winn-Dixie. At every step, including its Brief in this court, Winn-Dixie takes the affirmative of its employees' actions in insisting

that they were justified, i.e., they had probable cause, in causing the arrest of Gilbert Robinson. It never admits it caused the incident. We doubt that Mercury Motors Express ever argued that Welch quite properly got drunk and drove off the road. As we will show, Winn-Dixie perpetually argues that Robinson's "suspicious" behavior caused his arrest; Winn-Dixie's people acted reasonably.

Robinson and Mercury Motors presented very different opportunities for the respective employers to observe, correct, or alter the action taken by the employee. Welch crashed because he was drunk. It would be ludicrous to say that that was conduct approved by Mercury Motors Express Company. Drunken driving is itself a crime in Florida.

Winn-Dixie, acting through multiple employees over a period of months, continued to pursue a prosecution of Gilbert Robinson. The false accusation of crime is not itself a crime in Florida. There is a civil remedy for the false arrest, harassment and persecution of another through the criminal court system: malicious prosecution. It is on that count, not upon a negligence count, that Gilbert Robinson prevailed. Even today Winn-Dixie remains mired in the ambivalency that Winn-Dixie had probable cause to arrest and prosecute Robinson although the individual employees are liars for whom the corporation cannot be held accountable.

Mercury Motors Express Company had perhaps one brief moment in which to realize that Mr. Welch, who as far as we know was a relative stranger to the company, was inebriated. It had no conceivable way to know whether or not Welch got drunk after he embarked driving someone else's tractor pulling Mercury's trailer. Winn-Dixie on the other hand had more than thirty minutes in which to ruminate over the fact that Mr. Robinson had no stolen items on his person, and to make the

decision whether or not to prosecute nevertheless. It had hours to ponder the lengthy, almost comical, list of items that Robinson was said to have had on his person when Winn-Dixie completed its sworn UNIFORM RETAIL THEFT AFFIDAVIT. (R.725-728) Winn-Dixie had hours in which to reflect upon the wisdom of stealing Mr. Robinson's own merchandise from the back of his automobile and restocking it on Winn-Dixie's shelf for sale. After Winn-Dixie's employees were deposed in the criminal case, and the state attorney made a unilateral decision to amend the information to charge only theft of the potato peeler, Winn-Dixie had months in which to study and reflect upon what the future held, what the reason for that reduction in charges was. A single telephone call to the state attorney's office instructing the state attorney that Winn-Dixie desired to drop all charges would not have been unreasonable. It was not forthcoming.

Welch was an employee only by virtue of an ICC regulation. He was in no classic or traditional sense an employee of Mercury Motors; in fact he was a semi-independent contractor, driving a tractor for a woman who lived in South Carolina and held an ICC permit, and by coincidence that tractor was pulling a trailer owned by Mercury Motors Express Company. An employment under such an ICC permit did not create a traditional respondeat superior situation. Simmons v. King, 478 F.2d 857 (5th Cir. 1973). Mercury Motors denied that Welch was within the scope and course of any employment with Mercury Motors Express Company.

Compare the situation in Robinson in which Winn-Dixie had at least three employees at the managerial level each of whom participated in the arrest and conversion.

First there was Mr. Williams, who although his payroll level may have been that of assistant manager, was in fact the manager of the

store. Winn-Dixie made no attempt at trial, or on appeal, to distinguish the responsibilities of an assistant manager from that of a manager. As Williams testified,

> Q. ... let me ask you this. Has the assistant manager or the -- in fact, <u>you were the manager</u> that day, of the store?
> A. Okay, <u>yes,</u> sir.
> Q. You have had that responsibility before; you have been <u>the manager</u> of a store before, when someone is gone?
> A. <u>Sure.</u> (R. 227)
>
> * * *
>
> Q. But on the day of this incident, Mr. Kitcher (the other manager) was not there?
> A. No, Mr. Kitcher <u>was off days.</u>
>
> * * *
>
> Q. On this occasion, since you were the assistant manager, Mr. Kitcher was off, you were <u>in charge?</u>
> A. That's correct. (R.215)
>
> * * *
>
> Q. You, as the manager of the store that day, watched Gil Robinson be arrested; did you not, sir?
> A. I remember the officer coming in, tapping him on the shoulder.
> Q. Do you remember Gil Robinson being arrested?
> A. Yes, sir, he was arrested. (R.251)

Mr. Williams was described as the store manager by Winn-Dixie counsel in opening statement. It was said that security man Wolfe came back into the store and told "his manager" that Robinson had been shoplifting. Counsel then stated that "The police are called by the manager." (R.52) Security man Wolfe certainly thought that he was dealing with his manager on that day. In fact it was the manager's decision whether or not to order an arrest. As Wolfe testified,

> Q. Why didn't somebody apprehend him, sir, when he came back, walking back up to you before he went anywhere else;
>
> THE WITNESS: That would be up to the store manager, if he would want to do that. (R.348)

Mr. Williams was referred to by all parties and all witnesses throughout the trial as the manager. The instances are too numerous to quote. R.313, 315, 322, 331, 344, 345, 346, 347, 348 in addition to

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the record references noted above, all refer to William as the "manager".

If there was any significance to the fact that Williams may have been paid at an assistant manager's rate, it was the Defendant's obligation to make the distinction at trial, not de novo on appeal. Instead, Winn-Dixie called him the manager until it arrived in the Fourth District.

As we set forth in the Statement of Facts, it was the manager Williams who observed Mr. Robinson rearranging his groceries in his own automobile, saw him "stretch" and decided to arrest him. Herculean efforts have been made by Winn-Dixie in both appeals to stick security man Wolfe alone with the perjury; it would have us believe that manager Williams " ... was only peripherally involved, since he was relying on the information given him by the bagboy" (security man Wolfe). (p.10) But manager Williams was not just listening. He was watching,

> Q. Regardless of whether Chris told you or not, now you are telling the jury that you were totally familiar with the fact that Mr. Wolfe walked out with Mr. Robinson; Mr. Robinson opened the door of the trunk and the back seat and asked Mr. Wolfe to put the merchandise in the back seat? Is that correct?
> A. I guess that's the way it happened. I don't know what he told him out there.
>
> * * *
>
> Q. You did see Mr. Robinson and Mr. Wolfe putting articles in the back seat, from Winn-Dixie, didn't you?
> A. Yes, sir.
>
> * * *
>
> A. I don't remember if I saw him get in there, but I do remember seeing him in the back seat. Okay. (R.239, 240)
>
> * * *
>
> Q. At that point, you knew that he is in the back seat with merchandise that he had just paid for and just had bagged, by Chris Wolfe, correct?
> A. That's correct, I guess.
> Q. What's particularly surprising or annoying or suspicious about a gentleman getting in his back seat to go through items of merchandise that he had just

bought from your store, as an assistant manager?

A. To me it's unusual. Well --

Q. Go ahead.

A. I don't know. (R.241)

* * *

A. It was a little unusual, I thought, for him to get in the back seat, big old car like an El Dorado.

* * *

Q. That's suspicious to you because he is there with the goods he had just taken out to his car; is that correct?

A. It was suspicious to me . . . . (R.243)

It is true that security man Wolfe later told manager Williams that Robinson had stolen items on his person. But Williams had made observations and drawn conclusions on his own, before security man Wolfe ever came back into the store and said one word to him. Manager Williams was on the verge of having Robinson arrested before Wolfe told him anything. He told the arresting officer:

> Assistant Manager also advised he had observed the subject in his vehicle taking things out of his boots and pants and placing them in the car before walking back in for a second time. (Incident Report, R.725-728)

If his testimony can be believed, he watched Wolfe and Robinson go to the automobile, watched Robinson rearrange his purchases, and thought that was highly suspicious, long before Wolfe came back into the store and spoke to him. He was thus receptive to, may even have instigated, the accusations that Robinson had stolen the groceries that were outside in his car. He then embellished the story he related to the police.

Manager Williams even knew that Robinson was a frequent shopper, and a large purchaser, who often had his groceries placed in boxes for shipment. This he did not learn any more "peripherally" from security man Wolfe than he did any of the other above facts. As manager Williams testified,

Q. As a matter of fact, you knew Mr. Robinson, or knew of
Mr. Robinson before this incident, did you not?
A. Yes, sir, I did.
Q. You had seen him shopping in your store before?
A. Yes, sir.
Q. You knew he was a rather large purchaser; did you not?
A. Yes, sir. (R.221)

Even knowing that, Robinson was given no break. They lied to the police and had him arrested.

How much more intense was this "peripheral" involvement of manager Williams? We know that he or the district supervisor made the decision to call the police. (R.352, 353) We know that he observed at first hand as Robinson was apprehended and frisked. (R.725-728) We know, if Robinson's testimony is to be believed as it must on a directed verdict, that he heard security man Wolfe tell the police that the stolen items were in Robinson's pocket, and watched as he touched that pocket. He watched as the pockets were turned inside out and only Robinson's personal belongings were revealed. We know that he knew at that moment that a giant mistake had been made. We know from security man Wolfe that it was the manager's decision to arrest. We know that manager Williams, at that moment, made the decision to instruct the officers to arrest Mr. Robinson. In not one of these actions was manager Williams relying on the word of security man Wolfe. If he were, when he saw that the word of security man Wolfe regarding the stolen merchandise in the pocket was false, he then made a decision beyond security man Wolfe's authority: arrest anyway to protect the company. We know that when he saw that the pockets contained personal possessions, he could have and should have asked security man Wolfe the question which the Plaintiff's attorney asked at trial,

Q. How did you know that (Robinson) had nut crackers in
his pockets?
A. Well, I guess I saw them.

* * *

> A. Well, let me just let you know one thing. He ended up with two packages of nut crackers (in his car) ... he could have had some of those in his pockets.
> Q. He could have?
> A. I don't remember, you know. (R.362, 363)

Of course, manager Williams didn't really need to ask that question. He had seen that there were no stolen items in Mr. Robinson's pockets, and seen it with his own eyes. Within an hour or so, manager Williams would take those nut crackers and place them in a bag to be used as evidence of items that had been recovered from Robinson's person.

Sometime after Robinson's arrest, security man Wolfe filled out the UNIFORM RETAIL THEFT AFFIDAVIT. It read in part as follows,

> Suspect walked around store, shopping around, picking up items, placing them in shopping cart. Then he walked down isle 7 and stuffed jump ropes, super glue, down his pants. Then he placed a potato peeler down in his boot. He had nut crackers in his left pockets. (R.361)

Manager Williams did not sign that affidavit; security man Wolfe did. But it was manager Williams' responsibility to see that it was executed by security man Wolfe, and he was responsible for its contents. Wolfe wrote that "Mr. Williams" initially detained Robinson. A pertinent portion of the printed form of the affidavit is as follows,

> Recovered <u>yes</u>
> (yes/no)
>
> WHERE <u>inside boots and pants</u>
> (inside brown purse, left front pocket, etc.)

The store manager knew that that information was false. This is what he testified to at trial,

> Q. ... Now who told you, other than the potato peeler, that the other items had been stolen by Gil Robinson? Who told you that?
> A. I believe that's what Mr. Wolfe <u>took out</u> of his <u>car</u> when he went back inside.
> Q. Don't guess. Do you know that?
> A. That's where they came from. <u>We didn't take them off Mr. Robinson.</u>

Q. You never took them off his person; did you?
A. No, sir.
Q. And you never heard any employee at Winn-Dixie say that those items were taken off his person; did you?
A. No, sir.
Q. To your best knowledge and belief, do you know that those items came from the back seat of Gil Robinson's car, after he was taken away in handcuffs and jailed?
A. That's correct. (R.253-354)

Manager Williams knew full well from first hand observation that none of those items had been recovered from Mr. Robinson's person. But the sworn affidavit was filed with the police department as the accusatory document.

Should this not be enough of manager Williams'"peripheral" involvement, there is more. He, personally, and no one else, saw to it that items which Winn-Dixie stole from the back of Mr. Robinson's automobile were held to be used as physical evidence of items which Mr. Robinson was said to have stolen. Manager Williams' testimony at trial,

Q. As a matter of fact, some items you put into a bag and you stapled the bag; correct?
A. That's correct.
Q. And you stapled the bag and you kept them up on some kind of a locker in the office, some kind of a filing cabinet? You kept them up there; is that correct?
A. I don't remember, sir, where they were. They were in the office.
Q. They were in the office, all right; and they were kept there and they were there, why, for the prosecution?
A. Yes, sir.
Q. Tell the jury, if you would, what items were in that bag.
A. What items were in that particular bag?
Q. Yes, sir.
A. We had a potato peeler, if I remember right, two jump ropes; there was a nut cracker that you pull the meat out with, little utensils, and there was a tube of super glue.

* * *

Q. You don't know what was paid for, what wasn't; do you?
A. No, sir.
Q. But for some reason, those items were put in a bag for the prosecution to use at a later date, against Gil Robinson; is that correct?

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A. Yes, sir. (R. 252, 253)

As to the one item which became the crux of the prosecution, the potato peeler, manager Williams also had lied in deposition, as was demonstrated at trial,

Q. And you swore (in deposition) under oath, as the manager of the Winn-Dixie store, that the potato peeler was taken from his pocket; didn't you, sir?
A. Sir, I don't know where the potato peeler came from. (R.249)

Wolfe and Williams weren't the only managerial employees involved before and during the Robinson arrest. Mr. Donato was the district supervisor, he supervised that store and six others. (R.462) As security man Wolfe testified at trial, just after he allegedly observed Robinson shoplifting,

Q. Then what happened?
A. Well, I told either the store supervisor, Mr. Donato, or Mr. Williams -- I can't remember which one it was -- that he did get something again you know, concealed something right now in the store; and I believe one of them called the police. I am not sure which one. (R.352, 353)

It was district supervisor Donato who approved the decision to put Robinson's own merchandise on the shelves for resale. As manager Williams testified at trial,

Q. About Mr. Donato -- this gentleman sitting here (Donato sat through trial as Defendant's designated representative) - by the way, who is Mr. Donato?
A. Supervisor at the time.
Q. Of Store No.260?
A. Yes, sir.
Q. And you asked him what to do with it (Robinson's merchandise) and he told you to take the old wrappers and put the merchandise back into them and set them back on the shelf.
A. Not exactly, told me like that, but that's what we did.
Q. Well, you either talked about it --
A. We talked about it. (R. 258, 259)

Those questions and answers were also read, at trial, for

impeachment from Williams' deposition. At trial he had changed his story and attempted to say that Mr. Donato had nothing to do with the decision to resell Robinson's groceries. Nevertheless, all inferences are to be drawn in favor of the non-movant on a directed verdict, and we are entitled to believe that the deposition testimony was correct. It was chronologically closer to 5 December 1978, and before pre-trial meetings and strategy sessions occurred. Donato was present, he may have called the police, he knew of Robinson's arrest, he may have witnessed the arrest, he probably knew of the Uniform Retail Theft Affidavit, and he talked with manager Williams about restocking Robinson's own merchandise on the shelves.

For contrast, was there any suggestion that Mercury Express Company's managers were in the truck, while Welch was drinking and speeding, as Winn-Dixie's managers were standing there, deciding what to do next, after Robinson was searched.

Now it is said to be only security man Wolfe, the pathological liar, who was responsible for the Defendant's outrageous conduct. We have let the record speak. Winn-Dixie never does. We have published what the judge and jury heard. Winn-Dixie creates "facts" as if there were no record. The district supervisor and the store manager made <u>all</u> of the decisions, mostly from what they observed first hand, and not from what they were told by the security man. In fact as to the theft affidavit, the arrest, and the stealing of Robinson's own goods, Donato and Williams knew personally that what was done was wrong. There is not one word in the record to suggest that they relied on Wolfe in these decisions; there's nothing peripheral about it.

As a footnote, at one time Winn-Dixie had a fourth employee who was

supposed to testify as to Robinson's misconduct. During the criminal prosecution they added one Roosevelt Mellon to the list of witnesses. An associate of our firm traveled to Fort Lauderdale and deposed Mr. Mellon. During deposition, it became obvious that Mellon was a shill, an afterthought who was to perjure himself to bolster the prosecution after the Wolfe and Williams depositions went badly. Although his name appeared on Winn-Dixie's pre-trial list of witnesses, he never again was heard from in the case.

To close this chapter on factual distinctions between Robinson and Mercury Motors, we do not think that Mercury Motors Express Company's fault for the fact that Welch drove off the road quite compares to the activity of Winn-Dixie at multiple levels in the Robinson prosecution.

B. THE PROCEDURAL AND PRESENTATION DISTINCTIONS: Mercury Motors and Robinson are not merely distinctive factually. Their procedural history and presentation to the jury are also poles apart. Mercury Motors Express apparently denied that Welch acted on behalf of the corporation. Mercury Motors' counsel argued in her petition to this court that,

> The use of the words 'course and scope' was in no way intended to admit that Welch was acting within the course and scope of any employment with petitioner and for the furtherance of the petitioner's business. Petitioner does not nor never did (sic) admit that Welch was acting within the course and scope of his employment at the time of the death of respondent's decedent. ... Welch in no way met the criteria of being in the course and scope of employment at the time of the alleged accident. (Petitioner's Reply Brief, p.3)
>
> * * *
>
> The relationship between Welch and the petitioner is not governed by the traditional master-servant doctrine or that of respondeat superior. (p.7)

Under those facts, and those pleadings, it would surely have been unconscionable to assess the punitive damages award against Mercury

Motors Express Company. However, the opinion in Mercury Motors does not make clear that the court was reviewing an atypical respondeat superior case, and does not indicate that the defendant denied the scope and course element, requisite to vicarious liability, so we are only relying on the view of the pleadings from the Reply Brief.

Compare that to the pleadings at bar, in which the Plaintiff alleged at every stage that Winn-Dixie itself was responsible for his prosecution. In answer thereto, in affirmative defenses, in framing the issues, Winn-Dixie responded, (R.736)

> Paragraph 1. Defendant asserts truth of statements uttered as an affirmative defense.
>
> Paragraph 2. At all times material, Defendants (sic), through their employees or agents, had reasonable grounds and probable cause ...
>
> Paragraph 6. Defendant, through its agents or employees, had a present right of possession ... .
>
> Paragraph 7. Defendant, through its agents had probable cause ... .
>
> Paragraph 10. Defendants (sic) actions through its agents or employees, were made in good faith without malice ... . (emph. supplied)

Rather than choosing through its pleadings to attempt to deny responsibility for any wrongful actions undertaken by its employees, or to attempt to disassociate itself from the clear allegation of perjured testimony, the Defendant chose to affirmatively plead that at all times it acted through its agents or employees.

These cannot be the pleadings of a party which would later argue that it had no "fault", no responsibility, for the actions of its employees.

Prior to the trial, the Defendant filed its DEFENDANT'S UNILATERAL PRE-TRIAL CATALOGUE. (R.918) Winn-Dixie stipulated that the sole

defense issue was the following,

> 4. Defendant's issues (sic) are whether or not Defendant had probable cause to seek the arrest and prosecution of Plaintiff.

We could, if we were certain why the Court has accepted jurisdiction, stop here. One cannot stipulate to issues and change the rules post-trial. *Quick v. Leatherman,* 96 So.2d 136 (Fla. 1957), *infra,* pp.36, 37.

As to the affect of the Pre-Trial Stipulation upon the parties, the United States Fifth Circuit Court of Appeals has decided a case foursquare. In *Dorsey v. Honda Motor Company Limited,* 670 F.2d 21 (5th Cir. 1982), the court reviewed a procedural setting in which Honda had stipulated pre-trial that the acts of its agents were its own; the case was tried as laid out in the pre-trial order. On appeal Honda attempted to reverse a punitive damage award on the grounds that the plaintiff had failed to prove corporate fault. Implicit in the opinion is the recognition that there were no Florida cases, post *Mercury Motors,* which had dealt with this situation. The Fifth Circuit concluded that Florida law would not allow Honda to use the *Mercury Motors* "escape hatch" when it had made no attempt to imply any distinction between corporate acts and agents' acts during trial. Maybe the Fifth Circuit's conclusion was wrong, but it is directly on point as to the effect of the pre-trial stipulation.

Winn-Dixie's experienced appellate counsel is well aware of the fact that the Fourth District has *held* that this is a case of direct corporate liability, citing *Honda.* He has filed briefs in both *Mercury Motors* and in *Farish v. Bankers Multiple Line Insurance Co.,* 425 So.2d 12 (Fla. 4th DCA 1983). Knowing this, he chooses not to mention *Honda.* It does not even appear in Winn-Dixie's Table of Cases. This proves

nothing, except acknowledgment that the District is probably right.

Throughout the course of trial, Winn-Dixie consistently tried the case as one of direct liability, if any. There is not one word, in approximately 700 pages of trial transcript, which implies a distinction between the corporate acts and the acts of its employees. The corporation cast its fate with the actions of the employees, from the beginning. This is what the defense attorney told the jury in opening argument,

> ... what we have, here, I think you will find is a situation where a man was caught in the act of doing something that the store had every reason, not only probable cause, but every reason to suspect that this man had taken something, that they found some of their goods on his person and in his car, and they asked the State Attorney's office to prosecute him for that. (R.55)

For comparisons, surely Mercury Motors Express Company's counsel didn't open with a statement that Welch had "every reason" to get drunk and drive off the road.

On the third day of trial, the Defendant was still thoroughly reliant upon the testimony and actions of its employees, and was vigorously asserting the truthfulness thereof, notwithstanding that Plaintiff's counsel had argued to the jury that eight different sworn versions of the truth had been elicited from Winn-Dixie witnesses. This is what defense counsel urged to the jury in closing argument,

> I think that the issues in this case are pretty clear, and they can really be summed up in a few sentences.
>
> The Plaintiff in this case, Gil Robinson, wants you to believe that Winn-Dixie maliciously and without any probable cause whatsoever, had him arrested, had him prosecuted.
>
> * * *
>
> He wants you to believe that all the people from Winn-Dixie were maliciously lying and that he is telling you the truth. He wants you to believe that Winn-Dixie had no probable cause to detain him, no

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> probable cause to call the police. (R.625, 626)
>
> * * *
>
> Chris was not sitting there at any time and intentionally lying. He was trying to tell a story of what actually happened, ... (R.635)
>
> * * *
>
> Ladies and gentlemen, the issues in this case are the truth of what happened, not the fact that Chris Wolfe may not be able to get his story together, perfectly. That's not what the issues are, here. The issues here are: What is the truth? Did Winn-Dixie have probable cause, under the circumstances? ... Did they have probable cause to stop this man and arrest him and have him prosecuted? That's what the questions here, are.
>
> * * *
>
> ... please don't think for a minute I am conceding any of these aspects on liability, because I am not. (R.641, 643)
>
> * * *
>
> Is that common sense, that the circumstances of this case, as you heard them from the stand -- is that common sense, that Winn-Dixie maliciously did anything here? That they didn't have probable cause to do anything that they did?
>
> No, not at all. The common sense end of the testimony tells you who is telling the truth, here, what the real truth is. (R.651)

The Defendant presented to a jury what it said were very simple issues. The primary issue as it expressed it was what was "the real truth". According to the Defendant, Winn-Dixie had the Plaintiff arrested and prosecuted, Winn-Dixie had probable cause. It still argues that in the Supreme Court. It is clear that Winn-Dixie made no attempt to distinguish corporate acts from employee acts. The stage was set, perhaps by the Defendant more than by the Plaintiff, for the jury's verdict.

Although there is much handwringing on appeal over the fact that security man Wolfe has caused Winn-Dixie all of its problems, Winn-Dixie was an enthusiastic proponent of his testimony all through trial. One should understand that the arrest of Robinson was not an isolated, unexpected occurrence. Security man Wolfe's job title may

have been dairy and frozen food manager, but the job he liked best, and was most renowned for, was the arrest of customers. His reputation and enthusiasm for arrests were clearly a matter of pride, rather than of apprehension, at Winn-Dixie. As manager Williams testified,

> Q. Did he (security man Wolfe) have a reputation to stop more people ... ?
> A. Yes, sir, no doubt about it.
> * * *
> Q. But Chris was the best there was?
> A. There ain't no doubt about it, <u>best I have ever seen.</u>
> Q. Was he proud of it?
> A. I don't know if he was proud of it; but I wouldn't say it <u>that way.</u>
> * * *
> A. He amazed me. (R.219, 220)

Security man Wolfe certainly confirmed these facts,

> Q. Of course, sir. According to your testimony, you apprehended hundreds of shoplifters, up by the time that I deposed you, hadn't you?
> A. Yes.
> Q. To the best of your knowledge, nobody else at Winn-Dixie had a record like that, did they? No one?
> A. No.
> Q. In fact, if Mr. Williams said to you that he has never seen anybody like you for apprehending and following up on shoplifters, would you think that Mike was telling the truth? Does that sound fair?
> A. Yeah. I worked with him for a couple of years. (R.310)

Winn-Dixie's counsel opened to the jury by stating that Mr. Wolfe "by his own statements and by those who work with him, has a certain knack for catching shoplifters, has caught hundreds of shoplifters in his many years." (R.51) Winn-Dixie had "the real truth"; Robinson had "a preposterous story".

The jury was later instructed, quite unlike the instructions for example in <u>Farish,</u> <u>supra,</u> that,

> On the <u>defense,</u> the issues for your determination <u>are whether Winn-Dixie</u> Stores, Inc., had probable cause to believe that goods held for sale by the merchant were unlawfully taken by Gilbert Robinson ...
> * * *

> The issues for your determination ... are whether Winn-Dixie Stores, Inc., maliciously and without probable cause, instituted a criminal proceeding ... .
>
> * * *
>
> In determining whether Winn-Dixie Stores, Inc. acted maliciously, you may consider all the circumstances at the time of the conduct complained of, including any lack of probable cause to institute or continue the proceeding.
>
> * * *
>
> If you find for Gilbert Robinson and find also that Winn-Dixie acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against Winn-Dixie as punishment and as a deterrent to others. (R.672)

These instructions were given at Defendant's request. (R.180-189) In its closing argument Winn-Dixie implied no disapproval of the testimony of security man Wolfe and manager Williams. On the contrary, counsel told the jury that as to Robinson, "This man is coming in here and asking you to believe a preposterous story." (R.649) Winn-Dixie entirely embraced the instruction which was to be given on punitive damages against the corporation, and argued to the jury in closing that,

> Just briefly, let me touch for a minute on punitive damages. Punitive damages, you are going to see on the verdict form, is not something you have to award. Punitive damages are something that if you find liability, and you have found that Winn-Dixie acted with malice and moral turpitude and complete indifference to the rights of others, then if you found that, you can, in your discretion, award it. (R.648)

The jury did so find. That is exactly the choice which was presented to the jury not only without objection, but by conscious choice expressed in closing argument. During charge conference (R.180-189), Plaintiff requested an instruction on corporate liability. Defendant argued it had admitted liability. That's why there are no arguments about jury instructions in the appellate briefs.

Security man Wolfe's reputation and expertise were so thoroughly approved by Winn-Dixie that he had earned for himself the nom de guerre of "Sherlock Holmes". (R.219) Throughout the trial we refer to him periodically as "Sherlock" without one word of protest or disapproval. Mr. Wolfe's role in the Robinson tragedy was highly foreseeable. Yet the record is barren of any supervision, training or attention ever directed to his activities. As manager Williams testified regarding Wolfe and the customers "If he stopped them, it was fine with me. If someone is stealing something, that's fine with me." (R.218)

In the Robinson case, security man Wolfe, as far as anyone can tell, misapplied the deductive methods made famous by the fictional detective. Upon spying the groceries Mr. Robinson had bought the night before, he deduced that Robinson had stolen everything in sight. Manager Williams, who had been studying Robinson as he "stretched" agreed with the whole deduction. He told the police he had seen the theft. Supervisor Danato was also there, making the decisions. Our research has disclosed no reported decision in Florida in which the corporate activity in an intentional tort has been as broad as in this one. We invite Winn-Dixie in its reply brief to produce a case in rebuttal.

Under these facts, with this selection presented to the jury, under this procedural history, the Fourth District agreed with the plaintiff that the jury found that Winn-Dixie "itself" (District Court quotes) had acted. What else could any court have found? How can anyone consider this to be vicarious liability? Only after trial, Winn-Dixie changed its position and sought the Mercury Motors "escape hatch". When the Fourth District relinquished the file to the trial judge so that he might attempt to demonstrate with record references any support

for his remittitur, Winn-Dixie unilaterally submitted a proposed order for the trial judge. We objected in writing and informed the trial judge that Winn-Dixie had reversed its positions on appeal. In reply to that letter, Winn-Dixie candidly admitted the change of positions in writing to the trial judge,

> We feel that we must respond to Stuart Huff's letter . . . .
>
> * * *
>
> Nor is there anything wrong with our now taking a position which appears to be inconsistent with our closing argument to the jury. At that point we were attempting to convince the jury that there was probable cause to arrest the Plaintiff. The jury having found against us, we are now simply recognizing the grossly inconsistent nature of Chris Wolfe's testimony which has been quite ably demonstrated in Plaintiff's appellate Brief.
>
> The Plaintiff now argues that we are attempting to disassociate ourselves from the conduct of Chris Wolfe. Indeed that is exactly what we are trying to do for purposes of punitive damages ... . (Counsel didn't send a copy to District Court. No record number. Reproduced here as Appendix "A")

This court authored Mercury Motors, but we cannot believe that it intended to create a wild card, a post-trial "escape hatch" which allows a corporate defendant to decide after trial how it should have tried the case. Robinson was pled before Mercury Motors, tried upon the pleadings and pre-trial stipulation after Mercury Motors, and before any appellate decision that distinguished direct corporate liability from vicarious liability had been published. Farish, supra, and Honda, supra, came down after the Robinson trial. This court has apparently not yet spoken to the direct corporate liability question and our decision is not in conflict with anything; it is foursquare with Honda and the Fifth Circuit's interpretation of Florida law.

As the Fourth District has found that this is a case of direct corporate liability, is this a permissible holding in Florida? We

don't know. There is dicta, in dissent, in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983), to suggest that a more broad elimination of corporate punitive damages may be on the horizon. We would, respectfully, discuss U.S. Concrete later in this Brief. Here we only note that Robinson has apparently collided with Mercury Motors, and that cases more distinctive could hardly be found.

Winn-Dixie suggests that Life Insurance Company of North America v. Del Aguilla, 417 So.2d 651 (Fla. 1982), is a case on all fours. That surprises us, because it did not allege any conflict with Del Aguilla in its Jurisdictional Brief, even though it has used Del Aguilla in the District Court.

The case involves the conversion of funds by life insurance agents. It does not involve malicious prosecution, grocery stores, security men, store managers, or district supervisors. The agent was permitted by his superior to write annuities and forward premium to the company. He was prohibited from converting the premium to his own use. That was a loss to the company and was the antithesis of approved conduct.

Winn-Dixie's employees were specifically authorized to use their discretion in apprehending customers. ("It's fine with me.") Their authorization was to protect Winn-Dixie's property. With the involvement of the manager and the district supervisor one can infer there was authorization to play fast and loose with the facts if necessary to protect the company. The security man and the manager were doing what the company encouraged them to do. Even in this Brief, Winn-Dixie says they were doing it right, i.e., they had probable cause. We fail to see the analogy.

C. THE DIRECTED VERDICT: Although Winn-Dixie gives it no analysis, we must remember that what is under review is a directed verdict

entered by the trial court. It requires no citation that the trial judge was required to resolve any questions of fact in favor of the non-movant and to afford him all reasonable inferences to be drawn from the evidence. That being so, Plaintiff was entitled to the inferences that he at no time acted in any manner remotely suspicious, that he at all times owned the potato peeler and the other items of personalty and that, as the jury found, there was sufficient evidence of willful and wanton, outrageous conduct by Winn-Dixie itself.

At the close of the Plaintiff's case, Winn-Dixie moved for a directed verdict and cited Mercury Motors. This was the first time that anyone had suggested that this case was not one of direct corporate liability. The trial judge denied that Motion for Directed Verdict. He denied the renewed Motion for Directed Verdict at the close of all of the evidence, at the time when his impressions and his observations were most fresh. Two months after the trial, without the benefit of any trial transcript to review, distant from the testimony and the arguments, the trial court entered a directed verdict. But by that time, he obviously intended to alter the award anyway. It had little to do with an absence of evidence and had everything to do with his personal feelings about the verdict. On the same day, he entered the backup remittitur order, in a sense predicting that his directed verdict would be reversed.

The remittitur order (infra POINT III) itself reveals contradiction, for the trial court said in the first Order that there was no evidence of corporate fault, and in the second he said that $250,000 in punitive damages would properly equate to Winn-Dixie's fault. A foolish consistency may be unsound, but can it be said that a man who on the one hand believes that there was no evidence of

corporate fault believes, on the other hand, that there was corporate fault to the tune of $250,000., if he makes both decisions the same day? This court has already decided that question in Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978),

> The court is to decide at the close of the evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff ... .
>
> * * *
>
> There was a legal basis for punitive damages being assessed, else the issue should not have been permitted by the judge to go before the jury. Likewise the trial court obviously concluded there was a legal basis for punitive damages by permitting $50,000 of the award to stand. 359 So.2d 436

At bar there was a legal basis for the assessment of punitive damages or the court would not have submitted the issue to the jury. He obviously recognized that there was a legal basis, for in his backup order he allowed $250,000 of the award to stand. The Fourth District correctly found that the trial judge had erred in granting the directed verdict.

Finally, it should be noted that when the trial court entered a directed verdict on punitive damages on the grounds that the Plaintiff had not offered sufficient proof of corporate fault, he was holding the Plaintiff to a burden which the Plaintiff did not have in this case. When Winn-Dixie stipuated that it was acting, as a corporation, through its employees, even if that action was outrageous, it was a corporate act. As this court has said in Quick v. Leatherman, 96 So.2d 136 (Fla. 1957),

> At the outset we emphasize that our consideration of this matter is limited to the sole issue presented to the trial judge by the stipulation filed in the cause.
>
> * * *
>
> We therefore pretermit any discussion of any other propositions of law that otherwise might be raised.
>
> * * *

> Inasmuch as the parties have stipulated that the sole issue is the one which we have herewith disposed of and they stipulated that a determination of this issue would be determinative of the cause between them, we are bound to conclude that the decree dismissing the complaint was erroneous... . 96 So.2d 139

In Palmer v. Thomas, 284 So.2d 709 (1st DCA 1973), at 710 the court said,

> The function of an appellate court is to review errors allegedly committed by trial courts and not to entertain for the first time on appeal defenses which the complaining party could and should have but did not interpose and present to the trial court for decision.

In United States v. One 1978 Bell Jet Ranger Helicopter, 707 F.2d 461 (11th Cir. 1983), it was said,

> The most casual reading of this stipulation clearly indicates that the parties were attempting to limit the issues that were to be tried to a single issue, that is, did Waldron have any knowledge that Fripp was involved in unlawful activities ... .
>
> The stipulation here was nothing more or less than an agreement by the parties to simplify the issues to be tried by the court.
>
> * * *
>
> It was not open to the court to require proof of another issue, even though without a stipulation the other issue would clearly have been properly before the court 707 F.2d 462, 463

Winn-Dixie stipulated that the defense issues were limited to a single issue, i.e., did Winn-Dixie itself have probable cause to arrest the Plaintiff? It was not open to the trial judge to require proof of another issue, independent corporate fault, even if that other issue would have been properly before the court without the stipulation and the pleadings which had gone before the directed verdict.

D. THE ALTERNATIVE DICTA: Winn-Dixie recognizes that the District Court's finding of direct corporate activity conflicts with no other case, so Winn-Dixie avoids discussing the holding of the case. It

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instead seizes upon the court's alternative dicta, that even if there were not direct corporate activity there was still some fault, and the Defendant uses this secondary finding as an alleged conflict with Mercury Motors.

The District Court said that even if it accepted Winn-Dixie's hypothesis (which it did not) there was some fault on Winn-Dixie's part. The District Court found that fault to be evidenced by the way in which Winn-Dixie published and implemented its policies "governing the conduct of employees who observed shoplifting". That may be a cryptic statement, but it is not subject to the interpretation given to it by Winn-Dixie. The Defendant implies that this dictum condemns a corporation which tries to publish and implement policies. A much more logical reading condemns Winn-Dixie for its failures of implementation of any effective policy. The record shows that the Plaintiff attempted to introduce the one page sheet containing Winn-Dixie's shoplifting guidelines into evidence. We intended to prove that the policy had not been enforced and had not been followed. Knowing that, Winn-Dixie fought against the introduction of the guideline and argued to the court,

> MR. GOODMAN: I believe that the Plaintiffs will be attempting to bring in evidence ... a policy that Winn-Dixie has for apprehending shoplifters. I don't think that the fact of whether or not Winn-Dixie's employees followed Winn-Dixie's own policy is going to in any way be relevant. I don't think that a standard set up by a company is indicative of whether or not there was probable cause ... . I would request that the court limit the Plaintiffs from mentioning the individual company's standards ... . (R.11, 12)

Security man Wolfe testifies that there is no fixed policy at Winn-Dixie anyway. As he testified,

> Q. Now, the policy that we're talking about, is set forth in the manual on shoplifting; isn't it, sir?

A. Well, there are several versions of it. Maybe one of them could be in there.
Q. Several Winn-Dixie versions of shoplifting instructions?
A. Sure.
Q. Where are the others?
A. Well, a lot of the store managers and supervisors have different things that they like you to do. (R.328)

Manager Williams had even less training than security man Wolfe, so we don't know how he could ever have told Wolfe the "different things that they like you to do". As he testified,

Q. Isn't it a fact that as far as training with regard to shoplifting and securing, they don't give you a whole lot of training; do they, sir?
A. They give us a security pamphlet to read.

* * *

Q. Have you ever been to ... meetings where you were called in and you discussed shoplifting and how to apprehend someone, how to keep your eye on him and when to apprehend and that type of thing?
A. No, sir. (R.211)

In this lack of training or instruction there is strong inference of corporate negligence. It is more than inferential, it is positive evidence. The whole case revolves around shoplifting, one area in which Winn-Dixie obviously spends no money and offers no training.

The Fourth District's statement is not hard to understand; in fact, it's a normal way of expressing an opinion. If an IRS auditor says to a taxpayer "Your problem (fault) is evident from your bookkeeping and your accountant", the taxpayer can't conclude, "That means I would be better off if I didn't keep books and didn't use an accountant." That's what the court is saying, "Your fault is in your policy and implementation." Winn-Dixie gives the statement a twist and arrives at a meaning that is nonsensical. Even then, there's no attempt to show that the statement conflicts with any holding in any other reported decision.

D. THE POLICY ARGUMENT: Winn-Dixie's argument on the merits of

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POINT II is a public policy argument, one which may have support on the Supreme Court as indicated in U.S. Concrete. The policy argument is that punitive damages should not rest upon our large corporations, because they are isolated from their thousands of employees and they cannot monitor the activities of every employee in the daily scope and course of his job. It is said that punishment should be for the wrongdoer, not for his employer.

Winn-Dixie suggests that the Robinson result proves its point; the wrongdoers are the Defendants' store manager and its security man (and district supervisor) but they were not sued. They were not sued, says the Defendant, "because they have no money". This Winn-Dixie assertion is an almost subliminal suggestion that the case might not have been taken were Winn-Dixie not Florida's wealthiest ($8 billion in assets) company and that only avarice has motivated us to pretermit the real wrongdoers, the security man and the manager. If the Plaintiff had sued the employees who have nothing, justice would have been done, according to Defendant. This is an appealing argument and it would be persuasive were it not, respectfully, that it ignores what happens when the employer is the wrongdoer.

First, we agree that "who has money", standing alone, has no bearing on "who is liable"; that may bear upon the amount of a potential judgment but it does not tend to prove or disprove who is liable.

But if our law now is to be that only those who have nothing should be subjected to punishment, while their corporate employers - who presumably have everything - belatedly disavow the actions of their employees, will Florida be reaching a more perfect justice?

Winn-Dixie does not press for the elimination of punitive damages

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as a concept. Rather, Winn-Dixie asks that the law of Florida go further toward, or reach, the elimination of corporate responsibility.

Upon those employees who "have no money", who frequently have the least education, the least foresight into the harm their actions may cause, the least leisure time or reason to reflect upon the philosophy or wisdom of the company's practices, the narrowest life experience, upon them should the punishment be levied. That they "have no money" is a statement that they have the least to offer to the business world, they bring so little to their corporate employer that they cannot demand "much money". They don't accumulate much in a lifetime.

What would the salutary purpose of exemplary damages be then? The example of the price of outrageous conduct which is set in Robinson cannot have escaped a single giant department store or grocery chain operating in Florida. Exemplary damages applied in cases like this - which demanded a punitive verdict - have served as warnings time and again to large corporations throughout the history of our country. Verdicts of this type have ofttimes done quickly and effectively what legislatures might never have accomplished. Such verdicts have been, as the name implies, exemplary.

Now, in Winn-Dixie's view, we should have examples made of those persons who have no money. Examples to whom? Their peers who also have no money? Who also have no legions of corporate counsel to advise them as the law changes? Their peers who read less, know less; exactly those persons who will look, as they have always looked, to their own company to enforce what is and isn't acceptable within the scope of their job?

This is the shifting of traditional punitive liabilities which Winn-Dixie would have this court adopt. The concept appears under the

appealing guise of shifting the blame to the "appropriate" tort-feasor. In practice it will further destroy incentive for employers to carefully train and supervise, to cull their dangerous employees and their pathological liars, to actively promote rules, regulations and guidelines for decent and civil conduct.

Even from a pragmatic view, the mechanics of implementing Winn-Dixie's view of punitive damages create their own undoing. It doesn't take too much foresight to realize that when all punitive damages for outrageous conduct perpetrated <u>within</u> the scope of employment are shifted to the lower echelon employees, this court will inevitably hold that it was legal malpractice for an attorney representing an employee to have failed to cross-claim against his employer, on grounds that the corporation should have instructed, trained, instituted procedure, forewarned the employee, etc. When those facts are present, the appellate courts will surely hold the corporations liable to the employee for the plaintiff's punitive verdict against him. What we will have solved, if anything, is hard to imagine.

Presently, when corporate defendant and loyal employee present a unified front, well monitored by corporate counsel, they make a plaintiff's task formidable. Their's is a symbiotic association, the employee needs his job, and protection from judgment; the corporation needs his supportive testimony.

But with the elimination of corporate responsibility for outrageous conduct, what will happen? We'll use the case at hand. Williams and Wolfe "have no money", where will they find counsel? Winn-Dixie would badly need their supportive testimony to establish the probable cause defense, for it will still be vicariously liable for all compensatory

damages, will it not? Will Winn-Dixie tell them that if the jury finds their activities, which they thought they were performing in furtherance of Winn-Dixie's best interests, were outrageous, then these two employees will face a punitive damage verdict which they cannot pay? Will Winn-Dixie retain counsel for them? Will that attorney not be obligated to file a cross-claim? Will we not be allowed to "bad faith" their employer, on the punitive claim?

We can't agree with Winn-Dixie's seductively simple argument that the employee should always be made the example. Yet, Mercury Motors intends to eliminate the corporation's liability where it did nothing wrong; U.S. Concrete reaffirms punitive liability if the employer "itself" did something wrong.

What's not entirely clear to us, at the moment, is what happens when the corporation did do something wrong, and how the plaintiff proves it.

The corporation simply cannot act, outrageously or otherwise, except through its employees.

Winn-Dixie argues that the actions of Wolfe and Williams cannot constitute corporate misconduct. Its authority is the Restatement of Torts. However, Defendant says,

> Although the Restatement does not expressly cover this specific factual situation, illustration number 3 ... seems to indicate that the conduct of an assistant manager ... would not subject a company to liability for punitive damages. The examples appear to require that the misconduct be at least at the level above the supervision of an individual store. (p.12) (emph. supplied)

We don't know what the examples appear to require or don't appear to require. We do know that this court has held that managers of individual stores are vice-principals, that their actions, taken within

the scope of their authority, are corporate acts. S.H. Kress v. Powell, 180 So. 757 (Fla. 1938). We do know that where an assistant manager of a store falsified certain papers in order to attempt to prove that a bread truck driver had been shorting the company on his deliveries, that was sufficient to hold the corporation liable in punitive damages in a malicious prosecution case. K-Mart v. Sellars, 387 So.2d 552 (1st DCA 1980). We do know that Winn-Dixie's appellate counsel said, in arguing to this court that the Fourth District was wrong in Farish, "It makes no difference whether the employee is an officer." (PETITIONER'S BRIEF ON THE MERITS, Farish v.Bankers Multiple Line Insurance Co., p.25)

We don't think Winn-Dixie makes any cogent argument defining the plateau at which an employee's act becomes a corporate act. We would respectfully suggest that the employee level for corporate liability might well be analogized to the level of employee insulation which this court has established in a defamation context. In City of Miami v. Wardlow, 403 So.2d 414 (Fla. 1981), this court held that,

> ... the controlling factor in deciding whether a public employee is absolutely immune from actions ... is whether the communication was within the scope of the officer's duties. 403 So.2d 416

Defamation and malicious prosecution are torts. Immunity and liability are correlaries. Employees are employees. The principle is similar. The public employee is immune from suit for libel if his statements were within the scope of his job. The corporation's direct liability should arise from the activities of an employee taken directly within his authority. This is not a return to the pre-Mercury Motors case law, we're only suggesting the logical level at which an employee's activities may have been corporate activities. If

security man Wolfe had entered into a contract with Publix Markets to merge the two giant food chains, all would agree that that was beyond the scope of his job. But when "Sherlock Holmes", the manager and the district supervisor, saw to it that Robinson was prosecuted, that was exactly at their level of authority within the corporation. That is the right level to start separating vicarious activity from bona fide corporate activity.

It then becomes incumbent upon a corporate defendant who wishes to prove that the actions taken by the employees, although within the apparent scope of their authority, were, in fact, totally unauthorized, contrary to corporate rules, or the like, to plead so in its answer and to raise affirmative defenses which clearly set up those issues. Then the corporate defendant has in fact a Mercury Motors "escape hatch"; but it must open that hatch before trial, and during trial, not post-trial. It must put the plaintiff on notice and let the jury decide if the defendant has proven the right to escape. Reconciliation of purely vicarious corporate punitive liability, which no one seems to favor, and direct corporate liability which every Justice appears to favor, can be easily effected. But it is not by the establishment of an inflexible, arbitrary level of employment test and it is not by allowing corporations to endorse their employees' activities until the trial is lost. It is not, finally, to be reconciled by the shifting of punitive damages to those who "have no money", unless that result has been properly set up by pleadings before trial.

If corporations are not to be "vicariously" liable, but they are to be liable when the corporation itself condones the activity, the law must put the burden on the defendant to announce a position.

Only the defendants know whether the employee's tort was corporate

conduct. Plaintiffs, judges, and juries don't know. Let the defendants investigate their case, take an informed stand, and actually begin to define issues in their answers, affirmative defenses, and stipulations. The old approach - "Defendant denies all allegations; our employees did right." - was sufficient pre- Mercury Motors. Now it's not.

POINT III. THE TRIAL COURT HAS NO AUTHORITY TO SECOND GUESS THE APPELLATE PROCESS. THERE WERE NO GROUNDS FOR A REMITTITUR

We cannot think that this court has accepted jurisdiction to review the matters in POINT III, and have allocated our Brief accordingly. The District Court held that the trial court was without authority to enter a post-appeal order. The District said that it would have vacated the second order on that ground alone. Winn-Dixie recognizes the correctness of that ruling and assiduously avoids mention of it.

The post-appeal order commanded a remittitur of the punitive damage award. The trial judge incanted six conclusions. The trial judge did not give, and did not express any intention of giving, any reference to the record to support his conclusions. As this court said in Wackenhut,

> The deficiency of the order in this case is serious. By requiring a remittitur without an explanation founded in the record and ... ordering a new trial without stating reasons capable of demonstration in the record or beyond the record ... the trial court left the District Court of Appeal to grasp at straws when it reviewed the order. 359 So.2d 434

The District Court gave the trial court a second opportunity to comply. It relinquished the entire file for two months, directing the trial judge to support the remittitur with specific references to the record. There's no record reference yet for this order.

Sixty days later, the trial judge filed his MATTERS OF RECORD ON

WHICH THE REMITTITUR IS BASED. Detailed comment on that writing would be unnecessary. It does not express understanding of what the District Court had requested. The trial judge repeated his conclusions that he was shocked by the verdict and that it was out of proportion to the tortious conduct. At least, however, when compelled to review the trial transcript he omitted the conclusions in his earlier order that the jury had considered matters outside the record and that the jury was deceived as to the evidence. He gave not the slightest hint as to why he was shocked; he gave not the faintest inkling as to what the weight of the evidence did show.

The remittitur was facially deficient and the District Court said so. The District Court cited Wackenhut and Arab Termite and stated that it was "not convinced" by the trial court's two attempts to support the remittitur. Winn-Dixie gives these two words a twisted reading, saying that the District Court didn't have to be convinced that the verdict was improper. Of course, that's not exactly what the District Court said and Winn-Dixie's argument isn't exactly the law. The District Court isn't convinced by the attempt to provide any record reference to support the remittitur. And the District Court is required to, in one phrase or another, be convinced that the trial judge did have some solid grounds for entering the remittitur; how else would the District Court review for abuse of discretion?

Recognizing that Wackenhut controlled this situation, Winn-Dixie avoids it and relies upon cases in which new trials, not remittiturs, were at issue. We think those cases don't require further discussion. They weren't even in the District Court Briefs.

Although the trial judge's attempts to support the remittitur don't make sense to us, we do note that they fail to mention the UNIFORM

RETAIL THEFT AFFIDAVIT, the perjury by security man Wolfe, the active involvement of manager Williams and his perjury, the decisions made by Mr. Donato, and many other matters which could be seen as pro-plaintiff. This might indicate that the trial court did not fully appreciate the weight of all of the evidence, as the jury did.

The law is precisely the opposite of Winn-Dixie's argument. If the District Court had affirmed the remittitur without requiring a demonstration of support, then the District Court's opinion would be in conflict with Wackenhut and Arab Termite.

Perhaps we should address what is probably the true issue sub silentio in this POINT. Is the punitive damage award just too large? It is much smaller than the $2 million punitive verdict in Farish, supra. The tort there was interference with a lawyer's contingent fee agreement. It is smaller than the $800,000 punitive verdict approved by this court in U.S. Concrete. The tort there was retaining an employee who was grossly negligent. It is a much smaller percentage of corporate assets than the award approved by this court in Wackenhut. As Winn-Dixie's published corporate assets are $8 billion, the verdict is .000094 percent of its assets. The physical injury caused was more permanent than was even the tragic injury in Wackenhut. Most important, the type of tort itself, the imputation of crime with the expectation of imprisonment, cannot be discussed in the same breath with the torts in these other cases. The verdict is not too big. Perhaps it is too small. We asked the jury for $1 million. Perhaps that was too small.

The District Court was right on both grounds, for vacating or reversing the post-appeal remittitur.

CONCLUSION

The law provides additional damages, to punish and give warning, for flagrant corporate misconduct. Robinson is such a case. It was so pleaded and presented. A jury so found by special verdict. An appellate court has endorsed that verdict. The decision does not conflict with others, and the Defendant presents no argument thereon.

The remittitur specifically violated Supreme Court directives (twice) and had to be reversed.

Robinson now is caught in the web of recent vehicular negligence cases, although it cannot be compared to them. It would be profoundly unjust to treat Winn-Dixie's intentional tort as vicarious negligence, for convenience, in order to expand upon Mercury Motors. Robinson's counsel might be expected to say that, but it's true nevertheless. It would be profoundly unjust. Robinson had his own cause. He had a right to be heard on his own merits. The jury heard him. As The Miami Herald said in an editorial on 7 December, 1984,

> These juries did not face abstract hypothetical cases; they weighed specific events concerning particular human beings with all their frailties. This is the ability that makes a jury as relevant in the Computer Age as it was in the England of the Middle Ages.

The District Court agreed. The Supreme Court should affirm.

Respectfully submitted,

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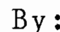
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was furnished by United States mail this 7 day of December, 1984, to MONTALTO & BLANK, 1041 Ives Dairy Road, Suite 139, Miami, Florida 33179, and LARRY KLEIN, ESQUIRE, Suite 503 - Flagler Center, 501 S. Flagler Drive, West Palm Beach, Florida 33401, Attorneys for Petitioner.

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