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 REPLY BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The reply brief page limitation precludes Schropp from addressing each misrepresentation and unsupported factual assertion Crown makes in its Statement of the Case and Facts (which are also frequently unsupported by any cite to the record)[1]. Schropp responds to some of these in the argument below.

Even more telling is Crown's failure to address crucial legal points made by Schropp, and its pattern of ignoring evidence for which it obviously has no response. These include:

1. Without objection from Crown, the trial court repeatedly instructed the jury that it could award punitive damages against one defendant and not the other (IB 17; R 1163, 1170, 1173);

2. Jury Questions 7 and 9 were not limited to the "special process," but included all of Crown's frauds "after the date of the sale" such as backdating the title certificate, lying about buffing Schropp's car, lying about the damage to the car and the cause of the damage, and (even assuming Crown did perform a special process), lying that Mercedes had authorized it and that it had only been previously done at the port of entry (IB 11-14, 17; R 1596);

3. Crown ignores this Court's holding in *Winn-Dixie*, quoted with emphasis by Schropp, that "we **also** hold that *Mercury Motors* is not applicable in the present case where the suit was tried on the theory of direct liability of Winn-Dixie, and the jury, by special

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[1] Schropp uses the same designations set forth in the Preliminary Statement as his Initial Brief, with the additions that "IB" refers to his Initial Brief and "AB" refers to Crown's Answer Brief.

verdict, decided that Winn-Dixie should be held directly liable for punitive damages." (IB 26, AB 19);

4. Crown recognized the case was being submitted to the jury on a direct corporate liability theory as well as a managing agent theory by its own comments in closing argument and by its failure to object to any of Schropp's statements in closing (IB 28);

5. Crown has no answer for the fact that if the case were tried solely on a managing agent theory, the verdict form Crown sponsored over Schropp's objections should not have contained separate spaces for the jury to answer Question 9 separately as to Crown and Cohen, but only a space as to Cohen (IB 29); and

6. Crown ignores that even if the Second District is correct and additional managerial-level conduct is required for punitive damage liability under *Winn-Dixie*, Schropp demonstrated such conduct through, among others, the lies of the service manager and detail department (or body shop) manager (IB 32-37).

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).

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

Crown attempts to divert the discussion from the actual holding in *Winn-Dixie* to another rule of law not even discussed in the case. As Schropp demonstrated in his initial brief, *Winn-Dixie* clearly recognized (as had the Fourth District) that a plaintiff is

entitled to seek punitive damages against a defendant "on the basis of direct corporate liability." 472 So. 2d at 724.

The Fourth District issued its decision in *Winn-Dixie* in 1984, prior to this Court's decision in *Bankers*. This Court's *Winn-Dixie* opinion observed direct corporate liability is distinct from a *Mercury Motors* theory. The Court then commented it had held in *Bankers* "that *Mercury Motors* was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation." 472 So. 2d at 724.

In the next sentence this Court 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, this Court was clearly stating the *Mercury Motors* standard is not applicable to **either** the managing agent theory of *Bankers* or the direct liability theory of *Winn-Dixie*.

Because Crown cannot address this clear holding, it asserts the holding in *Winn-Dixie* was "that a party who has tried a case on one theory cannot attack the judgment after trial on the basis of an antagonistic theory" (AB 19). However, prior to discussing the direct liability basis for punitive damages, *Winn-Dixie* simply noted the defendant had attempted to rely on *Mercury Motors* to justify the directed verdict. *Winn-Dixie* never set forth the "rule of law" Crown claims that it did. Indeed, it would not even make

sense because it was the plaintiff, not Winn-Dixie, who was advancing the punitive damage theory.[2]

The defendant in *Winn-Dixie* argued the plaintiff was not entitled to punitive damages under one theory (*Mercury Motors*), which this Court held was irrelevant to its entitlement under a separate theory (direct corporate liability under *Winn-Dixie*). Similarly, Crown's argument that Schropp is not entitled to punitive damages under one theory (managing agent under *Bankers*) is irrelevant to Schropp's entitlement to punitive damages under the separate theory of direct corporate liability (*Winn-Dixie*).

Crown does not seriously attempt to justify the Second District's position that *Winn-Dixie* is no different from the managing agent standard of *Bankers* based on the Fourth District's comment that the store employee in *Winn-Dixie* had consulted with an assistant store manager before calling the authorities to arrest the plaintiff (IB 27). Crown states, "the parties appear to have agreed that the conduct of the store manager was attributable directly to Winn-Dixie (AB 18)." Nowhere in the opinions does it state the parties made such an agreement. Furthermore, as even Crown recognizes by its footnote, the employee did not consult a "store manager," but only an assistant store manager (Crown's reference to a concurring opinion referring to the store manager

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[2] Crown repeats this fallacious reasoning at the end of the paragraph where it asserts this Court held the defendant to its trial election to proceed on a theory of direct rather than vicarious liability. Again, it is obviously not the defendant who picks the theories of punitive damage liability on which to proceed, but the plaintiff who does so (AB 19).

seizes on loose language in the concurrence where it was obviously not concerned with the status of that employee).

Crown's discussion of the instructions in its case misrepresents one instruction the trial court gave and ignores other crucial instructions (AB 20-21). Crown asserts the court instructed the jury that if found Cohen's conduct warranted punitive damages "then and only then they could consider in their discretion to award punitive damages against Crown" (AB 21). This is totally false. The actual instruction merely states one basis for Crown's punitive damage liability:

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

Because to do otherwise exposes the fallacy of its argument, Crown simply ignores the fact the court also instructed the jury three times, with Crown's approval, that "you may assess punitive damages against one defendant and not the other" (R 1163, 1170, 1173). This confirms the falsity of Crown's assertion the court instructed the jury it could "only" award punitive damages against Crown if it had done so against Cohen (AB 21).

Crown's claim that no other courts have recognized the direct liability theory ignores *Food Lion, Inc. v. Clifford*, 629 So. 2d 201 (Fla. 5th DCA 1993), cited at IB 29. *Food Lion's* reference to direct liability cited *Montgomery Ward and Co., Inc. v. Hoey*, 486 So. 2d 1368 (Fla. 5th DCA 1986). *Hoey* cited *Winn-Dixie* when

holding the jury could impose "punitive damages upon the employer, not for the employee's wanton action, but for the employer's." 486 So. 2d at 1371.

Many other Florida decisions have sustained punitive damage awards based on the direct liability of the corporation without any reference to a plaintiff proving liability under a *Mercury Motors* (vicarious) or *Bankers* (managing agent) theory.

For example, in an asbestos case this Court recently observed "punishment and deterrence are the policies underlying punitive damages." *W.R. Grace & Company v. Waters*, 19 Fla. L. Weekly S286 (Fla. 1994). Nowhere in that opinion, the underlying district court opinion, or in numerous other asbestos punitive liability cases is there any mention of the conduct of a particular employee or manager of the companies[3].

Similarly, this and other courts have recognized the propriety of punitive damages directly against insurance companies in bad faith cases without discussion of specific employees or managing agents. *E.g., Campbell v. Government Employees Insurance Company*, 306 So. 2d 525, 531 (Fla. 1974); *Dunn v. National Security Fire and Casualty Company*, 631 So. 2d 1103, 1108 (Fla. 5th DCA 1993).

As here, those corporate defendants are being held liable for punitive damages because of the actions of the company itself. *Winn-Dixie* addresses the situation where fraudulent or intentionally tortious conduct is not limited to a single

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[3] *E.g., United States Mineral Products Company v. Waters*, 610 So. 2d 20 (Fla. 3d DCA 1992); *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 247 (Fla. 1st DCA 1984), *review denied*, 467 So. 2d 999 (Fla. 1985).

individual but is properly chargeable to the corporate entity. That is the situation here and Crown should be punished and deterred based on the fraud that permeated virtually all of its dealings with Schropp.

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.

Crown states that "Schropp concedes that if *Winn-Dixie* does not offer him a distinct theory of recovery, he cannot prevail ..." (AB 14). This is false. Crown ignores the portion of Schropp's initial brief found at IB 32-37, presumably because Crown has no effective response. Schropp demonstrated Crown's argument that there was only one post-sale act covered by verdict Question 7 and only one "manager" involved (Cohen) is wrong. Verdict Question 7 asked the jury to determine if there was fraud against Schropp "after the date of sale" (R 1596; IB 34).

As detailed in the initial brief, the post-sale fraud was not limited to whether or not Crown performed a special process, but included the back-dating of the title; telling Schropp there was no pollution damage but only water spots; the service manager lying that he was watching the car being buffed when it was not; inducing Schropp to relinquish the car to Crown again by telling him Crown would buy back the car if he was not satisfied after the special process; claiming Mercedes-Benz authorized the special process; and the detail department manager's testimony regarding the special process (IB 11, 33-36). As discussed at IB 33-36, such evidence shows post-sale lies by both Crown's service manager and detail department (body shop) manager, among others.

Such evidence is sufficient to sustain the jury verdict even under a *Bankers'* theory. The jury found fraud by Cohen, the sales manager, and there is evidence of fraud by other employees (including managerial level employees: the service manager and the detail department manager). Crown's argument that there was no discussion of the service manager's duties cannot save it, for two reasons. First, there was no discussion of the duties of the assistant store manager in *Winn-Dixie*, and Crown must rely on the Second District's reading on this point to try to avoid punitive damages (otherwise, direct liability is different from *Bankers* and Crown loses). Second, Crown cannot distinguish its sales manager from its service manager or its detail department manager. Crown gave them all manager titles and enabled them to lie to Crown's customers (by following its standard procedures, IB 30).

The involvement of high-level Crown managerial personnel in the fraud perpetrated on Schropp is further demonstrated by the events surrounding and subsequent to the alleged "special process." Crown's brief describes in detail the supposed application of 3M Finesse during the fourth service visit, ignoring an interrogatory response in which Crown stated that no such process was ever done on Schropp's vehicle. Crown attempts to dismiss this sworn response in a footnote, claiming that it should be disregarded because it was "preliminary" and answered without the input of Cohen, who was no longer a Crown employee (AB 10).

Unfortunately for Crown, the interrogatory response cannot be so easily dismissed. The substance of the response was that Crown's service records detailed all work done on each customer's

car and that these records showed that nothing was done to Schropp's vehicle during the fourth service visit other than to change the wheel locks. There is nothing "preliminary" in a 1990 interrogatory response concerning the content of 1988 corporate records, and the interrogatory response itself states that "defendant's knowledge expressed herein is complete" (R. 510-11). Likewise, Cohen's lack of input cannot aid Crown, as Cohen filed a pretrial affidavit in opposition to Schropp's motion for summary judgment, also published to the jury, claiming that no "special process" had been performed and that Schropp's allegations to the contrary were "unfounded" (R. 671).

The reason Crown fears this evidence is that it traps Crown in a web of contradictory lies. It demonstrates that Crown's initial strategy was to claim that Schropp had fabricated the entire "special process" incident out of whole cloth. Later, perhaps because Schropp's other claims were well documented, it was decided to take the position that a "special process" had in fact been performed. Either version sinks Crown. If, as Crown claimed at trial, a "special process" was actually performed, the interrogatory response permitted the jury to find that Crown had deliberately destroyed or altered its corporate service records, which Crown swore would have shown the work if it had been done, to support its contrary initial position. If there was no "special process," the representations to Schropp were a sham and Crown suborned perjury by employees and former employees in testifying to an event which never occurred. In either case, the jury had ample

basis to award punitive damages against Crown for its direct participation in such egregious misconduct.

II. THIS COURT SHOULD TAKE JURISDICTION OVER THE CASE.

The Second District certified this case to this Court, not on conflict grounds, as Crown claims, but because it contains a question of great public importance with respect to punitive damages under Florida law.

As the Attorney General's office stated below, this case presents crucial issues as to whether consumers can effectively deter consumer fraud (IB 31). It demands a decision that fulfills the purposes of punitive damages: punishment and deterrence[4].

III. SCHROPP'S EVIDENCE SUPPORTS PUNITIVE DAMAGES UNDER THE DIRECT LIABILITY THEORY OF *WINN-DIXIE*.

The evidence discussed in part I.B. of this brief is also more than adequate to support a verdict based on direct corporate liability. Crown's argument that the evidence does not support liability under a direct liability theory is based on its selective reading of the facts which ignores the evidence construed in Schropp's favor, as it must be on all post-sale fraud. As detailed previously, this involved much more than the special process.

Schropp's response begins with the common sense observation that the Second District obviously recognized there was sufficient evidence of post-sale fraud to support a direct liability theory

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[4] Schropp's arguments in point I.A. demonstrate he should prevail because *Winn-Dixie* "also" recognizes a theory of direct liability. Point I.B. shows he should prevail even if there must be managerial level involvement to warrant punitive damages (the assistant store manager in *Winn-Dixie*, the lying service department manager here, for one).

when it certified the case to this Court. Otherwise it would have been requesting this Court address a hypothetical question or provide an advisory opinion. Crown's argument is based on the Second District's initial error in equating verdict Question 7 with Count VI of the amended complaint (IB 33-34). On rehearing, Schropp pointed out that Question 7 was broader in scope and there was evidence of numerous fraudulent acts by Crown employees other than Cohen after the sale. The Second District's subsequent certification demonstrates the sufficiency of this evidence to support direct corporate liability under *Winn-Dixie*.

Crown's discussion of the "facts" supporting its contention is riddled with errors and unwarranted assumptions. The only post-sale fraud Crown even attempts to discuss is its service manager, Woolridge's, lie that he was watching Schropp's car being buffed during the second service visit (AB 27; IB 5, 13).

Crown attempts to justify Woolridge's statement that he was watching the car being buffed by arguing it may have been true (AB 28). This is simply incredible, since the lie was specifically alleged in Schropp's complaint and **admitted** by Crown in its answer, and this admission published to the jury (R. 511; IB 33). Crown implicitly recognized in its Second District reply brief that the service manager's misrepresentation was sufficient to support the post-sale fraud claim (A 24-25).

Crown also claims the Woolridge buffing lie was only relevant to Count I, although it earlier noted that Schropp had voluntarily dismissed that count before trial (AB 28, 3; R 4). Not only did Schropp's closing emphasize this and other post-sale lies, but

Schropp's opening addressed the evidence that was to come in regarding the service manager's buffing lie (R 71). If Crown had truly believed the buffing incident was only relevant to the dismissed Count I, it would have objected to this evidence.

In addition, contrary to Crown's claim, both parties recognized in their closings that the case was going to the jury on Schropp's argument that Crown's corporate conduct warranted punitive damages (i.e., Crown was directly liable)(IB 36-37; see also Schropp's opening at R 78). This included the lie by Crown's service manager, Woolridge, regarding buffing (R. 1153). Thus, even if Crown had had a basis to object based on the pleadings, Crown tried the issue by consent. The verdict form, which divided the case into pre-sale and post-sale categories, rather than by counts (or by before or after Schropp demanded a refund or replacement, as Crown now belatedly claims was the true dividing line in the case), was expressly approved by Crown (R 1058; IB 34).

Crown also questions Woolridge's status as a managing agent. Crown's comments about Woolridge's status miss the point and are incorrect in any event. If there is a direct theory of corporate liability, Schropp does not need to prove any employee's status. That is, the status of the employee and assistant store manager in *Winn-Dixie* are not determinative where the company's actions warrant punitive damages[5].

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[5] Even if Crown were correct, and *Winn-Dixie* is the same as *Bankers*, Schropp has shown enough to sustain the jury verdict under a *Bankers'* theory. The jury found fraud by Cohen, the sales manager, and there is evidence of fraud by other employees (even managerial level employees: the service manager and the detail department manager).

Crown's discussion simply ignores the other post-sale fraud, such as back-dating the title and its repeated contentions there was nothing wrong with the paint. Even now in the Supreme Court, Crown cannot decide whether its position is that there was nothing wrong, or that Schropp's well ("irrigation") water caused the problem (AB 29-30). As shown in the initial brief, the one honest Crown employee and Mercedes-Benz acknowledged there was environmental damage to the paint (IB 6)[6].

In sum, there is ample evidence to support the jury's finding that Crown's fraud warranted punitive damages. Recall that even in *Bankers* where the jury exonerated the manager, this Court observed that "while admittedly tenuous," the additional activity of the corporation through the visits of another officer was sufficient, in conjunction with the manager's activities (MacArthur there, Cohen here), to support the punitive award. 464 So. 2d at 532.

IV. 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.

Crown says it is "impossible to imagine" what more it could have done when the jury returned what it contended was an inconsistent verdict (AB 31). It could have asked the jury deliberate further, as it was required to do under Florida law.

Schropp has not recast his claim after *Adoro Marketing, Inc. v. Da Silva*, 623 So. 2d 542 (Fla. 3d DCA 1993) (AB 31). Schropp

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[6] On this point, Crown describes the private investigator it hired to invade Schropp's privacy as a "photographer" (AB 29). The private investigator testified he was an investigator hired to "observe the premises," and he did not merely take photographs, but, for example, attempted to tail Schropp to work (R 763, 789).

argued in the trial court and Second District that Crown had waived its argument to a directed verdict by not asking to have the jury resolve the alleged inconsistency (R 1272-73, 1823-24). It is Crown who attempted to change horses and claim there was no inconsistency after *Adoro* came out (IB 41-42; R 1234-5; A 21, 23).

Crown contends that *Adoro* does not apply to cases of "derivative liability" (AB 31-32). First, contrary to Crown's misreading of the case, *Adoro* does not limit its holding on inconsistent verdicts to cases not involving "derivative liability." In a subsequent portion of the opinion (not dealing with the inconsistent verdict issue), the court discussed the parties' treatment of the president and the company together, but even then never mentioned "derivative liability."

Second, even under *Bankers*, there can be punitive damage liability for the corporation where a managing agent is exonerated. Thus, Crown's premise for its "derivative liability" argument is wrong and its argument falls.

Third, Crown ignores that *Adoro* is merely the latest in line of cases holding the appellant must object to an alleged inconsistent verdict when returned to give the trial court an opportunity to correct the inconsistency while the jury is still there. *E.g., Sweet Paper Sales Corp. v. Feldman*, 603 So. 2d 109, 110 (Fla. 3d DCA 1992).

Crown also mischaracterizes what should have been done (AB 31). The trial court would not have instructed the jury to deliberate further about whether to impose punitive damages on Cohen. Assume Crown's *Bankers'* argument were correct and the

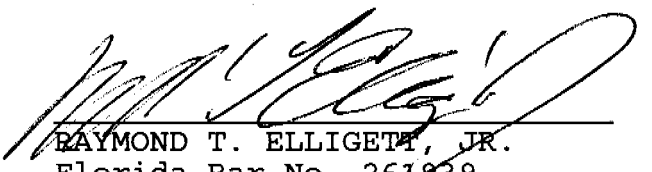
verdict was inconsistent. If Crown had properly objected, the court could have told the jury that if they intended to award punitive damages against Crown and not Cohen, they needed to answer Question 9 "yes" as to Cohen and then write in "zero" for the amount (or answer Question 9 "no" for Crown if they did not want to award punitive damages against Crown). Crown did not request this clarification because it knew what the result would be (IB 40).

Crown mischaracterizes its sponsorship of Question 9 as "acquiescence" (AB 32; IB 42 citing R 1053, 1058 showing Crown requested it over Schropp's objection). More important, its response relies again on its blatantly false assertion that the jury was "expressly" told it could not award punitive damages against Crown and not Cohen (AB 33). As demonstrated above, the instructions did not say that, but repeatedly told the jury they could award punitive damages against one defendant and not the other (R 1163, 1170, 1173).

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, 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 21st day of July, 1994.

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