IN THE SUPREME COURT OF FLORIDA

CHARLES P. SCHROPP,

Petitioner,

Case No. 83,522

vs.

CROWN EUROCARS, INC.,
d/b/a CROWN MERCEDES, and
ROBERT COHEN,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

We begin by noting our objection to both the organization and content of Petitioner Schropp's Statement of the Case and Facts. Schropp includes as "facts" evidence rejected by the jury in finding against him on four of the five counts submitted, significantly mischaracterizes the course of trial proceedings, and intermingles discussion of the proceedings with recitation of "facts" so as to repeat under several headings the same claims. Because Schropp has not presented the facts and proceedings in a responsible manner, it is necessary for Crown to present a more than usually detailed discussion of the case and how it reached this Court.

A. Proceedings Below

Schropp filed his original complaint in the Circuit Court on June 19, 1989 (R. 9/1303). The complaint included six counts against Crown; Cohen was joined as a co-defendant in four. Count I, against Crown only, sought a declaration of rejection or revocation of acceptance of a 1989 Mercedes automobile Schropp had purchased from Crown in October 1988. The ground alleged for rejection was a defect in the exterior finish of the car, which Schropp alleges was not corrected by Crown, resulting in Schropp's formal demand, in late November 1988, for return or replacement of the automobile.

Count II charged Crown and Cohen with fraud in the inducement

based on alleged misrepresentations by Cohen during negotiations. Count III sought damages from Crown for injury to the car while it was attempting to correct the finish. (The damage consisted of scratches on a wheel cover, which Crown had replaced at its expense. [R. 2/267, 290]) Count IV alleged conversion of the car based on representations made by Cohen after Schropp had demanded refund or replacement, specifically, that Cohen had induced him to return the car to Crown by assuring him that a Mercedes representative would inspect the car and authorize the use of a special process which had not previously been performed by a dealer, and that Crown would replace the car if Schropp were still unsatisfied. Count V alleged civil theft, and Count VI alleged common law fraud, in connection with the facts alleged in Count IV. Punitive damages were sought, against both defendants, in Counts II and IV-VI; treble damages and attorneys fees were sought against both in Count V.

Cohen, who was represented by separate counsel, successfully moved to dismiss Counts IV-VI as to him (R. 9/1316, 1345). Schropp then filed an amended complaint (R. 9/1346), the first six counts of which were identical to the original complaint except that Cohen was removed as a named defendant in Counts IV-VI. Counts VII-IX were added against Cohen, repeating the allegations of Counts IV-VI and adding further detail with respect to Cohen's statements. A new Count X was added, joining Mercedes Benz of North America ("MBNA") as an additional defendant and seeking rescission as to MBNA based on breach of warranty as to the car's finish. The case

thus came to issue.

Fairly early in the preparation stages MBNA settled Schropp's claim against it by re-purchasing the car at its original cost to Schropp. This settlement rendered moot the rescission claim in Count I, and Schropp voluntarily dismissed that count. The case thus came on for jury trial before Hon. Gasper. J. Ficarrotta on April 7, 1992 on the issues framed by Counts II-IX (which for practical purposes can be considered as identical to Counts II-VI).

At trial the sharpest legal dispute between the parties related to the status of Robert Cohen. Schropp contended that at the relevant times Cohen was a "managing agent" of Crown, as the term is used in Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985), under which Crown could be held liable in punitive damages for Cohen's conduct, without a showing of independent corporate fault as required in vicarious liability cases by Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). Schropp submitted a requested instruction on the issue taken from Florida Standard Jury Instruction 6.12b. Crown, on the other hand, argued that Cohen was not a managing agent and requested an instruction under Mercury Motors. Both sides presented considerable testimony about the nature and extent of Cohen's duties, responsibilities, and authority. Although Judge Ficarrotta expressly declined to rule on whether Cohen was a managing agent, (R. 8/1041) he granted Schropp's requested instruction, identifying Cohen expressly and solely as the person on the basis of whose acts Crown could be held liable for punitive

damages, in the event he were found personally liable for such damages. Schropp's requested instruction, given three separate times, is as follows:

> If you find for the Plaintiff and against the Defendant Crown Eurocars, Inc., and you also find that the greater weight of the evidence shows that the conduct of Robert Cohen was a substantial cause of loss or injury to the plaintiff and that such conduct warrants an award of punitive damages against him in accordance with the standards I have mentioned, then in your discretion you may also award punitive damages against the defendant Crown Eurocars, Inc. (R. 9/1163, 1170, 1173)

The jury returned a verdict finding against Schropp, and in favor of Crown and Cohen, on Counts II (fraudulent inducement), III (property damage), IV and VII (conversion), and V and VIII (theft). It found in favor of Schropp, and against both Crown and Cohen, on Counts VI and XI (fraud). The case had been submitted on an interrogatory verdict. As to each count seeking punitive damages the jury had to answer a series of questions, first, as to whether Cohen's conduct warranted imposition of punitive damages against him, and in the event of an affirmative answer to that question, to consider whether to impose punitive damages against Crown. The jury answered the questions pertaining to Counts VI and IX as follows:

> 7. Do you find from the evidence, as claimed by the Plaintiff, that the Defendants committed a fraud against Plaintiff after the date of sale?
>
> x
> YES
>
> _____
> NO

8. [assessed damages of $500]

9. If you answered YES to Question #7 above, do you further find from the evidence, as claimed by the Plaintiff, that the Defendants, or any of them, acted with fraud, actual malice, deliberate violence or oppression, or such gross negligence as to indicate a wanton disregard for the rights of Plaintiff with respect to the fraud after the date of sale?

Answer YES or NO as to each Defendant

Crown Eurocars, Inc.

x	
YES	NO

Robert Cohen

	x
YES	NO

10. [awarded punitive damages against Crown of $200,000; none against Cohen] (R. 10/1596-1597)

Immediately on receipt of the verdict, and before the jury was discharged, the following exchange occurred.

MR. KRAMER: May it please the Court. Oh, you don't want to take motions on the record now?

THE COURT: If you want to make a motion on the record, I'm not going to rule on your motions at this time.

MR. KRAMER: Okay.

THE COURT: If you want to make one, if you feel it's appropriate to make it now, feel free to do so.

MR. KRAMER: Fairly briefly.

THE COURT: Yes, sir. Go ahead.

MR. KRAMER: I think first of all, the verdict may be inconsistent, and second of all, I move to reduce the punitive damages to

> three times the actual damages and move for a new trial or judgement notwithstanding the verdict. In the alternative -- actually, I move for judgement notwithstanding the verdict, and in the alternative, for a new trial.
>
> THE COURT: If you wish to make those motions, I'll suggest something. You make them in writing, and you specifically state the basis, the grounds and the reasons for the motion. You know, you're not waiving anything. (R. 9/1216-17)

Crown thereafter filed written motions, including a motion in arrest of judgment, urging that Cohen's exoneration of any conduct warranting imposition of punitive damages required that judgment be entered for Crown on punitive damages. Judge Ficarrotta denied the post-trial motions, and the appeal followed.

The Second District Court of Appeals reversed the judgment for punitive damages and directed entry of judgment for Crown. It affirmed the $500 judgment for compensatory damages against Crown and Cohen, although it described Schropp's supporting evidence as "minimal" (slip op. at 10). In its opinion the Court made the following rulings: 1) Cohen's exoneration of any conduct supporting an award of punitive damages required entry of a judgment on punitive damages in favor of Crown, in the absence of participation by a "managing agent" of Crown in Cohen's tortious conduct; 2) Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985) does not espouse or support a basis for corporate liability for punitive damages distinct from that set forth in Bankers Multiple Line Insurance Co. v. Farish, supra, i.e., participation in the conduct claimed to warrant punitive damages by

a principal owner or managing agent of the company; 3) assuming a separate theory of corporate liability under Winn-Dixie Stores, Inc. v. Robinson, supra, as urged by Schropp, there was insufficient evidence to support liability for punitive damages under it.

Schropp filed motions for re-hearing and re-hearing en banc, which were denied. His motion to stay the mandate was also denied; the mandate has now issued. Schropp has filed a motion in this Court to recall the mandate of the Court of Appeals, which motion is pending as this brief is filed.

Schropp also filed in the Court of Appeals a motion for certification, which was granted in part, limited to the question whether Winn-Dixie Stores v. Robinson, supra, authorizes a different basis for corporate liability for punitive damages than does Bankers Multiple Line Insurance Co. v. Farish, supra.

B. Material Facts

Before discussing the relevant evidence, we must address Schropp's treatment of it in his brief. He treats the case as though he had prevailed on all counts, reciting as "facts" resolved in his favor all the evidence on all counts he presented to the jury, regardless of Crown's and Cohen's evidence that in many respects sharply conflicted with his. Schropp violates the fundamental rule that the evidence regarding any contested claim must be considered on appeal in the light most favorable to the prevailing party. On Counts II-V, Cohen and Crown were the

prevailing parties. They are entitled to have the evidence relating to these counts (at least evidence relating solely to these counts) considered in the light most favorable to them. Consequently we protest Schropp's treatment of the evidence about the negotiations for the purchase of the car and related events prior to his demand for refund or replacement.

Schropp justifies treating himself as the prevailing party on Counts II-V by making the astonishing assertion that the verdicts in favor of Crown and Cohen on those counts are attributable to the jury's conclusion that his settlement with MBNA meant that he had suffered no damage on these claims, even though they fully credited his evidence and rejected Crown's and Cohen's on all of them. Such an argument, first is illegitimate. Second, Schropp claimed at trial that he had suffered additional damages over and above the price of the car, in connection with each of those counts except III (property damage) and so argued to the jury. Counsel for neither Crown nor Cohen argued or intimated that the MBNA settlement rendered any of Schropp's claims moot. There is no need to enlarge this brief by stating in detail the evidence presented by Crown and Cohen substantially impeaching Schropp's account of these events. It is necessary only, as did the Court of Appeals, to acknowledge that Schropp's claims in Counts II-V must be treated as unproven, and to address in detail those points on which Schropp relies in his brief of his disputed evidence as to those events. The Statement of Facts in the opinion of the District Court of Appeals accurately and concisely summarizes those events to the

extent their understanding is necessary for adjudication of the issues presented by Schropp to this Court.

Charles Schropp, a Tampa lawyer, arrived at the Crown showroom on a Saturday afternoon in October 1988 in the market for a new car and in a mood to negotiate. Hard bargaining ensued between Schropp and Cohen (and Paul Miller, a salesman under Cohen's supervision). Both sides used all the leverage they could muster to close a $500 price gap, but nothing said or done by either Miller or Cohen arose (or, perhaps more accurately, descended) to the level of willful deception or misstatement of material facts, and there is no need to detail or characterize Schropp's negotiating tactics. Schropp, given the option of letting the car stay on the lot for detailing on Monday or taking possession immediately and having it returned to the dealership for detailing later, chose to drive it away.

After the car was picked up for detailing Schropp complained that he observed blemishes in the exterior finish consisting of discolorations (most noticeable under florescent lighting).[1] Two

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[1] There was much dispute about the cause of any blemish on Schropp's car's finish. Schropp claimed that it was environmental damage, i.e., damage suffered pre-delivery from exposure to environmental hazards, which was the basis for his breach of warranty claim against MBNA; he testified that he had been so advised by Klaus Lesnich, a service technician who had worked on his car. Crown presented evidence to the effect that whatever blemish Schropp and his wife could see on the car resulted from a pollution problem in Schropp's own home irrigation system, coupled with the fact that he never washed his car or garaged it.

Schropp's brief devotes considerable attention to this evidence (although it never discusses its actual content), describing it as Crown's "spying on its customers" and evidence of conduct by Crown continuing up to the time of trial that would support an award of punitive damages. The claim of "spying" appears to derive from the fact that, during trial preparation, Crown sent a photographer past Schropp's house to photograph his

subsequent visits to Crown's service department failed to restore the finish to Schropp's satisfaction.[2] Schropp made a written demand, near the end of November, that Crown take the car back and either refund his money or provide a replacement.

Following Schropp's demand Cohen, either directly or through a subordinate, asked Schropp to bring in the car one last time for inspection by a representative of MBNA. In a later conversation Cohen, Schropp testified, said that an MBNA representative had inspected the car and had authorized Crown to treat the finish with a special process that no dealer had previously applied and had been previously used only at MBNA's importing facility, and that, if the process did not satisfy Schropp, Crown would take the car back. Schropp agreed, and the car was treated. Schropp testified that the treatment on this occasion had left the finish improved but had not eliminated the spots.[3] (R. 2/280-290)

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mineral-stained driveway. (Just before the trial started, Schropp had thoroughly cleaned his driveway for the first time since he moved into his home.) To the extent this evidence requires further discussion, it will be addressed in the argument of this brief.

[2] Schropp's wife testified that on the first occasion, after having delivered the car, she spoke to Domer Woolridge, Crown's service manager, who told her that he could see someone buffing the car and that it would be ready in an hour. When she arrived at the dealership she was told by the service technician that the buffer had broken and the car would have to be returned later. Schropp relies heavily on this testimony in his brief. We will discuss its significance at an appropriate portion of the argument herein.

[3] Schropp devotes a large section of his brief to a preliminary interrogatory response by Crown, made without input from Cohen (who was working for another dealer and represented by separate counsel and had not theretofore discussed the case with Crown) that it had no knowledge of Cohen's statements and no records disclosed after a preliminary search indicating the performance of any "special process" on Schropp's car. Schropp

The "special process" involves application of Finesse, a 3M product that had just been introduced and was intended only for use by professionals. Witnesses for both Schropp and Crown testified that Finesse represented a breakthrough in the refinishing products business because it was the first such product that did not damage the "clear coat" final finish on Mercedes cars. (R. 1/100-101, 8/905-930) The actual work was done by Frank Butler, Crown's detail manager at the time. (R. 8/901-910) Schropp testified that, despite the improvement, he was not satisfied, but he was told that Cohen had looked at the car and said that it was fine and that Crown would not take it back.[4]

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argues that this interrogatory answer demonstrates that Crown never performed any "special process" on his car, notwithstanding his own testimony that refinishing work was in fact done, and had materially improved the finish. On this argument, he attempted unsuccessfully at trial to exclude the testimony of Frank Butler, Crown's (former) detail manager who had done the work. He likewise unsuccessfully urged his point on the Court of Appeals. We do not understand how Schropp could claim in good faith that Crown was barred by its early interrogatory answer, expressly stated to be the product of only preliminary investigation and without input from Cohen, and will not further address the point.

[4] Schropp and his wife are the only persons who claim ever to have seen the blemishes on the car's finish. Even Gene Perez, Schropp's expert witness who testified about the Finesse process and who had repaired the car after Schropp had backed it into his wife's car, testified that he had seen no indication of environmental damage to the finish, and that such damage should be apparent even to a lay person.

ISSUES ON APPEAL

I. Whether the Second District Court of Appeals correctly held that the standard for imposition of punitive damages on a corporation under Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (1985) is identical to the standard under Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985).

II. Whether, in the event of an affirmative answer on issue #I, this Court should determine that it has jurisdiction.

III. Whether (if this Court has jurisdiction) the District Court of Appeals was correct in holding that the evidence was insufficient to support a judgment for punitive damages against Crown under the theory of liability urged by Schropp.

IV. Whether (if this Court has jurisdiction) Crown preserved for appeal its objection to the verdict for punitive damages against it.

SUMMARY OF ARGUMENT

The question certified to this Court, whether Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985) and Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (1985) set forth separate and distinct bases for corporate liability for punitive damages, is the sole basis for its discretionary jurisdiction over the judgment of the Court of Appeals. Although Schropp may submit any argument on the merits he wishes, this Court must first consider its jurisdiction before addressing any such argument. This Court should determine that it lacks jurisdiction on the ground that the Court of Appeals correctly interpreted and applied Winn-Dixie Stores, Inc. v. Robinson, supra, and there is therefore no conflict between its decision and Winn-Dixie. The petitioner's burden to show conflict is no less necessary when this Court's discretionary jurisdiction is invoked under a certified question than when it is invoked solely by Petition for Discretionary Review.

Schropp's argument that Winn-Dixie authorizes a different basis for imposing punitive damages on a corporation than does Bankers Multiple Line, i.e., participation in the conduct allegedly warranting punitive damages by a principal owner or managing agent of the company justifies punitive damages without "independent corporate fault", is based on blatant misreading of a single phrase from the opinion, i.e., that in Winn-Dixie the case proceeded at trial "on a theory of direct liability". Schropp then elaborates,

without citing any supporting authority, the theory of "direct liability" that Winn-Dixie supposedly approved, a sort of generalized malice to be inferred from the defendant's "corporate culture." To the contrary, the Court's statement in Winn-Dixie simply reflected the fact that there was no trial issue in that case about the authority of at least one participant in the wrongful conduct to bind Winn-Dixie, and Winn-Dixie therefore could not question it on appeal. The issue at trial, and for which Winn-Dixie is most commonly cited (except in citations in parallel with Bankers), was whether the acts in question sufficiently evidenced malice that punitive damages were warranted at all. "Direct liability" is not a theory of liability distinct from Bankers; Bankers is the definitive decision on direct, as distinct from vicarious, liability.

Because there is no conflict between the decision below and Winn-Dixie, the Court should so state and decline jurisdiction to consider the merits of any issues advanced by Schropp. Schropp concedes that if Winn-Dixie does not offer him a distinct theory of recovery he cannot prevail, since he does not contend that any other representative of Crown who could be deemed its alter ego participated in the acts of Cohen that were said to warrant punitive damages.

Assuming, however, that Schropp is correct, the Court of Appeals correctly held that he had not presented evidence that would support a judgment for punitive damages under that theory. Aside from repeated invocations of trial testimony about being

defrauded in negotiations by Cohen, Schropp adduces only one incident involving alleged misconduct by any other Crown employee, which is both irrelevant and trivial. The statement of Domer Woolridge to Mrs. Schropp on the first service visit is relevant, if at all, only to Count I, which Schropp dismissed before trial. It has nothing to do with the merits of any of Schropp's claims but bears only on the collateral issue of whether Woolridge deceived Mrs. Schropp about activity on the car on that visit. Furthermore, Schropp's evidence is not inconsistent with its truth; the mechanics may have been working on the car as Woolridge spoke, before the machine broke. All of the other conduct Schropp adduces as evidence of this "culture" consists of arguments of counsel at trial and on appeal, which, even as he characterizes them, have nothing to do with the propriety of punitive damages against Crown.

Finally, Crown preserved for review the issue of its entitlement to judgment based on the jury's exoneration of Cohen by contemporaneous objection made before the jury were discharged. There was no occasion for Crown to request that the jury be sent back for further deliberations; there was nothing on which the jury could properly re-deliberate. Crown's liability was derivative through Cohen. Although the jury could have awarded punitive damages against Cohen but not Crown, it could not award punitive damages against Crown but not Cohen; the trial court so instructed. Under no circumstances would the Court have had authority, after receiving the verdict in favor of Cohen, to require the jury to re-deliberate on that verdict. Cohen would rightly have objected to

any request, whether by Crown or Schropp, for jury reconsideration of the verdict in his favor.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT THE STANDARD FOR CORPORATE LIABILITY FOR PUNITIVE DAMAGES UNDER WINN-DIXIE STORES, INC. v. ROBINSON, 472 SO.2D 722 (1985) IS THE SAME STANDARD AS ENUNCIATED IN BANKERS MULTIPLE LINE INSURANCE CO. V. FARISH, 464 SO.2D. 530 (FLA. 1985).

The necessary starting point for inquiry as to whether Winn-Dixie offers a different route to the corporate treasury than does Bankers is the decisions themselves, with particular reference to what was at issue in each case. The primary focus of Bankers was the level of authority and responsibility an agent must have before his conduct is deemed in law to be that of his principal. Farish had sued Bankers and its president, McArthur, for business torts. McArthur died, and his estate was substituted as a defendant. McArthur had been the primary actor in the tortious conduct, although he had been joined to some extent by another officer. At trial Farish obtained verdicts for compensatory and punitive damages against Bankers, but the jury returned a verdict for McArthur's estate as to both actual and punitive damages. Bankers argued that the judgment in favor of McArthur's estate required a judgment in its favor.

The Court acknowledged the general principle that exoneration of an agent necessarily exonerates the principal, but held that Bankers fell within the recognized exception that, where the principal personally participates in the conduct at issue, he may

be liable notwithstanding the agent's exoneration.[5] McArthur had not acted alone in interfering with Farish's contract but had been joined by another officer, on the basis of whose conduct Bankers could be held liable.

Bankers also argued that the judgment for punitive damages was improper because there was no "independent corporate fault" in conjunction with the contract interference, relying on Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). The Court rejected this argument, stating that Mercury Motors was not intended to apply to situations "where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation." 464 So.2d at 533.

In Winn-Dixie there was no issue at trial as to vicarious liability. The parties appear to have agreed that the conduct of the store manager[6] was attributable directly to Winn-Dixie. As this Court noted, the case had been "pled, tried, and submitted to the jury as involving direct corporate activity and vicarious liability was not an issue." 472 So.2d at 724 After trial, however, Winn-Dixie successfully moved to set aside the judgment for punitive damages on the ground that no independent corporate

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[5] This is not really an exception, but rather a situation outside the scope of the rule. If the principal has personally participated in the wrongful conduct at issue, he is liable irrespective of whether an agent is also guilty. The exoneration of the agent simply eliminates any basis for liability other than the principal's own actions.

[6] So referred to in the concurring opinion of Justice McDonald; the opinion of the Fourth District Court of Appeals refers to him as an assistant store manager.

fault had been shown under Mercury Motors. The Court of Appeals held that, because the case had not been tried on a Mercury Motors theory, Winn-Dixie could not argue post-trial that Mercury Motors controlled. The other issue in Winn-Dixie had to do with whether the store manager's conduct was sufficiently egregious to justify punitive damages, and if so whether the award was unreasonably high. To that issue the Court devoted its largest discussion, holding that the evidence supported a finding that the conduct met the required level of malice but directing reinstatement of an order of remittitur.

Schropp seizes on this Court's common-sense ruling, that a party who has tried a case on one theory cannot attack the judgment after trial on the basis of an antagonistic theory, as creating a whole new form of direct corporate liability for punitive damages. Under his theory one may pick through the evidence at trial, regardless of connection with the acts claimed to have warranted punitive damages, and may aggregate all incidents of claimed misconduct as exhibiting a "corporate culture" that justifies imposing punitive damages on the company, even if on no individual. Merely to state the proposition is to refute it. This Court did not preside at the birth of a new theory of corporate liability in Winn-Dixie; it simply held the defendant to its trial election to proceed on a theory of direct rather than vicarious liability.

Schropp argues as though Bankers did not involve direct liability. To the contrary, Bankers is the definitive case on direct liability for punitive damages; that is its whole point. A

corporation may be held liable for punitive damages based on the acts of an agent warranting punitive damages, without a showing of independent corporate fault as required in cases of vicarious liability, if the agent whose conduct resulted in imposition of punitive damages is a primary owner or managing agent of the corporation, i.e., a person of such a high level of authority and responsibility that his acts and statements are deemed at law to be those of the corporation.[7] In short, direct liability is non-vicarious liability. Had the jury found that Cohen's conduct warranted imposition of punitive damages against him, Crown could have been held directly liable for punitive damages.

This case, like Winn-Dixie was pled, tried, and submitted on a theory of direct liability, precisely the theory of liability enunciated in Bankers. However here, unlike Winn-Dixie, it was contested. Schropp proceeded on the theory that Cohen was a managing agent of Crown and that his acts and statements were attributable to Crown directly for purposes of both compensatory and punitive damages. He submitted as the appropriate instruction on punitive damages Florida Standard Jury Instruction 6.12b, which is expressly derived from Bankers and which requires its proponent to insert the names of any agents whose conduct is claimed to warrant imposition of punitive damages. Schropp inserted Cohen's name in the appropriate blank. At no time did he submit any other name, or in any way suggest that there was any other person he

[7] "Derivative liability" should not be confused with either direct or vicarious liability. All corporate liability is derivative but may be either direct or vicarious.

claimed to be a managing agent of Crown who had participated in any wrongful conduct associated with any claim in the case. Because Crown denied that Cohen was its managing agent, much of the trial was occupied with evidence about the scope of his authority and responsibility. No such evidence was presented regarding any other person whose name figured in any way in the trial.[8] The judge, although expressly declining to rule that Cohen was a managing agent, nevertheless rejected Crown's Mercury Motors vicarious liability instruction and instructed the jury that if they found that Cohen's conduct warranted imposition of punitive damages against him, then and only then they could consider whether in their discretion to award punitive damages against Crown.

To the extent that Winn-Dixie is applicable here, it is in its holding that a party who has tried a case on one theory may not urge post-trial an antagonistic theory. For Schropp to pursue Crown at trial on the theory that Cohen was its managing agent, and that Cohen's conduct was attributable to Crown directly without independent corporate fault, and then to argue on appeal that Crown should be exposed to punitive damages without Cohen's fault, is a monstrous presumption that the law does not countenance.

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[8] Schropp quotes a few extracts from his closing argument as indicating that his newly minted theory of "direct liability" was submitted to the jury, albeit without any instructions or verdict forms embodying it. We are unsure how the fact that in closing argument counsel for Schropp called all the defense witnesses liars bears on any issue except his professionalism. In any event, the quotations do not derive from discussion about punitive damages. When he discussed punitive damages, counsel for Schropp mentioned no one's name but Cohen's, and he urged that the jury impose damages on Cohen (in the range of $1,000 to $5,000) as a predicate for a requested $700,000 award against Crown.

Schropp's theory of "direct liability" has not found recognition in any decision of any court. No decision has cited Winn-Dixie as supporting any such theory of liability. Winn-Dixie is most commonly cited on the question of the level of malice required for imposition of punitive damages. Every decision that has ever cited Winn-Dixie in connection with an issue relating to derivative liability (either direct or vicarious) for punitive damages has cited it in parallel with Bankers as standing for the same proposition, namely, that independent corporate fault is not required where the acts primarily causing imposition of punitive damages are those of a principal owner or managing agent. See Rety v. Green, 546 So.2d 410 (Fla. 3d DCA 1989); S.H. Investment & Development Corp. v. Kincaid, 495 So.2d 768 (Fla. 5th DCA 1986); Montgomery Ward & Co. Inc. v. Hoey, 486 So.2d 1368 (Fla. 5th DCA 1986); McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So.2d 535 (Fla. 3d DCA 1986).

In In re Standard Jury Instructions (Civil Cases 88-3), 540 So.2d 825 (Fla. 1989) this Court approved amendments to the Florida Standard Jury Instructions, specifically including Amended Instruction 6.12b and 6.12c relating to imposition of punitive damages on corporations. Instruction 6.12b is the same instruction tendered by Schropp and given to the jury. Instruction 6.12c is a vicarious liability instruction based on Mercury Motors, for cases in which Instruction 6.12b is not applicable. Both Bankers and Winn-Dixie are cited as the basis for Instruction 6.12b. Although the approval of an instruction does not, of course, preclude

subsequent litigation about its application or sufficiency in a given case, it is significant that the Court did not give any hint of a distinction between Bankers and Winn-Dixie.

We agree that the Court meant what it said in Winn-Dixie, that Mercury Motors is not applicable to cases tried on a theory of direct liability. But that is not what Schropp claims it said. The governing principle in that statement is not about attribution of liability but about waiver or election; a party is held on appeal to his deliberate choices made at trial. That is one of the founding principles of the system of appellate review. It does not aid Schropp here. The Court of Appeals correctly held that Winn-Dixie does not endorse a basis for direct corporate liability for punitive damages distinct or different from Bankers.

II. THIS COURT SHOULD DETERMINE THAT THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND WINN-DIXIE STORES, INC. V. ROBINSON, 472 SO.2D. 722 (1985), AND ON THAT BASIS DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION.

Schropp does not discuss this Court's jurisdiction in his brief, except perhaps by implication. He seems to assume that the certified question entitles him to a determination on the merits by this Court as to any issue that was involved in the appeal. That is not the case. This Court's jurisdiction on certified questions is discretionary. The fact that a question is certified does not, ipso facto, obligate this Court to undertake full-scale review. It may conclude that the question certified was not of great public importance, or it may conclude that the question has been already answered correctly and does not require further judicial labor. Crown submits that is the case here. The basis for the certification by the Second District Court of Appeals was Schropp's assertion that its decision conflicted with Winn-Dixie. As we have demonstrated above, there is no conflict; the two decisions are in entire harmony. Winn-Dixie does not espouse a "corporate culture" theory of punitive damages independent of any wrongful conduct by someone deemed to be the alter ego of the corporation. That being the case, there is no occasion for this Court to probe the evidence, as did the Court of Appeals, to determine whether it would justify imposing punitive damages on the basis of that non-existent theory. The Court below concluded, after exhaustively reviewing the evidence, that none of Schropp's claims, singly or collectively, would support a finding of malice even under the

theory for which he contended. Although Crown's brief addresses that issue below, this Court need not replicate the labor of the Court of Appeals, where it is clear that the Court of Appeals did not misread Winn-Dixie and was not drawn into any conflict. Crown submits that this Court should, having determined that the Court of Appeals correctly read Winn-Dixie, declare the question certified to have been correctly answered by the Court of Appeals, declare no conflict between the decision below and Winn-Dixie, and dismiss the appeal for lack of jurisdiction.

III. ASSUMING THAT WINN-DIXIE STORES, INC. V. ROBINSON, 472 SO.2D 722 (1985) AUTHORIZES A THEORY OF LIABILITY FOR PUNITIVE DAMAGES DISTINCT FROM BANKERS MULTIPLE LINE INSURANCE CO. V. FARISH, 464 SO.2D 530 (FLA. 1985), THE COURT OF APPEALS CORRECTLY HELD THAT SCHROPP'S EVIDENCE WOULD NOT SUPPORT PUNITIVE DAMAGES UNDER ANY SUCH THEORY.

At the outset we emphasize that our argument on this issue, like the Court of Appeals' analysis of it, is hypothetical. We acknowledge no validity in Schropp's reading of Winn-Dixie. We believe, as the Court of Appeals held, that a managing agent must have participated in the conduct claimed to warrant punitive damages (direct liability) or that the corporation was in some way independently at fault in connection with the conduct (vicarious liability). The remaining arguments in this brief assume that Schropp is correct in asserting there is a theory of corporate liability for punitive damages that requires neither. Even on that assumption, there is no basis for disturbing the finding of the

Court of Appeals that Schropp presented insufficient evidence to justify punitive damages under such a theory.

Schropp relies primarily on the evidence regarding his negotiations with Cohen leading to the sale. We have already addressed the impropriety of his reliance on this evidence for any purpose, inasmuch as all claims relating to the negotiations were rejected by the jury. Schropp's attempt to treat himself as the prevailing party on Count II, especially, is ludicrous. His suggestion that the jury credited his evidence but decided that, in view of his settlement with MBNA, he had suffered no damage is at odds with settled principles regarding consideration of verdicts. Furthermore, the same reasoning would have required the jury to find against him on Count VI as well, since the object of the fraud alleged in Count VI was to induce Schropp to revoke his prior demand for refund or replacement and to agree to keep the car. The settlement with MBNA would have mooted that claim as much as it would have mooted the fraud in the inducement claim in Count II. The only sensible conclusion that can be reached from these verdicts is that the jury concluded that Cohen did not commit any fraud in the negotiations, that Schropp had not suffered any property damage, and that Cohen had not, in asking Schropp to return the car one last time for inspection by an MBNA representative, deprived or intended to deprive Schropp of his property but in some way had misled Schropp in connection with the request. It is therefore unnecessary to respond in detail to Schropp's extended and repeated accounts of the evidence he

presented in support of his claim of fraud in the negotiations. The jury's verdict conclusively resolves those claims against him.

When stripped of the protective cover of the evidence about the negotiations, Schropp can point to only one incident in which he claims that any employee of Crown acted wrongfully in any way. His wife testified that, on the first occasion after the sale when the car was returned to be buffed, Domer Woolridge, Crown's service manager, told her that he could see someone buffing the car and it should be ready within an hour, but when she arrived at the dealership she was told by Klaus Lesnich, a service technician, that the buffer had broken and she would have to bring the car back on another date. This, Schropp urges, demonstrates that Woolridge lied to Mrs. Schropp earlier and justifies punitive damages.

To begin, the claim about Domer Woolridge has nothing to do with Count VI, the only count on which Schropp prevailed even in part. Schropp, sensing this weakness, attempts in his brief to suggest that it was somehow an integral part of Count VI, arguing that the date of sale was a watershed event in the case, with anything that occurred after the date of sale being incorporated somehow into Count VI. That is directly contrary to the record, which shows that it was not the date of sale, but the date on which Schropp made a demand for refund or replacement, that divided all the events according to his theory at trial. The Domer Woolridge incident was pleaded (although Woolridge was not identified) in the complaint as a part of Count I for rescission based on failure to provide a vehicle that met new-car specifications. The paragraphs

referring to this first service visit were not incorporated into any subsequent count, although other allegations in Count I were incorporated in later counts. The only significance of the pre-demand service visits, as Schropp framed the issues, was in Crown's alleged failure to provide a satisfactory car.

Furthermore, the statements of Woolridge and Lesnich as related by Mrs. Schropp are not inconsistent. There was no evidence about when the buffer broke, whether before the work began or after, nor was there any evidence indicating whether the car had been partially buffed or was untouched. Lesnich's statement therefore is entirely consistent with the proposition that, at the time Woolridge spoke with Mrs. Schropp, the work had begun but could not be completed because the buffer broke. From this molehill Schropp attempts to create a mountain of punitive damages. It was not a focus of trial, occupying only a few lines of testimony, and Schropp never mentioned it as a basis for punitive damages in closing argument. (He did refer to the testimony once, briefly, early in closing argument while he outlined the evidence.)

Finally there was no evidence that would justify a conclusion that Woolridge was a managing agent of Crown, and Schropp did not so contend at trial. In his brief Schropp attempts to confer that status on Woolridge by placing the word "manager" in bold type. Bold type will not substitute for evidence, however. At trial Schropp made no inquiry about the nature of Woolridge's duties or the scope of his authority and responsibility. Schropp's evidence

on this point reduces to the fact that Woolridge, an employee whose status is undisclosed by the record, made a statement to Schropp's wife that could as well have been true as false.[9]

The remainder of Schropp's argument about Crown's "corrupt culture" is based not on events in any way related to Schropp's dealings with Crown but to the preparation for and conduct of trial. He berates Crown for "spying on its customers" and for making baseless allegations against him, without ever quite explaining what he means. The reference is to the fact that Crown presented substantial testimony, expert and non-expert, tending to show that any blemish in the finish of Schropp's car was attributable to Schropp's habit of leaving his car parked on the driveway in front of his garage next to sprinkler heads in an irrigation system that suffered from mineral pollution, together with the fact that he never washed it. The "spying" consists of having a photographer record the appearance of Schropp's mineral-stained driveway in the course of trial preparation. It is a mystery how any of this could bear on Schropp's entitlement to

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[9] Schropp devotes much of his brief to castigating counsel for Crown for a portion of the reply brief in the Court of Appeals dealing with this argument. We do not see that this has anything to do with the issue on appeal, but point out that in Schropp's answer brief he referred only to a "repair invoice" that supposedly demonstrated the falsity of Woolridge's statement. As is evident from the reply brief, undersigned counsel took Schropp's reference to mean a repair invoice for the buffer rather than, as it turned out, a repair invoice for the car. Schropp clarified his point at oral argument, resulting in some embarrassment to undersigned counsel but certainly not confusion on the part of the Court of Appeals, which carefully distinguished the events of the various service visits and dismissed Schropp's claim for punitive damages based on Woolridge's statement as too trivial to warrant extended discussion.

punitive damages. Crown possessed competent substantial evidence related to the issue of causation, i.e., that Schropp habitually neglected the care of his car under adverse conditions, conduct which could be expected to have a deleterious effect on the finish and could have caused the condition of which he complained, a condition which no one but himself and his wife claims to have seen.

Although it has nothing to do with punitive damages, Schropp attacks Crown's attorney for having argued on appeal that Schropp entered into a stipulation at trial that resolved the disagreement about instructions. The circumstances are discussed fully at pages 5-10 of Crown's reply brief in the Court of Appeals. We noted there that it was unnecessary for the Court of Appeals to resolve the dispute about the stipulation, and the Court of Appeals did not resolve it, although it commented about the record indications of its probable existence. (Slip Op., note 6 and accompanying text at pp. 11-12) Like all of Schropp's arguments about how the trial and the appeal were conducted, it is irrelevant to the question of whether Crown's employees, individually or collectively, committed conduct warranting imposition of punitive damages.

Schropp's entire argument is founded on misdirection and concealment. The more his claims are exposed as being without evidentiary basis, the louder he shouts. Even under his "corporate culture" theory, there is no basis for punitive damages in this record.

IV. CROWN ADEQUATE PRESERVED FOR APPELLATE REVIEW ITS CLAIM THAT THE EXONERATION OF COHEN REQUIRED JUDGMENT IN ITS FAVOR ON PUNITIVE DAMAGES

We are mystified by Schropp's statement that Crown acknowledged that it did not contemporaneously object to the verdict. The first thing that happened after the verdicts were read and accepted was Crown's objection, quoted in full in the Statement of the Case. Particularly in view of Judge Ficarrotta's express direction not to argue the objection but to file a written motion later, it is impossible to imagine what more Crown could have done.

After the briefs were filed in the Court of Appeals, Schropp recast his claim that Crown had not preserved the issue by filing a Notice of Supplemental Authority citing Adoro Marketing, Inc. v. daSilva, 623 So.2d 542 (Fla. 3d DCA 1993) for the proposition that Crown should have asked that the jury be returned to the jury room for further deliberation on whether to impose punitive damages against Cohen. Assuming the correctness of Adoro Marketing on the facts before that Court,[10] it obviously has no application here. Adoro Marketing did not deal with derivative liability, i.e., a situation where the liability of one party depends on the liability of another. It involved one plaintiff and one defendant, with

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[10] Adoro Marketing appears to be in conflict with cases such as North American Catamaran Racing Assn., Inc. v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1985), which held a defendant entitled to judgment on punitive damages on closely similar facts, where a jury had returned verdicts that were inconsistent on alternative but overlapping theories of liability.

multiple theories of liability on one set of facts. The jury returned a verdict finding no design defect but negligence in manufacture, where the evidence of negligence consisted essentially of design defect. The Court held that, because further deliberation could have clarified what the jury actually found, the defendant should have requested such an attempt.

Regardless of the propriety of jury reconsideration in those circumstances, Schropp's attempt to import it into a case of derivative liability founders on the fact that such reconsideration could not have been limited to issues between Crown and Schropp; the jury must reconsider their verdict in favor of Cohen absolving him from liability for punitive damages. But what of Cohen's rights in all this? He had a verdict in his favor, which had been accepted after the jurors swore that it was their true verdict. By what right could the judge, at the suggestion of either Crown or Schropp, have nullified Cohen's verdict and required the jury to reconsider whether they really intended to exonerate him from punitive damages? The Court in Adoro Marketing itself distinguished the situation there from situations involving derivative claims, where either the plaintiff's right to relief or the defendant's exposure to judgment depends on resolution of a claim involving another person. The only lawful way to obtain reconsideration of the verdict was for Schropp to appeal from it, which he did not do.

Schropp points to Crown's acquiescence in the verdict forms, as though the problem derived from the forms. It is quite true

that Crown agreed to have separate lines for Cohen and itself, but that has nothing to do with the issue. Separate lines were required because, as expressly stated in the instructions, the jury had authority to impose punitive damages against Cohen and not against Crown; it did not, however, have authority to impose punitive damages against Crown and not against Cohen. There was nothing to reconsider or clarify about the verdict as to Cohen; the jury expressly found that he did not commit any conduct warranting imposition of punitive damages against him. Having so found, they had no authority to consider punitive damages against Crown. That was the thrust of Crown's objection. There was nothing to reconsider, and any attempt to require reconsideration would have been an egregious violation of Cohen's rights.

CONCLUSION

For the reasons stated herein, respondent Crown Eurocars, Inc. respectfully requests this Court to determine that the Second District of Appeals correctly interpreted and applied this Court's decisions in Bankers Multiple Line Insurance Company v. Farish, 464 So.2d 530 (Fla. 1985) and Winn-Dixie Stores, Inc. v. Robinson,472 So.2d 722 (1985) and that there exists no conflict between the opinion below and this Court's decisions, and thereupon to dismiss the appeal for want of jurisdiction. Alternatively, in the event the Court assumes jurisdiction, respondent respectfully requests

that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Raymond T. Elligett, Jr., Esquire, Schropp, Buell & Elligett, Landmark Centre, Suite 2600, 401 E. Jackson Street, Tampa, Florida, 33602-5226, Attorney for Appellee; ~~Bridget L. Ryan~~, Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350; and Larry D. Goldstein, Esquire, 600 49th Street North, Suite A-1, St. Petersburg, Florida 33710, Attorney for Robert Cohen, this 6 day of June, 1994.

No longer w/comptroller's office - See Not. of Appearance

CLAUDE H. TISON, JR.