IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,237

UNDERWRITERS AT LaCONCORDE,
as Subrogee of INTERNATIONAL
AIRCRAFT SALES AND LEASING
CORPORATION,

Plaintiff/Petitioner,

vs.

AIRTECH SERVICES, INC.,

Defendant/Respondent

ON PETITION FOR REVIEW
FROM DISTRICT COURT OF
APPEAL, THIRD DISTRICT

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# BRIEF OF RESPONDENT

# ON JURISDICTION

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TABLE OF CONTENTS

## STATEMENT OF THE CASE AND FACTS

This litigation arises out of the crash of a DC-6 aircraft owned by INTERNATIONAL AIRCRAFT SALES AND LEASING, INC. [hereinafter INTERNATIONAL] on February 24, 1978. As a result of the crash, suit was filed by an entity described as "UNDERWRITERS AT LA CONCORDE" [hereinafter UNDERWRITERS]. UNDERWRITERS claimed that it was the insurance carrier for INTERNATIONAL and, as a result of AIRTECH's negligence incurred certain expenses and made certain payments to its insured as a result of the property damage loss.

Despite Petitioner's suggestion, there was no evidence adduced at trial to support the contention that UNDERWRITERS' damages were liquidated as of a date certain. In fact, the record was totally devoid of any evidence whatsoever which indicated the date or dates upon which UNDERWRITERS itself made any payments for any of the losses or expenses incurred.

After trial, the jury returned a verdict in favor of the Plaintiff, UNDERWRITERS, in the amount of $135,514.66. Following the verdict, Plaintiff's counsel submitted a proposed final judgment which was executed by the trial court on November 3, 1983[1]. The judgment awarded UNDERWRITERS $135,514.66 plus "pre-judgment interest from February 24, 1978"[2]. Upon receipt of the executed final judgment, AIRTECH filed its Motion to Amend the Final Judgment which the trial court ultimately granted. UNDERWRITERS at no time filed any post trial motions with the court.

On both UNDERWRITERS' appeal and AIRTECH's cross appeal, the Third District affirmed the trial court in toto.

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1. Counsel for Defendants were not provided with a copy of the proposed judgment prior to its execution by the trial court and hence did not have an opportunity to review and/or object to same prior to its execution.

2. February 24, 1978, was the date of the accident and not the date of any payments made by UNDERWRITERS and counsel for UNDERWRITERS has since confessed this as error before the Third District Court of Appeal.

## SUMMARY OF ARGUMENT

Petitioner's references to Jockey Club, Inc. v. Bleemer, Levine & Associates, 413 So.2d 433 (Fla. 3rd DCA 1982) and Plantation Key Developers v. Colonial Mortgage Co., 589 F.2d 164 (5th Cir. 1979) are irrelevant for the purpose of conferring conflict jurisdiction upon this Court. Fla.R.App.Pro. 91030(a)(2)(A) requires "conflict with the decision of another district court of appeal" and will not support jurisdiction based on alleged conflict with the same district or a federal court.

The decision below does not expressly and directly conflict with the First District decision of A.O. Smith Harvestone v. Silver Cattle Co., 416 So.2d 1176 (Fla. 1st DCA 1982) since the damages in A.O. Smith were fixed and never disputed at the trial level and the plaintiff preserved its right to request prejudgment interest by filing a proper post trial motion for same. Furthermore, as pointed out by more recent decisions in the First District post-trial assessment of prejudgment interest is proper only where the verdict conclusively determines the exact amount due and the date from which interest is to be computed: Brewster v. Alachua Tire and Fuel Services, Inc., 442 So.2d 313 (Fla. 1st DCA 1983).

The decision below does not conflict with Broward County v. Sattler, 400 So.2d 1031 (Fla. 4th DCA 1981) since the Sattler rationale has already been approved of by the Third District in appropriate cases: Jockey Club, Inc. v. Bleemer, Levine & Associates, supra. Implicit in the Sattler decision is the recognition that there must be some evidentiary predicate indicating "the date the debt was due". The Sattler rationale applies only where this evidentiary predicate has been fulfilled. Since the Third District has already embraced the Sattler rationale it stands to reason that Petitioner waived its right to have the trial judge assess interest since it failed to satisfy the evidentiary requirements for same.

## ARGUMENT

At the outset, Respondent would point out that any alleged conflict with the decision below and Jockey Club, Inc. v. Bleemer, Levine & Associates, supra, and Plantation Key Developers v. Colonial Mortgage Co., supra, are irrelevant to the question of conflict jurisdiction to this Court. Fla.R.App.Pro. 9.030(a)(2)(A) is quite specific in its requirement of "conflict with the decision of another district court of appeal". Jockey Club was an earlier decision from the Third District and Plantation Key was a decision from the Fifth Circuit Court of Appeal. Even assuming the existence of conflict with the decision below and these two cases[3] this is not sufficient to support jurisdiction under the terms of Rule 9.030.

At first blush, the existence of conflict between the decision below and A.O. Smith and Sattler seems apparent. Indeed, it may require review of the complete record on appeal before the lack of conflict becomes readily apparent. Respondent does, however, believe that, upon close and careful inspection of the cases, the apparent conflict will vanish.

Given a cursory glance, the decision below could easily be interpreted as a universal rejection of the trial court's ability to add interest to a jury's damage award. If read this way, it would indeed conflict with the A.O. Smith and Sattler holdings on this point. Such an interpretation, however, ignores the fact that the Third District has previously allowed a trial court to assess interest under appropriate circumstances: Jockey Club, Inc. v. Bleemer, Levine & Associates, supra.

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3. The question of whether or not Jockey Club, Inc. does in fact conflict with the decision below will be subsequently addressed.

It is therefore submitted that the lower court, rather than rain down a universal rule, merely held that within the procedural and/or factual context of this particular case, the trial court did not err in refusing to assess interest. As will be demonstrated, it is the procedural context which distinguishes this case from A.O. Smith and it is the factual context which distinguishes this case from Sattler and A.O. Smith.

In distinguishing this case from A.O. Smith, it is important to note that in A.O. Smith plaintiffs properly filed a post trial motion for assessment of interest. In the case sub judice, there is no indication that such a motion was ever filed. It is this procedural distinction which sets A.O. Smith apart from the decision below.

Regardless of whose duty it is to assess a particular damage element, it is axiomatic that there must first be a proper request for same. If it is the jury's function, a proper jury instruction is required. If it is the judge's function (statutory attorneys fees, costs) a proper post-trial motion is required.

If the issue is for the jury and the party fails to submit a proper written request for same, that party waives its right to complain: Fla.R.Civ.Pro. 1.470(b); Jackson v. Harsco Corp., 364 So.2d 808 (Fla. 3rd DCA 1979), cert.den. 376 So.2d 72 (Fla. 1979); Ellis v. Gol Condo Corp., 352 So.2d 1221 (Fla. 1st DCA 1977), cert.den. 365 So.2d 214 (Fla. 1978). Similarly, if the issue is for the judge, a proper timely request is required: Lobel v. Southgate Condominium Association, 436 So.2d 170 (Fla. 4th DCA 1983)[untimely motion for appellate attorneys' fees]; Morris North American, Inc. v. King, 430 So.2d 592 (Fla. 4th DCA 1983) [untimely motion for additional prejudgment interest]; Hartford Acc. and Indem. Co. v. Smith, 366 So.2d 456 (Fla. 4th DCA 1979) [untimely motion for statutory attorneys' fees].

In the case sub judice, there simply never was the proper request for prejudgment interest, either to the jury or to the judge. Contrast this with A.O. Smith where the plaintiff made a proper request by way of a post-trial motion for interest. Given a proper request and damages fixed at the time of payment, the First District held that the trial court should have awarded interest, on the facts of that case.

In this case, however, the lower court's opinion makes it clear that Petitioner neglected to make a proper request before the jury. The opinion is also devoid of any suggestion that Petitioner ever made a proper request before the judge in the form of a post-trial motion.

Instead, Petitioners resorted to the tactic of submitting a proposed judgment to the court without providing opposing counsel with an advance copy in the hopes of presenting Respondent with a fait accompli without the necessity of argument on the matter.[4] The tactic was obviously successful since the trial court, receiving no objection from Respondent proceeded to execute the judgment even though it was incorrect in both form and substance[5].

Upon receipt of the executed judgment, and realizing what had occurred, Defendant immediately filed a Motion to Amend which the trial court, after argument granted. At no time did Petitioner file any post-trial motion requesting interest or seeking to correct the obvious errors in the original judgment[6]. Therefore, the trial court was correct in granting the only relief requested, i.e., the deletion of

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4. This tactic violates at least the spirit of Fla.R.Civ.Pro. 1.080(h)(1) and certainly the custom and practice of the area.

5. The original judgment provided for "prejudgment interest from February 24, 1978". It did not assess a specific sum for interest nor reserved jurisdiction for the subsequent calculation of same. It also assessed interest from the date of the accident rather than the date or dates of Plaintiff's out-of-pocket- pecuniary loss.

6. As pointed out earlier, Petitioner has already confessed its original judgment to be in error.

improper phraseology in the original judgment.

If Petitioners genuinely believe that the trial court had the authority to assess interest, a post-trial motion for same should have been filed. If it had, A.O. Smith suggests that the trial court may have been required to permit it. Since no such motion was filed, A.O. Smith does not apply, and the Third District was correct in affirming the trial court's decision on the matter.

Secondly, it is equally fundamental that a party seeking a particular element of damage, such as interest, must lay a proper factual predicate for the calculation of same. A proper interest calculation cannot be made unless there is evidence establishing the date or dates of the pecuniary loss. If a party fails to offer evidence on the date(s) of pecuniary loss, there is no factual predicate upon which to base a ministerial interest calculation.

The First District has both expressly and impliedly recognized this essential element of an interest award. It was implicitly recognized in A.O. Smith because the court recognized that plaintiff's damages "were liquidated at the time it issued the last draft" at p.1178. It was expressly recognized by the later First District case of Brewster v. Alachua Tire and Fuel Services, Inc., 442 So.2d 313 (Fla. 1st DCA 1983). In Brewster, the First District disallowed a trial court's post-trial assessment of interest even though damages were liquidated. It held that a jury award for liquidated damages is:

> "Eligible for a post-trial motion seeking the assessment of pre-judgment interest, only where it conclusively determines the exact amount due and the date from which interest can be computed." At p.314

This self same recognition was made in the Broward County v. Sattler, supra, case where the Fourth District held that the trial court could assess interest "from the date the debt was due" and where the amount "merely requires calculation" at p.1033.

Indeed, as pointed out earlier, the Third District itself has embraced the Sattler rationale of allowing the trial court to assess interest in appropriate cases: Jockey Club, Inc. v. Bleemer, Levine & Associates, supra[7]. In Jockey Club, the Third District specifically held that the trial court could assess interest on a post-trial basis where:

> "The amount of interest is itself a liquidated mathematically calculable sum." At p.434

Thus, the Third District has gone on record as approving the trial court's authority to assess interest where the evidence renders the amount mathematically calculable and thus a ministerial task.

The only way to reconcile the decision below with Jockey Club is to conclude that the decision below did not enunciate a universal rule in conflict with Sattler and A.O. Smith, prohibiting the trial court from assessing interest. Since the decision approves of Jockey Club which in turn approves of Sattler[8] it stands to reason that the lower court merely approved of the trial court's decision not to award interest within the procedural and/or factual context of this particular case.

Admittedly, much of the foregoing is dehors the record at present. However, a careful comparison of the decision below with Jockey Club, Sattler, A.O. Smith and Brewster strongly suggests the existence of something unique about the complexion of this particular case.

Under A.O. Smith and Sattler, a trial court is permitted to assess interest only where there is evidence of the date the out-of-pocket pecuniary loss or debt was incurred. At that point, the assessment requires mere calculation and thus

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7. Any suggestion that the decision below failed to consider or overlooked its earlier decision is dispelled by the fact that the Jockey Club decision is cited with approval in the opinion.

8. Sattler was the sole authority relied upon by the court in A.O. Smith in allowing the trial court to assess interest.

becomes ministerial. In such a case, however, even the Third District allows the trial court to assess interest.

Since the decision below did not overlook its earlier decision in Jockey Club, Respondent submits that the case sub judice is factually and/or procedurally distinguishable from Sattler and A.O. Smith.

Lastly, Respondent submits that the recent Supreme Court decision of Argonaut Ins. Co. v. May Plumbing Co., 10 FLW 353 July 3, 1985[9], does not alter the complexion of this case and is distinguishable for the same reasons advanced hereinabove. Argonaut affirms the trial court's authority to assess prejudgment interest but it is also quite clear from the opinion that the plaintiff satisfied the evidentiary and procedural requirements for the "purely ministerial" task of "mathematically calculating" interest.

To suggest that this Court intended to hold that the trial court must in all cases assess interest regardless of the factual or procedural context of the case greatly overstates the holding. More importantly, it also ignores the fact that the Supreme Court has, on at least three prior occasions prohibited post-trial assessment of interest by the trial court: Shoup v. Waits, 107 So.769 (Fla. 1926); Cary and Co. v. Hyer, 107 So.684 (Fla. 1926); State Ex Rel. Blvd. Mortgage Co. v. Thompson, 151 So.704 (Fla. 1933).

The implication is clear - both the Third District and the Supreme Court recognize that when the task is "purely ministerial" and merely requires "mathematical calculation", the trial court should assess interest. However, where it is not, for

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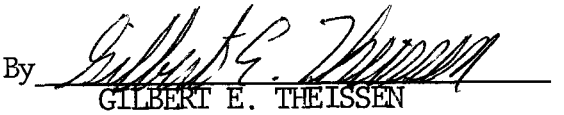
9. See Petitioner's Notice of Reliance dated July 17, 1985.

procedural and/or factual reasons, the trial court may properly refuse to assess interest.

Respondent therefore prays this Court to deny Petitioner's request to invoke discretionary jurisdiction.

Respectfully submitted,

By 
GILBERT E. THEISSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 23rd day of July, 1985, to H.C. PALMER, III, ESQ., McDonald & McDonald, 1393 S.W. First Street, Suite 200, Miami, Florida 33135.

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