IN THE SUPREME COURT OF FLORIDA

CHARLES P. SCHROPP,

Petitioner,

vs.

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

Respondents.

CASE NO. 83,522

ON CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Charles P. Schropp, the plaintiff in the jury trial below, is referred to as "Schropp."

Respondent, Crown Eurocars, Inc., a defendant below, is referred to as "Crown."

References to the record on appeal are designated by the prefix "R."

References to the Second District's decision are designated by the prefix "*Crown op.*" The opinion is included in the Appendix, along with excerpts of Crown's briefs and pleadings in the Second District which are cited in this initial brief.

STATEMENT OF THE CASE AND FACTS

As the Second District realized, the evidence, and all inferences which can be drawn from it, must be viewed in the light most favorable to Schropp who prevailed in the jury trial below (*Crown op.* 2). Because the Second District's recitation of the facts contains some mistakes and omissions, Schropp sets forth the facts surrounding Crown's sale of the automobile and its subsequent actions.

The jury in this case heard evidence of a consistent pattern of fraud and deceit which infected the entire Crown organization, to the point that virtually every Crown employee with whom Schropp or his wife had significant contact, including several Crown managers, made misrepresentations to the Schropps[1]. Based on the evidence of what amounted to a corporate culture of dishonesty at Crown, the jury awarded Schropp punitive damages based on direct corporate liability as authorized by this Court's decision in *Winn-Dixie Stores, Inc. v. Robinson*, 472 So.2d 722 (Fla. 1985). After originally reversing the punitive damage award on the grounds that the award could not stand because the jury had not also found Crown's sales manager liable for punitive damages, the Second District certified the case to this Court.

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[1] See the discussion below on one honest employee, Klaus Lesnich.

1. Crown's misrepresentations to Schropp and the environmental paint damage.

The events relevant to this suit began in October, 1988, when Schropp visited the Crown Mercedes-Benz dealership in St. Petersburg (R 122). Schropp negotiated with a salesperson, Paul Miller, and the sales manager, Robert Cohen, regarding the purchase of a vehicle (R 246-249, 257). At Crown's suggestion, Schropp drove a car he was considering purchasing to Tampa to pick up his wife, both then returning to the dealership (R 245, 254).

Cohen and Miller made several misrepresentations to induce Schropp to buy the car. These included false statements that Crown would provide the first two service visits, which would otherwise cost $180, at its expense, when these visits were free to every Mercedes-Benz purchaser (R 127, 258, 293). Crown and Cohen also misrepresented that the decal pin striping on the car was hand-painted, even placing the notation that the stripe was "hand-painted" on the purchase invoice (R 250, 251, 376, 2049). Crown and Cohen made further misrepresentations regarding the origin of the vehicle, the cost of the vehicle, the profit being made on the vehicle, and certain equipment on it (R 248, 249, 251, 369, 2060). After negotiations in which these misrepresentations were prominent in inducing Schropp to purchase, Schropp and Crown reached an agreement to buy the vehicle (R 258).

After Schropp's purchase, the dishonesty which had permeated the sales negotiations continued unabated. One of Crown's first

misrepresentations after the sale was to back-date the certificate certifying transfer of the vehicle to Schropp to the prior month, September (R 2063). In addition to the signature of a Crown officer, the certificate contained a false notarization where the notary swore the transfer to Schropp occurred on September 18, over two weeks before he ever set foot on Crown's lot (R 2063). Crown never explained if this fraudulent back-dating was to meet a sales quota, or for some other reason.

Because Schropp bought the car on a Saturday, Crown's service department was closed and, although the car was dirty from sitting on Crown's lot, the Schropps drove the car home prior to the detailing and cleanup (R 261). To assuage their concerns, Cohen and Miller assured the Schropps that Crown employees had thoroughly inspected the car, and it was "perfect" (R 128, 252-53)[2]. The following Tuesday, Crown sent an employee to Schropp's home to pick up the car for a service visit including detailing and cleanup (R 262-63).

Immediately upon return of the car from this first service visit, Schropp noticed big splotches and discoloration on the car's exterior paint finish (R 263). He immediately notified Miller, who advised him these were merely "water spots" and asked Schropp to wait until the thousand-mile service visit when Crown would buff them out (R 264-65).

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[2] It turned out that Crown had not inspected the vehicle, and the document given to Schropp purportedly evidencing Crown's inspection was from another dealership from which Crown had obtained the vehicle in a dealer trade (R 677).

While the car was at Crown for the thousand-mile service visit (the second service visit), Mrs. Schropp telephoned to check on when the car would be ready. Crown's service manager (Domer Woolridge) represented to her he was watching someone buff the car to take care of the spotting problem as he spoke to her on the phone (R 133, 941). However, when Schropp went to pick up the vehicle after the service visit it had not been buffed and the spots remained (R 135, 269). Another service department employee called Mrs. Schropp and told her Crown had not buffed their car because the buffer was broken (R 134). The repair invoice for this service visit noted the problem with "spots on paint" and also stated, "UNABLE TO BUFF AT THIS TIME -- BUFFER BROKEN." (R 2051).

At trial and then in its reply brief, Crown contended it had two buffers in the fall of 1988 (R 930; A 24). Crown made this assertion in an attempt to claim that Woolridge may not have lied when he claimed he was watching the car being buffed, even though one buffer was broken. Crown evidently forgot its own sales invoice clearly stated the car had not been buffed (R 2051). Thus, Crown did not disprove Woolridge's lie, but simply told another lie in the process. In other words, Crown could have buffed Schropp's car with its second buffer, but did not do so, perhaps in a deliberate effort to conceal that the so-called "water spots" were in fact a paint defect.

After the second service visit, Schropp wrote to Crown detailing the paint problem and other concerns (R 271-73, 2086). The letter noted Crown's claim that it had been unable to buff the

car because the buffer was broken (R 272, 2086). Crown's allegedly broken buffer and its asserted inability to obtain a key for the vehicle's wheel locks delayed Schropp's third service visit for a month (R 2088, 2093-94).

Throughout this period, Crown repeatedly misrepresented to Schropp there was no pollution damage, but only water spots or nothing on the paint and that any problem would be completely corrected when its buffer was repaired and the car could be buffed (R 265, 270, 280, 629, 659). However, Crown's own employee (Klaus Lesnich) subsequently admitted that acid rain had caused the paint damage (R 138, 277). Likewise, the manufacturer, Mercedes-Benz, stated in response to requests for admissions that the car had sustained environmental damage to its finish (R 973-74; see also the manufacturer's diagram from its inspection which indicated "fallout etching" i.e., environmental damage, on the car's surface, R 2085).

On the third service visit, the vehicle was finally buffed. However, while the car was still at Crown, Crown's service employee, Klaus Lesnich, called the Schropps and told them Crown had buffed the car and done the best they could, but the damage to the paint was pollution damage (R 138, 277). He volunteered that, if Schropp was not satisfied, the next thing to do was to repaint the car, which he didn't recommend because factory paint is always better than a repainting job (R 138, 277). When Schropp got the car back, the spots had largely been removed, but the pitting and etching in the paint surface remained (R 139, 279).

Upon receiving the car back from the third service visit, Schropp immediately relayed Lesnich's conversation regarding pollution damage to Miller (R 280). Schropp also told Miller that he did not want Crown doing any further work on the car, did not view it as a new Mercedes, and wanted Crown to take the car back (R 280).

Several days later Miller called back, indicated he had spoken with Cohen and that he was calling on Cohen's behalf (R 281). He represented to Schropp that Crown had made arrangements to have a representative of Mercedes-Benz look at the car with respect to Schropp's request that Crown re-purchase the car (R 281-282). This, it turned out, was another falsehood.

Based on representations that Crown intended to show the car to Mercedes representatives at Crown's grand opening, Schropp agreed to let Crown pick up the car for a fourth service visit (R 282, 285). Miller had promised that Crown would keep the car one or two days at most (R 286). When, after several days, Schropp had not received the car back or received a call from Crown, he tried unsuccessfully to reach Miller and Cohen, but no one returned his calls (R 286).

Schropp then drove to the Crown dealership, where Miller and Cohen told him that the Mercedes-Benz representative had inspected the car and had specially authorized them to perform a special process on the car which had never before been done at a dealership, but had been performed only at the ports of entry where the cars are received into the United States (R 287).

Schropp expressed reluctance, having learned Crown and Cohen had already told him several lies, and initially refused to allow any further work on the car, stating he wanted the car replaced (R 288). Ultimately, Cohen represented to Schropp, "If you're not satisfied with the results of this special process, we will take the car back" (R 288). Based on this representation, Schropp agreed to permit the alleged special process (R 289).

As discussed below, Crown has since told different stories under oath as to whether an alleged "special process" was actually performed. There is no question, however, that anything Crown may have done was not a specially authorized process previously performed by Mercedes-Benz only at ports of entry, as Crown had represented to induce Schropp to leave his vehicle in their possession. Ultimately, after eleven days, Schropp received his car back (R 289). While there was some improvement and the pitting was reduced somewhat, there was still pitting and additional scratches Crown had put on while buffing the car (R 290).

Schropp called Crown to tell it that he was not satisfied and wanted it to buy the car back (R 291). Cohen telephoned Schropp and told him that he thought the car looked fine to him and therefore Crown was not going to replace it (R 291).

2. The suit and pretrial proceedings.

In 1989, Schropp filed suit against Crown and Cohen (R 1303). Schropp amended his complaint and added Mercedes-Benz as a

defendant (R 1346). After acknowledging that the vehicle had sustained pollution damage to its finish (R 973-74, 2085), Mercedes-Benz ultimately settled out of the suit by repurchasing the vehicle for Schropp's full purchase price (R 385-86).

Crown's initial defensive strategy was to claim that the entire story regarding the alleged special process had been fabricated by Schropp. During discovery, Crown swore under oath in an interrogatory response that no special process, or any other process, had been performed on the paint of Schropp's car during the fourth and final service visit and all that was done was to change the wheel locks (R 510-511, 2026-27). Crown at that time claimed Schropp's allegations that Crown said it had performed a "special process" on the vehicle's paint were a lie. Cohen supported Crown's position in an affidavit in opposition to Schropp's motion for summary judgment which stated in pertinent part: "Mr. Schropp's allegations concerning any representations about any special process are unfounded." (R 671).

The interrogatories Schropp propounded requested Crown to:

> "Describe in detail any and all work of any kind which was done to Plaintiff's vehicle by Crown or anyone acting on Crown's behalf between November 28, 1988, and December 9, 1988, and identify all persons or business entities who participated in any such work and all documents or evidence which reflects, relates to or mentions any such work." (R 509).

After Schropp moved to compel as to a non-responsive original answer, Crown filed an amended response which stated as follows:

> Between the dates indicated, the information provided by service invoice number

> 830 is the only information available to this defendant other than the independent recollection of the company that resulted in work being performed thereon of Mr. Klaus Lesnich, service advisor, and Mr. Domer Woolridge, service manager, at the Eurocars dealership.
>
> At the time, they have nothing to add about the description of work that was done as evidenced by service invoice number 830, but have information concerning the condition complained of by plaintiff and plaintiff's own actions surrounding that service visit.
>
> **If there was any additional work as alleged by plaintiff, the defendant is presently without knowledge of any such work but can categorically state that defendant's regularly kept business records which would detail such work show only the services performed on invoice number 830.**
>
> Defendant is without knowledge of what its former employee Robert Cohen may have to add to this response, but defendant's knowledge expressed herein is complete, although investigation is continuing.
> R 510-511 (emphasis added).

Service invoice 830, which was introduced into evidence, showed only the changing of the wheel locks on Schropp's vehicle (R 2026-27)

At trial, Crown attempted to change its position and claimed it had in fact performed a special process on Schropp's vehicle during the fourth service visit. This flip-flop included testimony by the Crown detail department manager who allegedly recalled performing the special process on Schropp's vehicle several years before, even though he detailed hundreds of vehicles each year.[3]

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[3] Frank Butler, (R 905-906, 934, 1756), also referred to as the body shop manager, *Crown op.* 5.

Schropp then published the contradictory interrogatory response to the jury (R 510-11, 673, 906, 916, 926). Confronted with the blatant inconsistency between the sworn interrogatory response and the testimony of Crown's detail department manager, the jury was free to conclude that Crown had lied about the special process at trial, that Crown had lied in filing a false interrogatory response, or both.

3. The trial.

At trial, Schropp and his wife related their experience with Crown as set forth above. This included the numerous misrepresentations on free service visits, the origin of the vehicle, the pinstripe, the cost of the vehicle, the vehicle inspection, the back-dating of the title, and the many misrepresentations made regarding the paint problem (R 127, 128, 248, 249, 250, 251, 252-53, 258, 293, 369, 376, 2060, 2063).

The paint misrepresentations included telling Schropp there was no pollution damage but only water spots (or no problem), the service manager claiming he watched the car being buffed when it had not been buffed, telling Schropp that Crown would buy back the car if he was not satisfied with the alleged special process, that Mercedes-Benz authorized the process, and Crown's contradictory assertions over whether or not a special process was performed to correct the defective paint (R 133, 134, 135, 265, 270, 280, 287, 288, 510-11, 629, 659, 671, 2026-27, 2051).

Crown emphasized credibility in its opening and closing to the jury and it repeatedly attacked Schropp (R 726-731, 1129-1145). Crown tried to argue both that there was no damage to the paint on the car and that, if there were, Schropp's sprinkler system had caused the damage (R 629, 641, 659, 738, 773, 910).

Crown revealed at trial that it had hired a private investigator to follow Schropp and to snoop around his residence (R 763-64, 789). The investigator testified that Schropp's sprinkler system must have been drawing rusty water from an underground well (which was hitting the car), because Schropp's driveway had rust stains, while his neighbors had no rust stains (R 763, 773, 775, 787). However, the prior owner of Schropp's house had service equipment which had stained the driveway (R 159).

More importantly, the Schropps did not even have a well, but used city water for their sprinkler system -- just like their neighbors (R 995). This decimated Crown's rusty water defense.

The willingness of Crown and its employees to say whatever it took was demonstrated at trial by Crown's claim that Schropp's own sprinklers allegedly caused the paint problem. Cohen testified that Crown learned of this early on, when Crown had parked a blue Mercedes in Schropp's driveway at the time it had picked up Schropp's car for service, and the blue car had come back with the same "water spot" problem (R 664). If this were true, Crown incredibly never bothered to pick up the phone and tell its dissatisfied customer it had located the source of the problem, despite its self-proclaimed dedication to customer service (R 665).

As noted, the specific misrepresentations regarding the paint included the statement by Crown's service manager (Woolridge) that he was watching someone buff the car on the second service visit when Lesnich later admitted the buffing machine was broken at the time (R 133, 134, 368; see also the repair invoice which showed Crown did not buff the car, at R 2051). When the service manager testified later in the trial, Crown never even sought to elicit a denial or explanation of this lie (R 940-943).

Crown and Cohen represented to Schropp that if a special process the manufacturer had authorized did not make the paint satisfactory to Schropp that "we are going to take the car back" (R 287-88). When whatever was done on the fourth service visit did not correct the paint defect to Schropp's satisfaction, this representation also turned out to be a lie (R 291).

The jury heard the details discussed above on Crown's misrepresentations about the "special process." The jury heard how Crown's misrepresentations about the special process and its promise to replace the car induced Schropp to give Crown the car after he had stated he did not want Crown to perform further work on it (R 282-83, 287-89, 2089).

The jury heard Crown's sworn interrogatory answers regarding the special process which it later contradicted at trial (R 510, 688, 1862, 2076-77).

The jury heard Cohen's sworn affidavit that "Mr. Schropp's allegations concerning any representations about any 'special process' are unfounded" (R 671, 1860). Yet, Cohen testified at

trial: "There was a special process done. It was not done by Mercedes-Benz of North America. It was something that we did, Crown did, to satisfy him with his permission." (R 673).

Thus, the jury was entitled to decide which times Crown and Cohen were lying about the alleged special process which was supposed to have cured the defects in the paint. And the jury was entitled to conclude Crown had lied about Mercedes-Benz authorizing a "special process," in order to gain custody of Schropp's car another time.

Cohen testified that in handling the Schropp vehicle he always followed Crown's policies and procedures (R 662). Crown's chairman of the board did not contradict this when testifying later (R 882-95).

Dwayne Hawkins, Crown's chairman of the board, acknowledged that pollution damage to cars before they reach the dealer is a problem in the industry (R 883, 894-95). Both Cohen and Hawkins testified they consider a car Crown sells with pollution damage to the paint to be a "brand new car" (R 694, 895).

4. The closing arguments, jury instructions and verdict.

The closing arguments of both Schropp and Crown demonstrate that everyone realized Crown's direct corporate liability for punitive damages was before the jury.

Schropp argued Crown's actions exhibited "the general corporate culture at Crown Eurocars" (R 1070), and that Crown's

actions "demonstrated a pattern of conduct and a way of doing business" and that lies were "how Crown Eurocars conducts business" (R 1152, 1154).

Schropp did not focus solely on Cohen, but addressed numerous other misrepresentations discussed herein. Schropp argued a lengthy "table of lies" in closing (R 1151-52). For example, Schropp argued the service manager's lie that he was watching the Schropp car being buffed -- when Crown's invoice showed it had not buffed the car (R 1153). Indeed, Schropp urged the jury to only consider a nominal award against Cohen, but to deter Crown and send it a message for its conduct (R 1096, 1098).

Crown also recognized at trial that Schropp's claims were against it for its direct liability by its failure to ever object to the arguments noted above. Even Crown in its closing argued, "But if they are saying that that shows a motive of this corporate defendant to defraud on everything under the sun, I'm saying the evidence doesn't show that." (R 1127).

Crown invited the jury to decide who was lying: Crown or Schropp. Crown admitted in closing that the credibility of Cohen could not be separated from that of Crown's other witnesses and that if the jury were to find Cohen was lying, Crown's entire presentation was "a big lie," stating: "If Robert Cohen was lying, then Frank Butler [Crown's detail department manager] was lying, then Thomas Brown, Junior was lying, then Chris Otis was lying and the whole thing was a big lie." (R 1144). The jury accepted Crown's invitation.

Crown posited this case as a credibility contest in which either it or Schropp's entire presentation was a "big lie." To that end, Crown accused Schropp of having himself caused the damage to his vehicle and fraudulently attempting to pawn the responsibility off on Crown and claimed that Schropp, a licensed attorney, had intentionally destroyed material evidence (R 1136, 1139). Crown's closing characterized Schropp's case as "bunko that has been brought before you" (R 1129). Crown also hired a private investigator to photograph Schropp's home and to follow him to work, all because he complained about a vehicle purchased from Crown (R 770, 879). Everyone agreed someone was lying -- and the jury decided it was Crown. The jury accepted Crown's challenge and decided that it was Crown whose presentation was the "big lie," and assessed an appropriate punitive award.

The interrogatory verdict contained a question on whether there had been a fraudulent inducement with respect to the purchase of the car (R 1594). The court instructed the jury that one of the elements of a fraud case was damage, and Crown argued in its closing that Schropp had not been damaged with respect to any misrepresentations Crown may have made in the sale of the car because Mercedes-Benz had repurchased the vehicle for its full purchase price (R 1138-39, 1159). As Schropp had received all of his purchase price back from Mercedes, the jury, not surprisingly, did not find for Schropp on the claim of fraud *in the purchase* of the car (R 1549, 1594). Equally unsurprisingly, the jury concluded that Schropp had proven actionable fraud in Crown's actions

following the sale, and awarded $500.00 in compensatory damages against Cohen and Crown, and $200,000.00 in punitive damages against Crown alone (R 1597).

The trial court, without objection from Crown, repeatedly instructed the jury that the decision to award or not award punitive damages was within its discretion **and it could award punitive damages against one defendant and not the other** (R 1162, 1163, 1169, 1170, 1172, 1173). The instructions told the jury it could find Crown liable for punitive damages based on Cohen's actions, but did not instruct the jurors they could do so *only* on that basis (R 1163, 1170). As noted, both Schropp and Crown addressed Crown's corporate liability for punitive damages in their closing arguments (R 1070, 1127, 1144, 1152, 1154).

The jury answered interrogatory Questions 7 and 9 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)
>
> * * *
>
> 9. If you answered YES to Question No. 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	 YES	X NO

(R 1596-97). The jury then awarded $200,000 in punitive damages against Crown and none against Cohen (R 1597).

Crown remarked at the conclusion of the trial that it thought the verdict might be inconsistent (R 1217). Yet, Crown failed to ask the trial court to have the jury resolve what it claimed at that time was an inconsistency (R 1217). Crown continued to argue in its appeal briefs to the Second District that the verdict was inconsistent (A 21, 23). Only after the Second District had ruled in Crown's favor, and Schropp reiterated this waiver problem in his motion for rehearing, did Crown attempt to claim the verdict was not inconsistent (A 27-28).

5. Crown's post-trial arguments.

Although admitting it appeared nowhere in the record, Crown attempted to argue post-trial that Schropp had stipulated that the

only basis on which he asserted punitive damage liability against Crown was based on Cohen's actions (See A 20 at n.1; R 1232-33, 1265). Schropp specifically denied there was a stipulation both in his post-trial memorandum and appellate brief (R 1822, n. 2).

The Second District correctly noted that there could be no such stipulation where the record contains no written evidence of it, citing Fla. R. Jud. Admin. 2.060(g) (*Crown op.* 11)[4].

Crown argued post-trial that the answers to Questions 7 and 9 presented an irreconcilable inconsistency, urging that Crown could not be held liable for punitive damages unless Cohen was held liable (R 1234-35). As noted, Crown had not objected to the instructions to the jury that it could award punitive damages against one defendant and not the other. And, further, it did not request that the jury deliberate further to resolve the claimed inconsistency (R 1217).

The trial court denied Crown's post-trial motions and it appealed (R 2023-26, 2030). Schropp initially cross-appealed from an abundance of caution in anticipation Crown would request a new trial (so that Schropp could insure any new trial would be on all issues)(R 2042). When Crown filed its initial brief limiting its requested relief to a directed verdict and not requesting a new

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[4] The Second District did, however, confuse the nature of what Crown alleged regarding the nonexistent stipulation, erroneously assuming the dispute had to do with whether Cohen was a managing agent rather than Crown's claim that Schropp had stipulated away all grounds for punitive liability except the actions of Cohen.

trial, Schropp noted there was no need to pursue the cross appeal (Answer brief p. 11).

6. The Second District opinion.

The Second District's opinion mistakenly assumed that Question 7 on the interrogatory verdict with regard to whether the defendants committed a fraud against Schropp after the sale was limited to Count VI of the amended complaint which was against defendant Crown only and centered on the alleged special process (*Crown op.* 5). As is often the case, the interrogatory verdict questions did not correspond exactly to counts of the complaint. Question 7 in the interrogatory verdict asked about post-sale fraud by the defendants (plural) (R 1596). Count VI was directed solely against Defendant Crown, while Count IX contained similar allegations against Defendant Cohen (R 1354, 1360). There was no separate interrogatory verdict addressed solely to fraud by Cohen (R 1596-97).

As previously demonstrated, the post-sale fraud on which the jury found in favor of Schropp involved much more than simply allegations about a special process. It involved the fraudulent back-dating of title documents. It involved lies by a Crown manager that he was watching Schropp's car being buffed when the repair invoice showed the car had not been buffed because the buffer was broken. It involved Crown's assertions that Schropp had damaged his own car by using well water and then lied about it. It

involved Crown's misrepresentations that it would take back the car if its efforts to correct the paint problem did not satisfy Schropp. It involved Crown's position that a customer should accept a pollution damaged car as new, and its approach toward a customer who would not (claiming it had figured out that the customer's sprinklers caused the problem, but not telling the customer, and hiring a private investigator to spy on the customer and his home).

The Second District's opinion, however, focused solely on the so-called "special process." The court found the evidence was sufficient for the jury to "conclude that Crown and Cohen had made false statements which were material to Schropp and on which he had relied to his detriment in deciding to leave his car with them so Mercedes-Benz could inspect it and authorize Crown to perform the special process on the car." (*Crown op.* 10). The court thus concluded there was competent substantial evidence to support the award of compensatory damages for fraud.

The court then discussed its analysis of *Bankers*[5], *Winn-Dixie*[6] and *Mercury Motors*[7] and concluded that they dictated reversal of the punitive damage award. As discussed in detail below, Schropp disagrees.

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[5] *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530 (Fla. 1985).

[6] *Winn-Dixie Stores, Inc. v. Robinson*, 472 So. 2d 722 (Fla. 1985).

[7] *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981).

Schropp also argued in his answer brief that Crown had waived any argument that awarding punitive damages against Crown was inconsistent with exonerating Cohen on Question 9 by failing to request the jury resolve the alleged inconsistency in its verdict asserted by Crown. Schropp filed as supplemental authority, after the argument but before the Second District's opinion, the decision in *Adoro Marketing, Inc. v. Da Silva*, 623 So. 2d 542 (Fla. 3d DCA 1993). The Second District confused this point with another of Schropp's points (that Crown had proposed Question 9, which Schropp objected to, R 1053-54) and stated, "the record shows that defense counsel preserved the issue by timely raising a question of the possible ambiguity or inconsistency of the interrogatory verdict." (*Crown op.* 17, n. 10).

Schropp filed a motion for rehearing and rehearing en banc and a request to certify to this Court based on the Second District's discussion of *Winn-Dixie* and the conflict with *Adoro*. The Second District denied the motions for rehearing, but granted the certification with respect to the following question as one of great importance:

> IS THERE A DISTINCTION BETWEEN THE PREDICATE NECESSARY TO HOLD A CORPORATION LIABLE FOR PUNITIVE DAMAGES UNDER A THEORY BASED ON *BANKERS MULTIPLE LINE INSURANCE COMPANY v. FARISH*, 464 So. 2d 530 (Fla. 1985) AND UNDER A THEORY BASED ON *WINN-DIXIE STORES, INC. v. ROBINSON*, 472 So. 2d 722 (Fla. 1985)?

ISSUES ON APPEAL

I. IS THERE A DISTINCTION BETWEEN THE PREDICATE NECESSARY TO HOLD A CORPORATION LIABLE FOR PUNITIVE DAMAGES UNDER A THEORY BASED ON *BANKERS MULTIPLE LINE INSURANCE COMPANY v. FARISH*, 464 So. 2d 530 (Fla. 1985) AND UNDER A THEORY BASED ON *WINN-DIXIE STORES, INC. v. ROBINSON*, 472 So. 2d 722 (Fla. 1985)?

II. WHETHER A PARTY WHO CONTENDS A VERDICT IS INCONSISTENT MUST REQUEST THE JURY TO RESOLVE THE INCONSISTENCY, RATHER THAN LATER SEEKING A DIRECTED VERDICT BASED ON THE ALLEGED INCONSISTENCY?

SUMMARY OF ARGUMENT

Winn-Dixie authorizes a theory of direct corporate liability for punitive damages which does not require punitive conduct by a managing agent. In addition, Schropp demonstrates that under both *Winn-Dixie* and *Bankers*, the evidence supports the jury's verdict in his favor on punitive damages and requires its affirmance.

Schropp also argues that, under the Third District's holding in *Adoro*, Crown's failure to request the jury resolve the conflict resulting from verdict Question 9 precluded review of that point on appeal.

ARGUMENT

I. THERE IS A DISTINCTION BETWEEN THE PREDICATE NECESSARY TO HOLD A CORPORATION LIABLE FOR PUNITIVE DAMAGES UNDER A THEORY BASED ON *BANKERS MULTIPLE LINE INSURANCE COMPANY v. FARISH*, 464 So. 2d 530 (Fla. 1985) AND UNDER A THEORY BASED ON *WINN-DIXIE STORES, INC. v. ROBINSON*, 472 So. 2d 722 (Fla. 1985).

The Second District concluded there was no distinction in a corporation's responsibility for punitive damages under the managing agent theory discussed in *Bankers Multiple Line Insurance Company v. Farish*, 464 So. 2d 530 (Fla. 1985) and direct corporate liability under *Winn-Dixie Stores, Inc. v. Robinson*, 472 So. 2d 722 (Fla. 1985) (see *Crown op.* 12-16). Schropp believes there is a distinction, but demonstrates the jury's verdict should be affirmed in either event.

A. *WINN-DIXIE* RECOGNIZES A DIRECT CORPORATE LIABILITY BASIS FOR PUNITIVE DAMAGES WHICH DOES NOT DEPEND ON PUNITIVE CONDUCT BY A MANAGING AGENT.

In *Bankers*, the plaintiff sued MacArthur, who was the president and chairman of the board, along with the corporation. The jury exonerated MacArthur (from both compensatory and punitive damages), but awarded punitive damages against the corporation. 464 So. 2d at 532. This Court affirmed, observing the corporation had

also participated in the wrongdoing, by visits of an officer of the corporation with a party (pursuant to the instructions of MacArthur). This Court observed that "while admittedly tenuous," the additional activity of the corporation through the visits was sufficient, in conjunction with MacArthur's activities, to support the punitive award. 464 So. 2d at 532.

In *Winn-Dixie,* the plaintiff did not assert that an officer or board member (or any specific employee) had committed tortious acts warranting punitive damages, but sued the corporation itself. This Court noted, "the jury returned a verdict, finding that the *corporate defendant* acted with 'malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others.'" 472 So. 2d at 724 (emphasis by the Court). In this case, as in *Winn-Dixie,* the jury specifically found in answering verdict Question 9 that Crown had acted in such a manner as to warrant punitive damages directly against it.

Winn-Dixie stated that *Bankers* held *Mercury Motors* was not intended to apply where the managing agent of the corporation was responsible for the conduct warranting punitive damages. 472 So. 2d at 724. *Winn-Dixie* then stated: "We **also** hold that *Mercury Motors* is not applicable in the present case where the suit was tried on the theory of the direct liability of Winn-Dixie, and the jury, by special verdict, decided that Winn-Dixie should be held directly liable for punitive damages." 472 So. 2d at 724. (emphasis added).

Thus, *Winn-Dixie* holds that, in addition to a *Mercury Motors* respondeat superior theory of punitive damages, a jury can award punitive damages based on the actions of the managing agent or primary owner (*Bankers*), or based on the direct corporate liability of the corporate defendant.

In an effort to distinguish *Winn-Dixie*, the Second District reviewed the Fourth District's opinion in *Winn-Dixie* and noted the Fourth District's comment that the store employee had consulted with an **assistant** store manager before the authorities were called to arrest the suspected shoplifter (*Crown op.* 14). However, the Fourth District opinion demonstrates the decision did not turn on that point. The Fourth District found punitive damages proper against the corporation because "the jury, by special verdict, found that the *corporate defendant* acted with 'malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others.'" 447 So. 2d at 1005 (emphasis by the court). This Court's decision in *Winn-Dixie* did not even mention the assistant store manager.

Thus, it is clear that neither the Fourth District nor this Court relied on the fact that an assistant manager had been consulted for the holding of direct corporate liability for punitive damages. Indeed, there is not even a discussion as to whether an assistant manager was sufficient to meet the managing agent employee level required by *Bankers*.

This Court's decisions recognize the obvious point that corporations act through their employees. When a particular

employee's behavior, standing alone, warrants punitive damages, the jury can impose them if the employee is a managing agent or primary owner (*Bankers*) or, if he is not, when the corporation also acts negligently in a manner that contributes to the punitive damages (*Mercury Motors*). *Winn-Dixie* holds the jury can also award punitive damages when the conduct of the employees manifests a moral turpitude of the corporation which warrants punitive damages. This happened in *Winn-Dixie*, where the jury did not find that a specific employee's conduct warranted punitive damages. And it happened here, where the jury did not hold Cohen liable for punitive damages, but found Crown liable.

Both counsel for Schropp and for Crown realized the case was going to the jury on a direct corporate liability theory against Crown for punitive damages, and both argued this point in their closing arguments. Schropp argued Crown's actions exhibited "the general corporate culture at Crown Eurocars"; "demonstrated a pattern of conduct and a way of doing business"; and that lies were "how Crown Eurocars conducts business" without objection by Crown (R 1070, 1152, 1154).

Crown in its closing argued, "But if they are saying that that shows a motive of this corporate defendant to defraud on everything under the sun, I'm saying the evidence doesn't show that" (R 1127). Crown invited the jury to decide if "the whole thing was a big lie." (R 1144).

A recent case recognized the direct corporate liability basis for punitive damages, but noted the parties had not presented the

theory there. *Food Lion, Inc. v. Clifford*, 629 So. 2d 201 (Fla. 5th DCA 1993), held the trial court there erred, "given the jury instructions" in allowing punitive damages against the corporation where the jury found the agent not guilty of punitive conduct. The court stated, "This case was **not** submitted to the jury on the basis of direct corporate liability." 629 So. 2d at 203 (emphasis added). In the present case, Crown's request for Question 9 on the verdict and both parties' closing arguments demonstrated that all parties recognized Schropp's case **was** submitted to the jury on the basis of direct corporate liability for punitive damages. By certifying the case to this Court, the Second District recognized this as well.

Verdict Question 9, which *Crown requested*, reflected Crown's understanding that the case was being submitted to the jury on a corporate liability theory by including separate lines for the jury to respond with respect to Cohen and Crown. Crown's Question 9 also asked the jury to find if "the Defendants, **or any of them**, acted with [malice, etc.]." (R 1597).

However, if the case had been tried solely on a managing agent theory, the verdict form which Crown sponsored would not have contained spaces for the jury to answer Question 9 separately as to Crown and Cohen, but only a space to answer as to Cohen, since Crown's potential liability for punitive damages would arise solely from a finding against Cohen, and would not require a separate finding against Crown.

Instead, the verdict permitted the jury to make the finding of direct corporate liability this Court specifically sanctioned in

Winn-Dixie. The jury did nothing more than follow the trial court's unobjected to instructions that "you may in your discretion decline to award punitive damages" and "you may assess punitive damages against one defendant and not the other" (R 1163, 1170, 1173). The verdict was also consistent with Schropp's suggestion in closing argument that the jury focus on Crown and that any award against Cohen be minimal (R 1096).

As the foregoing demonstrates, there was ample evidence to support a direct corporate liability finding. The jury was entitled to rely on the evidence of repeated fraudulent conduct by multiple Crown employees. And the jury was entitled to believe Cohen's testimony that all of his conduct in this case was in accord with Crown's policies and procedures, particularly when Crown's chairman of the board did not contradict this when testifying (R 662, 882-95).

The Second District's holding, in fact, rewards Crown for the very breadth of the improper conduct undertaken in its name. As Crown's "the whole thing was a big lie" argument recognized, the jury was entitled to believe Schropp's case and conclude numerous Crown employees (including managers) lied (R 1144).

Faced with evidence that virtually every Crown representative the Schropps came in contact with misrepresented something, it is not surprising the jury would conclude that such actions were part of Crown's corporate culture. Thus, the jury properly assessed the penalty against the root cause of that conduct, rather than against

someone who was apparently only following standard marching orders from the top.

The punitive damage award appropriately punished Crown and will deter other car dealers who would otherwise be inclined to: (1) engage in such a pattern of misrepresentations, (2) assert pollution damaged cars are new vehicles whose damage isn't covered by the new car warranty, but is the customer's problem, (3) hire private investigators to spy on their customers who complain, and (4) provide false discovery responses in litigation.

The Assistant Attorney General, who appeared at the hearing on the post-trial motions to support the jury award, observed that the purpose of punitive damages is to punish wrongdoing and deter others who are similarly situated. He noted this case involved "a type of consumer fraud" on the part of the dealership and "an intentional tort" (R 1292).

The jury no doubt appreciated that, if Crown were permitted to escape responsibility for this series of lies and deceit for only $500.00, it had not been punished or deterred, and would feel free to continue its dishonest course of conduct (Crown made a gross profit of $4,700 on this car alone, R 1069, 2066). The Attorney General's office does not have the staff to pursue such consumer fraud. Most victims of such lies do not take action, and the reversal of the punitive award in this case would send a clear message to those who might try to right such wrongs that they should not bother.

B. EVEN IF *BANKERS* AND *WINN-DIXIE* PRESENT THE SAME BASIS FOR PUNITIVE DAMAGES, AND REQUIRE MANAGERIAL LEVEL PUNITIVE CONDUCT, SCHROPP'S EVIDENCE SUPPORTS THE JURY VERDICT.

The foregoing demonstrates it is not necessary under *Winn-Dixie* to identify a management level employee who personally committed punitive acts. However, even if such evidence were required, Schropp presented it as to managerial level employees other than Cohen.

The Second District emphasized it was "important to our disposition of the instant case that in *Bankers* the corporation's liability was based on the activity of another *officer* of the corporation." (*Crown op.* 13, emphasis by the court). As noted above, the Second District also looked back into the lower appellate opinion in *Winn-Dixie*, to discuss the assistant manager. The Second District then expressed its mistaken view that there was no evidence of another person with managerial responsibility participating in the post-sale fraud as to Schropp. Therefore, it held the jury could not, as a matter of law, impose punitive damages on the corporation.

The Second District was wrong, both legally and factually. As discussed above, *Winn-Dixie* indicates that in cases of direct corporate fraud, one does not have to identify fraudulent conduct by a managerial employee. However, even if, as the Second District held, a plaintiff must show fraudulent conduct by another

"managerial level employee," it erred in overlooking the evidence of such post-sale fraudulent conduct here.

The uncontroverted trial testimony showed that Domer Woolridge, Crown's service **manager**, had lied about work being performed to correct the finish defects on Schropp's vehicle during the second service visit. Mrs. Schropp testified at trial that Mr. Woolridge told her over the telephone that he was physically watching Schropp's vehicle being buffed to remove the spotting.

However, when Schropp picked up the vehicle, it had not been buffed. The repair invoice stated, "unable to buff at this time -- buffer broken" (R 2051). The Second District noted this incident at page 3 of its opinion, stating that "one issue at trial was whether buffing had actually been performed at this time to correct the spots on the finish and whether Crown employees had lied to Schropp that a buffing had been done."[8] This evidence, of course, permitted the jury to find that Crown's **service manager**, another managerial level employee (like Cohen, its sales manager), had also lied about the efforts to correct the finish on Schropp's vehicle after the sale.

As discussed above, the Second District failed to realize this incident was an issue under Question 7 of the interrogatory verdict, and the opinion assumed that interrogatory verdict

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[8] The panel's characterization of this as an "issue at trial" was overstated. This incident was specifically alleged in Plaintiff's complaint and was admitted by Crown in its answer. This admission was also published to the jury (R. 511). Domer Woolridge also testified at trial and did not deny the lie (R. 940-44).

Question 7 was limited to the "special process" misrepresentations (*Crown op.* 8). This is wrong.

The opinion's incorrect assumption created a significant error in the opinion's analysis. Question 7 refers to fraud by the Defendants **after the date of the sale**. This form of verdict, which divided the jury's deliberations into pre-sale and post-sale categories, rather than by counts, was expressly approved by Crown (R 1058). Thus, Question 7 included not only Cohen's actions, but also embraced the post-sale conduct of Crown and its other employees, including, **but not limited to**, the special process.

First, Crown recognized in its Second District reply brief that its service manager's misrepresentation about observing the car being buffed constituted a sufficient basis for the post-sale fraud claim. Crown argued the statement was not necessarily false because Crown had two buffers, only one of which was broken (A 24-25). This overlooked the fact that the invoice did not merely say the buffer was broken, but stated: "UNABLE TO BUFF AT THIS TIME -- BUFFER BROKEN" (R 2051).

Furthermore, the jury verdict in Schropp's favor compels the conclusion that Mrs. Schropp told the truth about Crown's claim it was buffing the car, and that the Schropps told the truth when they said the car had not been buffed when they received it back after the second service visit. As noted above, the existence of a second buffer would demonstrate only that Crown lied a second time when it claimed it could not buff the car on that visit. Even ignoring the many other fraudulent acts by Crown employees, this

additional post-sale fraud by the service manager provided ample basis for the jury to award punitive damages against Crown under the Second District's analysis (i.e., another managerial level employee). If the Second District is correct and *Winn-Dixie* requires actions of another managerial level employee -- there, the *assistant* store manager -- the actions of the *service manager* here satisfy that requirement. Crown's service manager certainly occupied a position of equal or greater authority than the assistant store manager who the Second District thought sufficient to sustain the punitive award under its view of *Winn-Dixie*.

Second, the jury was also entitled to conclude that the fraudulently back-dated and falsely notarized title transfer documents reflected a Crown corporate policy (R 2063).

Third, the Second District, in its summation of the facts purportedly "in a light most favorable to Schropp," recounts the testimony of Crown's detail department (or body shop) **manager** concerning the "special process" he allegedly performed on Schropp's car during the fourth and final service visit (*Crown op.* 5). In so doing, the court overlooked that Crown had previously sworn under oath in an interrogatory response that no special or other process had been performed on Schropp's car during the fourth and final service visit, and that the only work done was to change the wheel locks. Crown, at that time, claimed Schropp's allegations regarding a "special process" were a lie (Cohen's affidavit and the interrogatory and response are quoted in the statement of facts).

When Crown flip-flopped at trial and claimed that it had in fact performed a special process on Schropp's vehicle during the fourth service visit, Schropp published this contradictory interrogatory response to the jury. Confronted with the blatant inconsistency between the sworn interrogatory response signed by an "officer or agent" or Crown[9] and the testimony of Crown's detail department manager, Frank Butler, the jury was entitled to conclude that Crown's detail department **manager** had lied about the special process, that Crown's officer had lied in filing a false interrogatory response, or both. Either is clearly sufficient to affirm the punitive verdict.

Crown admitted in the trial court that this evidence was sufficient to support the fraud verdict. Crown's counsel stated at the post-trial hearing that even he would be satisfied there was adequate evidence to support the fraud claim if there were circumstantial evidence that no special process had been performed (R 1242-43). In making this statement, counsel apparently had forgotten Cohen's affidavit on behalf of Crown, in which he swore, "Mr. Schropp's allegations concerning any 'special process' are unfounded," and Crown's interrogatory answer discussed above (R 671, 1860).

However, the clearest indication of the mistake in attempting to separate the conduct of Cohen from that of the other Crown employees is the closing argument of Crown quoted above. Crown flatly told the jury that the credibility of Cohen could not be

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[9] See Fla. R. Civ. P. 1.340(a).

separated from that of the other Crown employees, and that if the jury were to find Cohen was lying, Crown's entire presentation was "a big lie." He stated: "If Robert Cohen was lying, then Frank Butler [Crown's detail department manager] was lying, then Thomas Brown, Junior was lying, then Chris Otis was lying and the whole thing was a big lie." (R 1144). (As noted above, Woolridge, the service manager, also lied). The jury found Crown had engaged in the big lie.

In sum, even if the Second District's legal analysis were correct, the fundamental basis for its legal analysis, (namely that Cohen's actions were the only ones which formed a basis for the post-sale punitive verdict against Crown), is factually incorrect and there is ample evidence of misconduct by other managerial employees of Crown to support the verdict.

II. A PARTY WHO CONTENDS A VERDICT IS INCONSISTENT MUST REQUEST THE JURY RESOLVE THE INCONSISTENCY, RATHER THAN LATER SEEKING A DIRECTED VERDICT BASED ON THE ALLEGED INCONSISTENCY.

While the Second District certified only one question, once the Supreme Court acquires jurisdiction, it can review all issues the petitioner presents. *E.g., Tillman v. State*, 471 So. 2d 32 (Fla. 1985); *White Construction Co., Inc. v. Dupont*, 455 So. 2d 1026 (Fla. 1984).

If this Court agrees *Winn-Dixie* presents a different basis for punitive damages than *Bankers*, then there is no inconsistency in

the verdict. Question 7, which found the Defendants had committed a fraud upon the Plaintiff after the sale, is consistent with Question 9, in which the jury responded negatively to a question which asked, in part, whether Cohen had acted "with fraud." Then the punitive damages verdict for Schropp should stand.

If the Court recedes from *Winn-Dixie* and does not permit direct corporate liability, but agrees Schropp presented evidence of fraud by managerial level employees other than Cohen, then there is no inconsistency. Then the punitive damages verdict for Schropp should stand.

However, if this Court determines the Second District's analysis on these issues is correct, then Questions 7 and 9 presented an inconsistency in the verdict. Crown waived the right to assert the inconsistency on appeal on two separate grounds: first, by failing to ask the trial court to have the jury resolve the alleged inconsistency before it was discharged; and, second, by failing to object to, and indeed requesting, the allegedly ambiguous verdict form (R 1053, 1058).

As noted above, Crown stated when the verdict was rendered and the jury was still present, that the verdict might be inconsistent, but failed to ask the court to have the jury reconsider the alleged inconsistency (R 1217). At the post trial hearing, Crown acknowledged its waiver problem concerning verdict inconsistency, but attempted to argue that the inconsistency constituted fundamental error under *North American Catamaran Racing*

Association, Inc. v. McCollister, 480 So. 2d 669 (Fla. 5th DCA 1985) (R 1234).

McCollister, however, holds that verdict inconsistency rises to the level of fundamental error only when there is no evidence to support any theory of liability accepted by the jury. In *McCollister*, a negligence action, the only evidence of negligence related to negligent design, but the jury found no design defect. Thus, there was no evidence to sustain the finding of negligence. That is not the case here, in which, in addition to Cohen there was also evidence of misrepresentations by Crown's salesman, its service manager, and other Crown employees. Indeed, Crown's post-trial memorandum tacitly conceded the existence of evidence apart from Cohen's conduct which would support the jury verdict (R 1753). Thus, (even if correct) *McCollister* rebuts, rather than supports, Defendants' inconsistency argument.

In *Adoro Marketing, Inc. v. Da Silva*, 623 So. 2d 542 (Fla. 3d DCA 1993), the jury returned a verdict which defense counsel argued was inconsistent. Relying on the inconsistent verdict, defense counsel argued that a judgment should be directed in defendants' favor. The appellate court noted that defense counsel did not ask the trial judge to permit reconsideration by the jury, which was still present, to resolve the inconsistency.

The Third District in *Adoro* held the defendant's failure to request the jury be permitted to reconsider the verdict in light of the inconsistency precluded the defendant from seeking reversal on that basis. By permitting Crown to appeal and seek a directed

verdict based on the alleged inconsistency, the Second District's opinion directly conflicted with the established principle of law set forth by *Adoro*. Based on the foregoing, if the answer to interrogatory verdict Question 9 presented an inconsistency, then Crown failed to preserve that argument by not requesting the jury revisit the inconsistency, and the jury's verdict should be affirmed.

The failure to follow the rule here demonstrates the absurd result which follows from permitting the corporate defendant to walk away from a jury that obviously intended to award punitive damages against it. Such a result would deprive Schropp of what he certainly would have had if Crown had requested the jury to reconsider the alleged inconsistency. It takes little imagination to envision that the jury which awarded $200,000 against Crown, if told that it had to provide the same yes or no answer in Question 9 for Crown and Cohen in order to award punitive damages against Crown, would have done so (the jury would have been free to award a much smaller amount against Cohen, as Schropp suggested in closing (R 1096)).

Crown's failure to ask to have the jury resolve what it claimed was an inconsistency in the verdict should be seen for what *Adoro* says it is: a litigation tactic designed to prevent the jury from further expressing its clear intentions regarding punitive damages. By electing not to request further deliberations, Crown waived this argument.

Crown's position overlooks the possibility that, if there were an inconsistency, the jury might have erred in answering "no" as to Cohen on Question 9. The facts construed in Schropp's favor as the prevailing party demonstrate ample basis to award punitive damages against Cohen. Thus, Crown has no proof that the "mistake" was in the jury's answer to the Crown portion of Question 9, rather than the Cohen portion. Indeed, the jury likely followed Schropp's suggestion that it not punish Cohen because Crown was the real culprit (and answered "no" on Question 9, rather than "yes" and then awarding zero damages on the following question).

Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109 (Fla. 3d DCA 1992), is another recent case holding an alleged verdict inconsistency does not constitute fundamental error. The party must object to the verdict when returned to give the trial court an opportunity to correct the inconsistency while the jury is still there, through additional instructions or a special verdict form. 603 So. 2d at 110. In reversing a new trial order, the appellate court held "relitigation would deprive the appellants of their earned verdict and give the appellees an unearned additional bite at the apple." Id.

On rehearing to the Second District, Schropp pointed out that the Second District's opinion conflicted with *Adoro*. Crown's "answer" was to argue this case does not present a question of verdict inconsistency, but only a legal question of whether punitive damages were awarded on an impermissible basis. This answer is not viable for several reasons. First, it came far too

late, after Crown had vehemently argued in support of its post-trial motions that the verdict contained a "fundamental inconsistency" (R 1234-35); and in its appeal reply brief (A 23), and initial brief (A 21), where it stated: "This verdict is a logical, legal, and factual impossibility." Only after *Adoro* undermined Crown's position did Crown attempt to avoid its impact by adopting a new, inconsistent position.

Second, Crown argued *Adoro* was inapplicable because "this jury found that Robert Cohen did not act maliciously or willfully and wantonly, and it did not find anyone else to have done so." (A 28). That is wrong, as the jury found that **Crown** acted maliciously or willfully and wantonly (R 1597). Since Crown's companion contention is that a finding against Crown could only be predicated upon the acts of Cohen, it necessarily follows that, if Crown is correct, there is a factual inconsistency between the two findings.

In short, *Adoro* cannot be avoided. *Adoro* mandates the judgment in Schropp's favor should be affirmed on that basis.

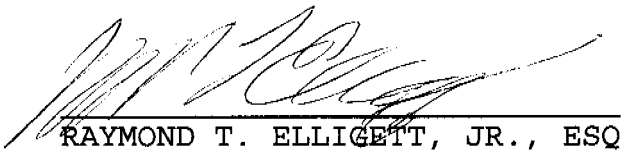
Crown also waived its inconsistency claim by failing to object to, and in fact affirmatively requesting, Question 9 of the potentially ambiguous verdict form (R 1058, over Schropp's objection, R 1053). Crown's contention on appeal that a "no" finding on Question 9 for Cohen precluded punitive damages against Crown, even if the jury answered the same question "yes" as to Crown, demonstrates that it should **not** have asked for separate answers for Crown and Cohen on Question 9.

Florida case law is settled that such a failure to object constitutes a waiver of any ambiguities in a verdict form. *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987); *Rosario v. Melvin*, 446 So. 2d 1158 (Fla. 2d DCA 1984).

CONCLUSION

The judgment pursuant to the jury verdict should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: CLAUDE H. TISON, JR., ESQ., Macfarlane, Ausley, Ferguson, & McMullen, P.A., P.O. Box 1531, Tampa, Florida 33601; ~~BRIDGET L. RYAN~~ No longer w/ Comptroller's office - see notice of appearance, Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350; and LARRY D. GOLDSTEIN, ESQ., 600 49th Street North, Suite A-1, St. Petersburg, Florida 33710 by U.S. Mail, this 10th day of May, 1994.

Attorney

A P P E N D I X

INDEX TO APPENDIX

Appendix Part 1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CROWN EUROCARS, INC., d/b/a CROWN MERCEDES, and ROBERT COHEN,	)	
Appellants/Cross-Appellees,	)	
v.	)	Case No. 92-03523
CHARLES P. SCHROPP,	)	
Appellee/Cross-Appellant.	)	

Opinion filed December 29, 1993.

Appeal from the Circuit Court for Hillsborough County; Gasper J. Ficarrotta, Judge.

Claude H. Tison, Jr., and Jeffrey N. Kramer of Macfarlane Ferguson, Tampa, for Appellant/Cross-Appellee Crown Eurocars, Inc.

Larry D. Goldstein of Watson & Goldstein, St. Peterburg, for Appellant/Cross-Appellee Robert Cohen.

Raymond T. Elligett, Jr., and Mark P. Buell of Schropp, Buell & Elligett, P.A., Tampa, for Appellee/Cross-Appellant.

DANAHY, Acting Chief Judge.

Crown Eurocars, Inc. (Crown) and its employee/sales manager, Robert Cohen, defendants in the trial court, appeal from a judgment entered in favor of the plaintiff, Charles P.

Schropp, on a jury verdict awarding compensatory damages against both Crown and Cohen and punitive damages against Crown . Of the several counts presented to it, the jury awarded damages only under Count VI for fraud in Crown's and Cohen's attempts to correct a defect on the exterior finish of a new Mercedes-Benz automobile they sold to Schropp in 1988. Crown and Cohen claim there was insufficient evidence to support the compensatory damage award. Crown alone further argues that even if there were sufficient evidence, Crown could not be held liable for punitive damages under the circumstances of this case. We disagree with Crown and Cohen and find that there was sufficient evidence to support the compensatory damages award. We do, however, agree with Crown that it was improper to award punitive damages against it. Accordingly, we affirm in part and reverse in part.

The Facts

The evidence at trial, viewed in a light most favorable to Schropp, showed the following. The parties' troubles began in October 1988 when Schropp, in the market for a new car, dropped by the Crown Mercedes-Benz dealership in St. Petersburg to inspect the wares on display at Crown's newly-opened premises. He soon narrowed his interest to a particular vehicle and after some hard bargaining Schropp and his salesperson, Paul Miller, with some participation by Cohen, neared an agreement. Schropp was allowed to drive the car to Tampa to pick up his wife so that they both could participate in the final negotiations. There remained some last minute maneuvering with concessions from both

Cohen and Schropp. Finally an accord was reached and the deal was struck. This occurred on a Saturday when Crown's service department was closed. Since the Schropps were anxious to begin enjoying their new purchase, they took the car home before Crown could provide the final detailing and clean-up. The following Tuesday Crown sent an employee to the Schropp home to pick up the car for the omitted detailing. This was done and the car was returned to Schropp that evening.

Immediately Schropp noticed some spots on the car's exterior paint finish. He notified his salesperson who told him to wait until the thousand mile service visit when Crown would take care of the spots with a buffing at the same time it would take care of a punch list of several other items that Schropp had noted. At this second service visit a service department employee informed Schropp that the car had wheel locks, which were not an option specified on the window sticker, and that there was no wheel lock key available. Because it was unwise to drive the car with locked wheels and no key to unlock them should wheel or tire service be necessary, a service department employee forcibly removed the wheel locks. This action resulted in some scratching to the wheel covers which Schropp noticed when the car was returned to him. Also, the spots on the paint finish remained causing Schropp further dissatisfaction. One issue at trial was whether buffing had actually been performed at this time to correct the spots on the finish and whether Crown employees had lied to Schropp that a buffing had been done. In any event, there is no doubt that at the third service visit the

car was indeed buffed. Despite this, Schropp could still see the spots.

A short time later when the new wheel locks arrived the car was brought in again for its fourth and final service visit. Because Cohen knew that Schropp was still dissatisfied with the condition of the paint finish, Cohen contacted him while the car was at Crown during this final service visit and asked him to leave the car at the dealership a little longer so it could be inspected by a Mercedes-Benz factory representative who would be present at Crown's official grand opening that week. While Crown had provided Schropp with a replacement car during previous service visits, it did not do so on this last occasion.[1] Several days later Cohen told Schropp that Mercedes had authorized the use of a special paint refinishing process not previously used outside the port of entry in Jacksonville. Schropp, leery by now of the runaround he felt he was getting and the disappointing level of service, was mollified somewhat by this promised participation of a Mercedes-Benz representative. Accordingly, he agreed to leave the car with Crown for the time necessary to apply this special process. Schropp understood from Cohen's representations at this time that Crown had to perform this special process as a condition to Mercedes-Benz' considering a return and exchange of the car and that if Schropp was still

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[1] The Schropps did own a second vehicle. Crown kept the Schropp's new Mercedes-Benz a total of eleven days during this fourth and final service visit.

unsatisfied with the condition of the finish after this special process was performed, Crown would take back the car.

Crown's body shop manager himself performed the special process on the car and obtained what he believed to be an excellent result. Schropp told Cohen after having the car returned from this final service that the paint finish did indeed look improved but it was still not to his satisfaction. Schropp wanted his money refunded as Cohen had promised. Crown refused because it believed the special process resulted in a beautiful finish on the car and no one could see any defect but Schropp. At this point Schropp retained the car and had no further dealings with Crown and Cohen until he sued both of them and Mercedes-Benz.[2]

The Jury's Findings

After exhaustive pretrial proceedings and a week-long trial the case reached the jury. The jury considered the evidence supporting several counts we will outline here although in this appeal we are only concerned with the allegations and proofs concerning Count VI. This is the fraud count relating to the circumstances surrounding the special paint refinishing process.

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[2] The importer, Mercedes-Benz of North America, originally a defendant in this case, is not a party to this appeal. Schropp voluntarily dismissed it from the case when, after Schropp had possessed the car for approximately two and one-half years, it repurchased the vehicle from Schropp for the full purchase price.

Among the several counts the jury considered, the first alleged fraud in the inducement against both Crown and Cohen, characterizing the latter as a "managing agent" of Crown. This fraud in the inducement count was based on statements made during the negotiating process before Schropp decided to purchase the car. Schropp alleged that these statements were untrue and that he had relied upon them in agreeing to buy the car.[3] The allegedly false statements included an offer of the first two service visits at the expense of Crown when it turned out that these first two visits were always with Crown's compliments without cost to any customer. Another statement was that the pinstripe was handpainted when in fact it was a decal. Another count named only Crown and alleged that property damage to the car occurred when the wheel locks were forcibly removed and the buffing was done (dents and scratches to the exterior of the car). Schropp named both Crown and Cohen in an additional count alleging conversion claimed to have occurred when Schropp relinquished possession of the car for the ostensible purpose of having a Mercedes-Benz representative inspect it as a pre-condition of exchange. This conversion count set forth the events surrounding Crown's and Cohen's securing of Schropp's authorization for the special process to correct the defects in the paint finish. Another count, again naming both Crown and Cohen, charged civil theft, incorporated the factual allegations

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[3] A count for breach of contract by delivering a nonconforming vehicle and seeking rescission was voluntarily dismissed before trial began.

of the conversion count, and sought treble damages. Finally, Count VI, the count with which we are concerned in this appeal, alleged fraud against both Crown and Cohen in their dealings with Schropp concerning the same statements outlined in the conversion count. But the allegations and proofs of fraud focused on their statements alleging Mercedes-Benz's involvement in inspecting the car and authorizing the special process.

The jury received the following standard instruction, 6.12(b), on punitive damages:

> If you find that the plaintiff has proven his claim of fraudulent inducement, you shall consider the issue of damages. The amount of damages you should award is the difference between the value of what defendants represented that plaintiff would receive and the actual value which plaintiff received.
>
> If you find for the plaintiff and against the defendants, you may consider whether in the circumstances of this case it is appropriate to award punitive damages, in addition to compensatory damages, as punishment and as a deterrent to others.
>
> . . . .
>
> Punitive damages may be awarded in your discretion if the conduct of the defendants causing loss or injury to plaintiff was so gross and flagrant as to show a reckless disregard of human life or the safety of persons exposed to the effects of such conduct.
>
> Or, such damages may be awarded if that conduct so entirely lacked any care that the defendants must have been consciously indifferent to the consequences, or they wantonly or recklessly disregarded the safety and welfare of the public.
>
> Finally, such damages may be awarded if defendants' conduct showed such reckless indifference to the rights of others as to

be equivalent to an intentional violation of those rights.

You may in your discretion decline to award punitive damages. If you find that punitive damages should be assessed against the defendants, then in fixing the amount of such damages, you should consider the nature, extent and degree of the misconduct and the related circumstances.

You may assess punitive damages against one defendant and not the other, or against more than one defendant in different amounts.

If you find for the plaintiff and against the Defendant Crown Eurocars, Incorporated, 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 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, Incorporated.

The jury returned a verdict in favor of Crown and Cohen on all counts except Count VI in which it found for Schropp. Thus, the jury found that Crown and Cohen had not fraudulently induced Schropp to buy the car, had not damaged it when trying to repair it, had not converted the car to their own use when Schropp left it for them to show to Mercedes, and had not committed a civil theft. The jury did find, however, that Crown and Cohen had committed a fraud on Schropp in the dealings concerning Mercedes-Benz inspecting the car and authorizing the special process. The court had submitted to the jury an interrogatory verdict whose relevant questions were answered in the following manner:

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

(If the answer to Question No. 7 is YES, proceed to Question No. 8. If the answer to Question No. 7 is NO, proceed to Question No. 11 and do not answer Questions Nos. 8, 9 & 10.)

8. If you answered YES to Question No. 7 above, what sum of money do you find from the evidence to be the amount of Plaintiff's compensatory damages proximately caused by the fraud after the date of sale.

$ 500.00

9. If you answered YES to Question No. 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	 YES	X NO

(If the answer to Question No. 9 is YES, proceed to Question No. 10. If the answer to Question No. 9 is NO, proceed to question No. 11 and do not answer Question No. 10.)

10. If you answered YES to Question No. 9 above, what sum of money do you assess in favor of the Plaintiff and against the Defendant(s) as punitive damages with regard to the fraud after the date of sale?

Crown Eurocars, Inc. $ 200,000.00

Robert Cohen $_____

Analysis

We first address the threshold issue of the sufficiency of the evidence that Crown and Cohen committed a fraud upon Schropp as charged in Count VI. Although we think it minimal, the jury had evidence before it from which it could conclude that Crown and Cohen had made false statements which were material to Schropp and on which he had relied to his detriment in deciding to leave his car with them so Mercedes-Benz could inspect it and authorize Crown to perform the special process on the car. The jury could thus conclude that Schropp had suffered damages since he lost the use of the auto during the period he relinquished possession to Crown for Mercedes-Benz' inspection of it as well as for the time it took to apply the special process.[4] See Miles v. Kavanaugh, 350 So. 2d 1090 (Fla. 3d DCA 1977); Roger Holler Chevrolet Co. v. Arvey, 314 So. 2d 633 (Fla. 4th DCA 1975); cf. Schryburt v. Olesen, 475 So. 2d 715 (Fla. 2d DCA 1985) (loss of use can satisfy damages element but proofs lacking in case). Accordingly, we find that there was competent substantial evidence to support the award of compensatory damages for fraud.

Having thus found that the evidence supports the jury's award of compensatory damages, we turn now to the issue of the

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[4] Schropp testified that Crown had his car for the fourth and final service visit approximately eleven days. It was after the wheel locks were installed that Cohen allegedly called him to ask that the car remain for the inspection and application of the special process. Therefore, the period during which Schropp lost the use of the car during the events relating to Count VI was five or six days.

punitive damages. See Ault v. Lohr, 538 So. 2d 454 (Fla. 1989) (Ehrlich, C.J., concurring). Crown argues that since all the allegations and proofs in the case relating to the claims of Count VI rest upon what Cohen said or did,[5] when the jury exonerated Cohen no separate liability for punitive damages could then be assessed against Crown. Both Crown and Cohen claim that Cohen's status as a "managing agent," a person with enough responsibility in the corporate organization to bind the corporation by his acts alone, Bankers Multiple Line Insurance Co. v. Farish, 464 So. 2d 530 (Fla. 1985), was stipulated to at the final charge conference. Schropp vehemently disputes that such stipulation was entered into although the complaint he filed characterizes Cohen as "managing agent of defendant Crown." However, Schropp is correct that otherwise the record before us contains no written evidence of any such stipulation. See Fla. R. Jud. Admin. 2.060(g). Crown notes that despite the absence of any written stipulation its "footprints" in the record are unmistakable.[6] Regardless of these arguments, resolution of this

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[5] The proofs related to Count VI also contained evidence of what the salesperson said and did. However, this salesperson was an underling of Cohen's. The proofs showed only that this salesperson said or did something at Cohen's direction and never on his own.

[6] For example, the charge as given to the jury on punitive damages, Standard Civil Instruction 6.12(b), is characterized by its title as the "Attributed liability for acts of managing agent, primary owner, or certain others." The Notes on Use cite Bankers and Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985), as authority for 6.12(b). Additionally, a transcript of a post-trial hearing shows that the trial judge had denied an instruction requested by Crown which the parties characterized as its "Mercury Motors" instruction, Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). These cases are discussed infra.

dispute is irrelevant to our disposition of this appeal. This is so because an examination of the controlling case law, Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981), Bankers, and Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985), requires us to conclude that whether Cohen was or was not Crown's managing agent, the jury's exoneration of Cohen from that higher level of maliciousness in the commission of the fraud,[7] which is required to support an award of punitive damages, precludes the assessment of punitive damages against Crown.

A. Analysis under Bankers and Winn-Dixie: "Managing Agent"

In deciding whether punitive damages were properly awarded for the post-sale fraud outlined in Count VI, we will first analyze this case on the assumption that Cohen was a "managing agent" when he and his underling convinced Schropp to leave the car for inspection by Mercedes-Benz and authorization of the special process. In Bankers our supreme court set forth the law of corporate liability for punitive damages on account of actions by a managing agent. The court further elaborated on this theory in Winn-Dixie. In Bankers the primary wrongdoer, MacArthur, the president and chairman of the board of the corporation, was exonerated by the jury but the corporation was held liable for punitive damages. The supreme court upheld this

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[7] This higher level of fault or maliciousness in committing a tort supporting an imposition of punitive damages is generally referred to as "willful and wanton misconduct" or behavior. See Mercury Motors, 393 So. 2d at 547.

punitive damages award against the corporation because it found that the corporation, through another officer acting at the direction of MacArthur, participated in the wrongdoing also. The court found this was a sufficient, although tenuous, predicate for the punitive damages award. Id. at 532. It is important to our disposition of the instant case that in Bankers the corporation's liability was based on the activity of another officer of the corporation. Unlike Bankers, in the case before us there is no evidence that another person with managerial responsibility (besides Cohen) participated in any acts alleged in Count VI. The jury specifically found that Cohen's actions were wrongful in that his actions fulfilled the elements of the tort of fraud, but that in doing so he did not exhibit any maliciousness or willful and wanton behavior.[8] The jury thus exonerated the only

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[8] Although the parties have provided us with excellent briefs in this appeal, they tend to cloud the distinction between the tort of "fraud," originally known as "deceit," and "fraudulent conduct." If the plaintiff proves the elements of the tort of fraud or deceit, i.e., "(1) a false statement concerning a specific material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury to the other party acting in reliance on the representation," S.H. Inv. & Dev. Corp. v. Kincaid, 495 So. 2d 768, 770 (Fla. 5th DCA 1986), then the plaintiff is entitled to compensatory damages. The parties here refer to "fraudulent conduct" when they mean conduct of a gross and flagrant nature showing reckless disregard of human life or safety, or so entirely lacking care to show conscious indifference to the consequences, or wantonly or recklessly disregarding the safety and welfare of the public, or showing reckless indifference to the rights of others equivalent to intentionally violating those rights, the proof of which entitles the plaintiff to an award of punitive damages. Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (Fla. 1936). In order to clarify this analysis we prefer to characterize this egregious conduct as "willful and wanton" or simply "malicious." Although the jury found that Cohen had committed a "fraud" as that term is properly defined in S.H. Investment, see

person who could possibly be responsible as a managing agent for the claims in Count VI. Therefore, the jury could not, as a matter of law, assess punitive damages against the corporation, Crown, for the actions of its managing agent. Compare Bankers (another officer of corporation besides individually-named president acted maliciously and in concert with president permitting assessment of punitive damages against corporation).

Neither can we find a basis to support the punitive damages award against Crown under a related theory outlined in Winn-Dixie. Schropp argues that we must affirm the award of punitive damages in the instant case because even if Cohen was an exonerated managing agent under Bankers, Crown must answer for the punitive damages under the "direct corporate liability" theory propounded in Winn-Dixie. The supreme court in Winn-Dixie held that the Fourth District Court of Appeal correctly concluded that the case was tried on the basis of direct corporate liability as argued by the plaintiff Robinson. Although the supreme court did not specify what the factual basis for the direct corporate liability was, the opinion of the Fourth District, Robinson v. Winn-Dixie Stores, Inc., 447 So. 2d 1003, 1004 (Fla. 4th DCA 1984), reveals that an assistant manager was consulted before the authorities were called in to arrest the suspected shoplifter although there was very little probative evidence on which to do so. In the case before us, there is no

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Question No. 7 of the interrogatory verdict, the jury also found in its answer to Question No. 9 that his required level of maliciousness supporting an award of punitives was lacking.

evidence beyond Cohen's actions to otherwise show direct corporate liability as claimed in Count VI. To affirm the punitive damages award against Crown, there must be proof of Crown's willful and wanton behavior against Schropp other than through Cohen's actions because the jury found Cohen's actions were not willful and wanton. We reject Schropp's argument on this Winn-Dixie issue and hold there was insufficient proof of any direct corporate liability to support the award of punitive damages for Count VI. Compare Jack Eckerd Corp. v. Smith, 558 So. 2d 1060 (Fla. 4th DCA 1990), aff'd, 577 So. 2d 1321 (Fla. 1991) (legal "malice" shown to prove malicious prosecution in lack of probable cause to arrest and therefore compensatory damage award affirmed but proofs did not rise to higher level of willful and wanton misbehaviour to support punitive award in shoplifting case). Because there was an absence of the requisite proof we hold that under either Bankers or Winn-Dixie punitive damages against Crown cannot stand in the face of the jury's finding that Cohen, the only actor whose actions concerning the special process could incur corporate liability, did not commit the fraud with the necessary higher degree of actual malice or willful and wanton behavior.[9]

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[9] Schropp argues that Cohen testified he always acted within the scope of his employment and in accordance with Crown's "corporate policies." In face of Cohen's exoneration from maliciousness by the jury and without further evidence of other "corporate" wrongdoing in obtaining Schropp's car so that Mercedes-Benz could inspect it, we are not persuaded by this argument. See Jack Eckerd Corp. v. Smith.

We understand Schropp to argue that the Winn-Dixie type of "direct corporate liability" to support an award of punitive

b. Analysis under Mercury Motors: "Non-Managing Agent"

We will assume, for our alternate analysis of the case, that Cohen was not Crown's "managing agent." In doing so we focus on the vicarious liability theory of punitive damages set out in Mercury Motors. Mercury Motors held (a) that before an employer can be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be "some fault" on its part separate from the employee's and (b) although the wrongful acts of the employee must rise to the level of willful and wanton to support an award of punitive damages against the employee, it is not necessary that the employer's wrongdoing also be willful and wanton. Additionally, the employer's wrongdoing must have foreseeably contributed to the plaintiff's injury. Id. at 549. Mercury Motors teaches that the liability for punitive damages flows through the tortfeasor/employee to the corporate employer only if the level of maliciousness of the employee reaches that higher level necessary to support punitive damages and the employer's contribution is its own related fault. As we have noted, the evidence in the instant case falls short of that higher level of the employee's maliciousness required since the jury exonerated Cohen in its answer to Question No. 9.[10] Further-

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damages is distinct from the Bankers "managing agent" type of liability to support punitives. We read the supreme court's opinion in Winn-Dixie as suggesting a variation on "managing agent" liability since a corporation can only exercise its discretion through its principals, i.e., its managing agents; its operations are conducted through its employees.

[10] Schropp contends that Crown is foreclosed from arguing this point because it was the proponent of this question. Although it

more, no other employee was shown to have this higher level of maliciousness concerning the fraud alleged and proved under Count VI.

Conclusion

In summary, under either the Mercury Motors or the Bankers/Winn-Dixie legal standard for corporate liability for punitive damages we hold that given the jury's exoneration in finding that Cohen's wrongful acts were not willful and wanton, and lacking any other evidence that Crown "itself" behaved outrageously, punitive damages may not be assessed against Crown. Thus, we affirm the award of compensatory damages against Crown and Cohen but reverse the award of punitive damages against Crown.

Affirmed in part, reversed in part, and remanded for entry of judgment in accord with this opinion.

THREADGILL and PARKER, JJ., Concur.

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is true that Crown proposed the jury questions, the record shows that defense counsel preserved the issue by timely raising a question of the possible ambiguity or inconsistency of the interrogatory verdict.

APPENDIX PART 2

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

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

Appellants. Case No. 92-03523

vs.

CHARLES P. SCHROPP,

Appellee,

_____/

ON APPEAL FROM THE CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA

BRIEF OF APPELLANT, CROWN EUROCARS, INC.

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JEFFREY N. KRAMER
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representing that it would be examined by a Mercedes representative, and subsequently that a Mercedes representative had authorized a special repair process to be used on the vehicle, which representations were alleged to have been false. The complaint sought both actual and punitive damages against Cohen and Crown on all counts except Count III.

The case came on for trial on April 7, 1992 before Honorable Gasper J. Ficarrotta and a jury. At the beginning of trial plaintiff voluntarily dismissed Count I (rescission), and Counts II-VI were tried between April 7-11, 1992. During the trial it became clear that the sole basis for liability of Crown for either actual or punitive damages was the acts and statements of defendant Cohen. Plaintiff's theory was that Crown was liable for punitive damages directly for any wrongful acts of Cohen, Cohen having been a "managing agent" of Crown within the meaning of Bankers Mutual Life Insurance Co. v. Farish, 464 So. 2d 530 (Fla. 1985) and Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722 (Fla. 1985). This point came into particularly clear focus during the charge conference, when Crown submitted a requested instruction on derivative liability based on Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981), which would have required the jury to find some independent fault on the part of Crown in order to support liability for punitive damages based on the acts of any employee not found to be a managing agent of the company. At this point Schropp obviated the need for a Mercury Motors instruction by stipulating that Cohen was the only person on the basis of whose

acts he sought to hold Crown liable for punitive damages. (The evidence had indicated that another employee had participated in some of the discussions leading up to the sale.) The trial court ruled that Cohen was a managing agent of Crown and, with no other employee being involved, denied the requested Mercury Motors instruction.[1]

The case was submitted to the jury on special interrogatories that, as to each count, required the jury first to make a finding as to commission of the tort alleged, and in the event of an affirmative finding, to determine whether the defendants acted with the intent requisite to support an award of punitive damages. The jury returned a verdict finding against Schropp, and in favor of defendants Crown and Cohen, on each of Counts II through V. Specifically, the jury answered "no" to questions 1, 5, 11, and 15, which required them to determine whether Crown and Cohen had fraudulently induced Schropp to purchase the car (Count II, question 1), had damaged the car in connection with subsequent repairs (Count III, question 5), and had committed conversion (Count IV, question 11) or civil theft (Count V, question 15). The jury found in favor of Schropp and against defendants Crown and Cohen on Count VI, relating to misrepresentations made after the sale in connection with the repair attempts, finding in response to question 7 that Crown, through Cohen, had made such misrepresentations, and assessing Schropp's damages at $500

[1] The charge conference was not transcribed. However, at a hearing on post trial motions on May 29, 1992 this stipulation was referred to and acknowledged. (R. 9/13-14, 46).

such an intent. This verdict is a logical, legal, and factual impossibility.

Where a verdict contains fundamental inconsistencies that completely undermine its underlying basis, no judgment can be entered thereon, and any judgment entered at trial must be vacated. Wharfside II Ltd. v. W. W. Gay Mechanical Contractor, Inc., 523 So. 2d 193 (Fla. 1st DCA 1988), aff'd 545 So. 2d 1348 (Fla. 1989); National Aircraft Services, Inc. v. Aeroserve International, Inc., 544 So. 2d 1063 (Fla. 3d DCA 1989); Williams v. Hines, 80 Fla. 690, 86 So. 695 (1920). Where the inconsistency results from findings that do not bar the claimant from the relief it seeks under principles of collateral estoppel, a new trial may be awarded. Here, however, the jury findings which resulted in a final judgment in favor of Cohen as to punitive damages would constitute an absolute bar on retrial to any attempt by Schropp to demonstrate that Cohen acted with fraudulent intent. Therefore the appropriate remedy is to direct entry of judgment in favor of Crown. National Aircraft Services, Inc. v. Aeroserve International, Inc., supra; Williams v. Hines, supra. In any retrial of Count VI, Crown would clearly be entitled to the benefit of the finding that Cohen did not act with fraudulent intent, and since there is no basis for punitive damages except the fraudulent intent of Cohen, collateral estoppel would bar Schropp from any attempt to prove entitlement to punitive damages on a re-trial. Therefore, the judgment against Crown for punitive damages must be vacated, and a judgment in favor of Crown directed on that issue.

Appendix Part 3

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

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

Appellants. Case No. 92-03523

vs.

CHARLES P. SCHROPP,

Appellee,

_____/

ON APPEAL FROM THE CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT CROWN EUROCARS, INC.

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Furthermore, as a necessary predicate to his argument that other evidence supports the verdict for punitive damages against Crown, Schropp falsely denies the existence of a stipulation or acknowledgement that materially affected the course of trial and is clearly evidenced in the record of proceedings.

As to the question of contemporaneous objection, we point out first that the contemporaneous objection requirement is inapplicable where the inconsistency is of a fundamental nature. Robbins v. Graham, 404 So. 2d 769 (Fla. 4th DCA 1981); North American Catamaran Racing Assn., Inc. v. McCollister, 480 So. 2d 669 (Fla. 5th DCA 1985). McCollister, a wrongful death action arising out of an accident on a boat manufactured by the defendant, alleged two theories of recovery, strict liability based on defective design, and negligent design or manufacture. The design of the boat was the foundation of both theories. The jury returned a verdict in favor of the defendant on strict liability but in favor of plaintiff on negligence. The court held that the inconsistency was of a fundamental nature because there was no evidence of negligence other than the claimed design defect the jury had found not to exist, and accordingly reversed the judgment notwithstanding the absence of a contemporaneous objection.

The same principle would apply here, had there not been a contemporaneous objection. Given the specific finding that Cohen was not guilty of any actual fraud, malice, or other condition of

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machines and had still others available to it (R. 8/930), and therefore the fact that one of them was out of service proves nothing about the truth or falsity of the statement.

the conduct of employees other than Cohen. The evidence he cites for this proposition is, in the main, evidence that has nothing to do with the only count on which the jury returned a verdict in his favor. Most of it consists of evidence regarding acts and statements of a salesman working with Cohen in connection with the sale of the car, and it should be noted once again that the jury found against Schropp on all his claims related to the sale. As we have already demonstrated in Point II of the Opening Brief, there is no evidence that any statement Cohen made in connection with the return of the automobile for repair work on the finish was incorrect in any particular, that any promised work was not done or was misdescribed, or that any other wrongful act whatever was committed in connection with the attempts to get the finish to Schropp's satisfaction. Schropp's brief asserts that there was evidence of fraudulent activity by one other Crown employee (although his argument begs the question of whether that employee was a managing agent and, if not, what constituted the independent corporate fault on Crown's part that would justify holding it liable for punitive damages based on his conduct). However, this assertion is itself directly false. He asserts that a service department employee lied to him in saying, during a telephone conversation, that he could see another employee using a buffing machine on Schropp's car at that time. Schropp claims that this statement was proved false by a repair invoice showing that one of Crown's buffers was being repaired at the time. Unfortunately for Schropp's position, Crown had two buffers at all material times, as

shown by uncontradicted evidence. (R. 8/970) In addition to its own two buffers, it had access to other buffers owned by other Crown dealerships located in the same building. (R. 8/970-972). Consequently, the fact that one of Crown's buffers was under repair is unprobative as to the truth or falsity of the service employee's statement that an employee was working on Schropp's car. Schropp made no attempt to prove that the buffing machine that was under repair was the only such machine owned by or available to Crown at the time, and the undisputed evidence establishes that it was not. The assumption of unavailability of another buffing machine is the sole basis for Schropp's claim that the service employee made a false representation. Since that assumption is not founded on any evidence, and indeed is refuted by uncontradicted evidence, it amounts to nothing.

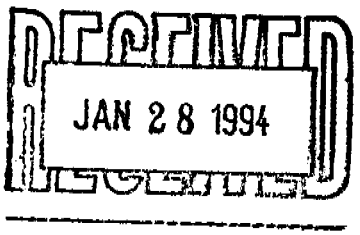
II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF SCHROPP AND AGAINST COHEN AND CROWN FOR COMPENSATORY DAMAGES ON COUNT VI, WHERE SCHROPP PRESENTED NO EVIDENCE THAT ANY OF THE REPRESENTATIONS MADE BY COHEN REGARDING THE INSPECTION AND REPAIR OF THE CAR WERE FALSE OR MISLEADING.

(Adopted by Appellant Cohen)

Schropp's argument with regard to the sufficiency of the evidence does not meet the objections raised by Crown and Cohen, nor are the statements in his brief supported by the record. First, he repeats his unsupported assertion that a service employee lied to him in stating that another employee was working on the car

Appendix Part 5

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA



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

Appellants. Case No. 92-03523

vs.

CHARLES P. SCHROPP,

Appellee,
_____/

RESPONSE TO MOTION FOR REHEARING,
MOTION FOR REHEARING EN BANC, AND
MOTION FOR CERTIFICATION

Schropp has filed motions for rehearing, rehearing en banc, and certification in response to this Court's exhaustive opinion finding that he was not entitled to a judgment for punitive damages against Crown. The Motion for Rehearing asserts that three issues were overlooked or incorrectly decided by the panel. Two of the arguments (failure to preserve objection to verdict and corporate liability under Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 [Fla. 1985]) are duplicated in the Motion for Rehearing En Banc, and one (failure to preserve objection) is the subject of the Motion for Certification. These arguments are largely a rehash of the submissions previously made in briefs and at oral argument, which this Court carefully considered and expressly rejected. A brief discussion of each follows.

I. FAILURE TO PRESERVE OBJECTION

Schropp claimed on appeal that Crown had not preserved its objection to the verdicts exonerating Cohen from any malicious or willful and wanton misconduct but finding Crown liable for such conduct. The sufficiency of Crown's objection was discussed at length in its reply brief and was the subject of full discussion at oral argument. This Court discussed that claim in detail in holding that Crown's contemporaneous objection was sufficient to preserve the issue.

Schropp now claims that, to preserve its objection, Crown could not request entry of judgment in its favor based on Cohen's exoneration but had to ask that the jury be sent back for further deliberations, citing as supposed authority for this proposition Adoro Marketing Inc. v. Da Silva, 623 So.2d 542 (Fla. 3d DCA 1993). Adoro does not speak to the situation present here, which is perhaps why it was not cited in this Court's opinion. Schropp has consistently attempted to portray the issue of preservation of Crown's objection as one involving a mere factual discrepancy among parts of a verdict involving the same parties, where in fact the issue is one of derivative liability based on the malice or imputed malice of a managing agent.

As Adoro and the case on which it is founded (Cowart v. Kendall United Methodist Church, 476 So.2d 289 [Fla. 3d DCA 1985]) make clear, the requirement in those cases of requesting further consideration by a jury is limited to situations where factually

incongruent verdicts are returned on multiple counts alleging different theories of relief on the same facts between the same parties, a situation in which further consideration can clarify the ambiguity. We deal here, however, as fully discussed in the briefs, with a situation in which the liability of one party depends on the liability of another. For Crown to have been lawfully assessed with punitive damages, it was, as this Court correctly held, a pre-requisite that Robert Cohen be found to have acted maliciously or willfully and wantonly. Upon what ground could have the verdict in favor of Cohen been set aside and subjected to reconsideration? By what right could the trial court have instructed a jury, after returning a verdict in his favor, that it must retire and reconsider whether to adhere to that verdict? The verdict in Adoro simply raised a question as to what the jury had actually determined to be the facts, as between the same parties; this jury found that Robert Cohen did not act maliciously or willfully and wantonly, and it did not find anyone else to have done so. That created no factual ambiguity; it presented a legal question whether the jury had imposed punitive damages on Crown on an impermissible basis.

It is upon this issue that Schropp relies primarily in his Motion for Rehearing En Banc and in his request for certification. It should be apparent from the foregoing that there is no question of exceptional public importance presented here, nor is there any conflict with any other decision of this Court or any other Florida court. Schropp is simply attempting to manufacture an issue by

mischaracterizing both what this Court decided and what was decided in Adoro Marketing.

II. CORPORATE LIABILITY UNDER WINN-DIXIE

Schropp devotes the longest section of his Motion for Rehearing to a rehash of the evidence on the basis of which he claimed on appeal that a verdict for punitive damages against Crown could stand despite the exoneration of Robert Cohen. Most of the space is devoted to his conversation with a service representative who said that he could see a mechanic buffing the car, and his attempt to use an early discovery response to prevent a former Crown employee from testifying. He now argues that the service representative could have been found to be a managing agent, contrary to the express premises on which the jury was instructed. All this is adequately answered by this Court's exhaustive discussion of the distinction between the common law tort of fraud or deceit and the requirement of malicious or willful and wanton misconduct to support an award of punitive damages. As the opinion notes, Schropp admitted that the special process was performed, rendering irrelevant his trial tactic of using the discovery response to foreclose testimony by the person who had actually performed it. The opinion further noted, although it pointedly stated that the evidence was very thin, that Schropp was entitled to go to the jury on his claim that Crown and Cohen were liable in fraud or deceit for his actual damages for detention of the automobile. Assuming, on Schropp's version of the event, that the

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 21 day of January, 1994.

CLAUDE H. TISON, JR.