IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 78,957

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT, CASES NO. 90-0917 & 90-0932

THE WACKENHUT CORPORATION, a
Florida corporation, and
DELTA AIR LINES, INC.,

Petitioners\Cross-Respondents,

vs

FELICE LIPPERT,

Respondent\Cross-Petitioner.

______________________________________/

RESPONDENT\CROSS-PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
Table of Authorities	i
Preface	1
Argument	2
Conclusion	7
Certificate of Service	

TABLE OF AUTHORITIES

CASES **PAGE**

E.O. Roper, Inc., et al v Wilson Toomer Fertilizer Co., 116 Fla. 796, 156 So. 883 (1934) 6

Shaw v Shaw, 334 So.2d 13 (Fla. 1976) 3

PREFACE

As the Respondent\Cross-Petitioner, FELICE LIPPERT, has filed a combined Answer\Initial Brief, this Reply Brief will be limited to the issue raised as part of her initial Cross-Petition. She is not authorized by the Rules of Appellate Procedure to further respond to the Petitioner's arguments regarding the certified question, thus the limitation of this Reply Brief. That non-response by her to those additional arguments should not be construed in any way as a concession on her part to those arguments.

ISSUE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ORDERING A NEW TRIAL IN THE UNDERLYING INSTANT CASE, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

The fact that the jury at the trial of this cause returned a verdict in opposition to the Petitioners' position is in no way evidence supporting their position that they were somehow prejudiced during the proceedings at trial. The Petitioners are reaching into pure fiction when they argue, "it is highly likely that had the jury known that LIPPERT would actually receive the full damages set forth on the verdict, rather than the limited amount specified an the ticket, the jury would have evaluated the facts differently, and found LIPPERT comparatively negligent in this action." [Petitioners' Reply Brief, Page 14). This is pure speculation on the part of the Petitioners and is certainly not a basis for ordering a new trial as the Fourth District Court of Appeal has done.

The Petitioners start their argument on this issue with the proposition that the determination of whether to grant a new trial or not, is generally left to the discretion of the Trial Court. The Respondent agrees. The issue of whether or not to grant a new trial in this case was properly raised to the Trial Judge who denied said Motion. (R.2811). In raising such

arguments, the Petitioners are putting forth the position that it was proper for the Fourth District Court of Appeal to substitute itself for the Trial Court (and the jury for that matter), as the proper evaluator of the evidence that was presented, Clearly that is not the function of an Appellate Court, as Appellate Courts have no "sound discretion". Their function is to determine if Trial Courts have abused their discretion, or by rendering judgments which cannot be supported by competent evidence. Shaw v Shaw, 334 So.2 12, (Fla. 1976). The Order issued by the Fourth District Court of Appeal found no abuse of discretion in the Trial Court's denial of the Petitioners' Motion for a new trial, Yet, that Court went on and substituted its findings for that of the Trial Court, and in fact, ordered a new trial.

The Petitioners claim that they were so prejudiced by the Trial Court's earlier statements, regarding the previously entered erroneous Summary Judgment, that it caused them to try the case as informally as if it were a small claims case. This counsel has never seen one, but maybe there are small claims cases that take over a week in front of the jury, with expert witness testimony, and endless argument between counsel, but if such a case exists, counsel for the Respandent has never seen one. The Petitioners argue that maybe they would have tried harder if they had not been told that their liability would be

limited. In an effort to establish the unbelievability of the Petitioners' claim, the Respondent has been forced to supplement her Appendix by including the transcript of both the testimony of the Petitioners' jewelry expert, MARTIN KING, and the closing arguments of their counsel. (App. 22, and App. 108). The Petitioners expert spent thirteen (13) pages testifying item by item as to the value of the pieces of jewelry. (R 1221 - 1233). On cross-examination he testified that he had spent One Hundred Hours (100) preparing his valuations, for which he was paid Four Thousand Five Hundred Dollars ($4,500.00). (R - 1236). This is an unusual expense for a small claims case not exceeding One Thousand Two Hundred Fifty Dollars ($1,250.00).

In addition, both counsel for Petitioner, DELTA, and Petitioner, WACKENHUT, argued the amount of damages in their closing arguments. (R. 1402, 1417, 1428, 1438, 1440, 1441, 1446, 1456 and 1457). They were fully and completely aware of the fact that the issue of damages was being presented in its entirety to the jury. The prejudice, the Petitioners are now claiming simply did not occur. Whether the Petitioners' counsel may have tried harder under different circumstances is completely irrelevant and not a proper basis upon which to order a new trial.

Furthermore, the argument that the Petitioners did not try as hard because they knew their liability was limited, just

does not make any sense. They knew at the very least if the original Summary Judgment was abided by after the trial was completed, that; the issue determined by the Summary Judgment, would then be appealed. If that decision was overturned, (as the Fourth District properly determined it should be), would the Petitioners then be arguing that they were prejudiced? Of course not. The outcome of the case is exactly as it would have been had the Trial Court entered a Final Judgment in the amount of One Thousand Two Hundred Fifty Dollars ($1,250.00), and then been reversed by the Appellate (hurt. Only in the instant case, the order of events was reversed. The Trial Court reversed the prior decision to limit the Judgment to $1,250.00 (which was within the Trial Judge's authority to do), and then presented the issue to the Appellate Court which affirmed the Trial Court's decision. The end result in either order of occurrence is the same, and the amount of prejudice to the Petitioners in either *case* is the same. None! To require a new trial solely because of this alleged prejudice is unnecessary, a waste of resources, and just plain wrong.

The fact that the Order entered by the Fourth District Court of Appeal directly and expressly conflicts with past decisions of this Court, and other district Courts is a genuine basis as to why the Court should rule on this issue. This

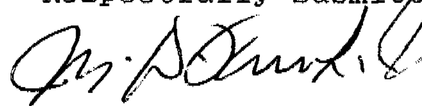
Court's decision in E.O. Roper, Inc., et al vs Wilson Toomer Fertilizer Co., 116 Fla. 796, 156 So. 883 (1934), is controlling in this situation. The outcome of a new trial in this case would be exactly the same as the decision appealed from. The facts are no different now than they were when this case was originally tried. The law, as it, was correctly applied by the Trial Judge, is no different now than it was at the time this case was tried. If the law was applied correctly in a new trial, the verdict is guaranteed to be exactly the same as before. As such, to order that a new trial be held is directly in conflict with this Court's decision in Roper.

As such, this Court should take jurisdiction over this issue and reverse that part of the Fourth District Court of Appeal's decision that remands this matter fur a new trial.

CONCLUSION

For the reasons set forth in the Briefs filed herein, it is respectfully requested that this Honorable Court affirm in part the decision of the Fourth District Court of Appeal below and reverse that part of its opinion which ordered a new trial.

Respectfully submitted,



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