IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,237

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

Plaintiff/Petitioner,

vs.

AIRTECH SERVICES, INC.,

Defendant/Respondent.
_____/

ANSWER BRIEF AND INITIAL CROSS APPEAL BRIEF BY DEFENDANT/RESPONDENT AIRTECH SERVICES, INC.

WALSH, THEISSEN and BOYD, P.A.
Gilbert E. Theissen, Esq.
633 S.E. Third Avenue
Suite 402
Fort Lauderdale, Florida 33301-3182
Phone: 463-6655 Miami: 945-7429

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Wherever appropriate, references to the Appendix attached herewith will be designated by the symbol [App.]. References to the trial transcript will be designated by the symbol [T.]. References to the Record on Appeal will be designated by the symbol [R.A.].

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. The crash occurred on February 24, 1978, while the aircraft was landing in San Juan, Puerto Rico. The crash was apparently caused when the right main landing gear failed to extend properly even though the crew claimed that the cockpit warning light did not illuminate. The cause of the failure was never definitely identified with speculation ranging from a faulty uplock mechanism to a broken bungey cable.

Two days prior to the accident, another flight crew experienced an apparent malfunction with the right main landing gear and/or indicator light and brought the aircraft to AIRTECH to have the problem looked into. On the day before the accident, AIRTECH examined the aircraft, found a switch which appeared to be stuck, freed up the switch and lubricated and tested the landing gear a total of seven times. At that point the aircraft was then returned to service.

As a result of the crash, suit was filed by an entity described as "UNDERWRITERS AT LACONCORDE". UNDERWRITERS claimed that it was the insurance carrier for INTERNATIONAL AIRCRAFT SALES AND LEASING, INC. and, as a result of AIRTECH's negligence had become obligated to and did pay the property damage loss to the aircraft.

The evidence at trial showed that on June 3, 1978, Marsh and McLennan (not UNDERWRITERS) paid the aircraft owner the sum of $147,000.00. The evidence also showed that, on June 19, 1978, F.A. Conner issued a check in the amount of $19,500.00 to Marsh and McLennan (not UNDERWRITERS) for the salvage of the aircraft.

Upon payment to INTERNATIONAL AIRCRAFT SALES AND LEASING, INC., a subrogation receipt was executed subrogating Marsh and McLennan (not UNDERWRITERS) to all rights and causes of action accruing to INTERNATIONAL AIRCRAFT as a result of the February 24, 1978 accident.

The jury returned a verdict in favor of the Plaintiff UNDERWRITERS AT LACONCORDE in the amount of $135,514.66. No prejudgment interest was awarded by the jury.

The original Final Judgment (submitted by Plaintiff's counsel) awarded UNDERWRITERS $135,514.66 plus "prejudgment interest from February 24, 1978". AIRTECH filed timely post trial motions which included a Motion to Amend the Final Judgment. All of Defendant's post trial motions were denied with the exception of Defendant's Motion to Amend the Judgment which the court granted by court Order dated January 3, 1984.

The Plaintiff filed this Appeal appealing the trial court's order striking prejudgment interest in the Final Judgment. In response thereto, the Defendant AIRTECH filed a timely cross appeal. On appeal, the Third District affirmed the trial court's ruling in toto and denied UNDERWRITERS' Motion for Rehearing.

From the Third District's ruling, UNDERWRITERS' filed its Petition for Discretionary Review of the Third District's decision and this Court by Order dated November 5, 1985 accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

APPEAL

The trial court's deletion of prejudgment interest in the Final Judgment was correct notwithstanding Argonaut Ins. Co. v. May Plumbing Co. 474 So.2d 212 (Fla. 1985). Although Argonaut held that it is the trial court's function to assess interest, it did not excuse the party seeking interest from the obligation of laying a proper evidentiary basis and/or making a proper and timely request for interest.

In the case at bar, Plaintiff failed to offer evidence as to the date(s) of actual payment by the Plaintiff and therefore failed to satisfy the "date certain" prerequisite for an award of interest. Furthermore, Plaintiff failed to make a proper timely request on a post-trial basis for an award of interest. Therefore, for either or both of these reasons, the trial court did not err in deleting references to prejudgment interest in the Final Judgment.

CROSS APEAL

The trial court committed reversible error by instructing the jury that violation of a Federal Aviation Regulation was negligence per se when it was clear that the regulation was not in effect at the time of the accident. Although a similar

regulation was in effect, there was substantial differences between the two versions. As a result of these differences, the Defendant was prejudice by the trial court's instructions and a new trial should be awarded.

The trial court also committed error by failing to direct a verdict at the close of Plaintiff's case since Plaintiff failed to offer any evidence showing that "UNDERWRITERS AT LACONCORDE" was a legal entity and/or otherwise sui juris. Plaintiff's counsel was well aware that this issue had been specifically raised by Defendant during pretrial discovery proceedings and was therefore required to offer at least some evidence to show that "UNDERWRITERS AT LACONCORDE" was, in fact, a legal entity with capacity to sue. Since Plaintiff failed to do this, he failed to prove a material fact essential to recovery and a directed verdict should have been granted in favor of AIRTECH.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DELETING PREJUDGMENT INTEREST FROM THE FINAL JUDGMENT

THE TRIAL COURT DID NOT ERR IN DELETING PREJUDGMENT INTEREST FROM THE FINAL JUDGMENT.

Petitioner relies almost exclusively upon this Court's recent decision in Argonaut Ins. Co. v. May Plumbing Co. 474 So.2d 212 (Fla 1985) for the proposition that the trial court erred in deleting prejudgment interest from the original Final Judgment. However, as will be demonstrated, within the evidentiary and procedural context of this case, the trial court did not err and its ruling should be affirmed, notwithstanding Argonaut.

Prior to Argonaut, there was considerable confusion among the Districts regarding whose function and under what circumstances prejudgment interest was to be assessed. While the Argonaut decision answered many of the questions, it did not, it is submitted go so far as to hold that prejudgment interest must be assessed by the trial court in all cases regardless of the procedural or factual context of the case.

The Argonaut Court affirmed the trial court's authority to assess prejudgment interest once the "verdict has liquidated damages as of a date certain". 474 So.2d at 215. Once this occurs, the interest computation becomes "purely ministerial" and may be assessed by the trial court on a post-trial basis. It was however surely not the intent of the Argonaut Court to thereby excuse the Plaintiff from satisfying the various evidentiary and procedural prerequisites which

accompany every other element of damage sought to be recovered, regardless of whose function it may be to assess it.

It therefore stands to reason that if any of these "other prerequisites" have been for any reason, left unsatisfied, then the Plaintiff may not, in such case be entitled to prejudgment interest. This conclusion is reinforced not only by common sense, but also by prior decisions of this Court, as will be shown.

Although the Argonaut decision held that it was the trial court's function rather than the jury's function to assess prejudgment interest, it did so without any reference to at least three prior Supreme Court decisions which came to precisely the opposite legal conclusion: Cary and Co. v. Hyer 107 So.684 (Fla. 1926), Shoup v. Waits 107 So. 769 (Fla. 1926)[1], and State ex rel Blvd. Mortgage Co. v. Thompson 151 So. 704 (Fla. 1933).

The rule that it is the jury's function to assess interest was first enunciated in the seminal case of Cary and Co. v. Hyer supra. That case involved an action for replevin of an automobile and after a trial on the merits, the jury fixed a value of the automobile at a sum certain without any mention of prejudgment interest. When entering the Final Judgment, the

---

1. Indeed, it was the Shoupe v. Waits decision relied upon by the Third District below in its affirmance of the trial court. It would therefore be most ironic were this Court to reverse the very same Court which was, perhaps the most faithful to the principle of stare decisis.

clerk of the trial court included a sum for prejudgment interest and, on appeal, the Supreme Court reversed holding:

> "Although interest upon the value of the property from the date of the unlawful taking or detention to the date of the verdict is allowable as an element of damage, like all other elements of damage, such interest, ... is to be assessed by the jury and assessed in the verdict. The clerk was therefore without authority to include in the alternative money judgment interest ... upon the value of the automobile as found and fixed by the jury, and the judgment is to that extent erroneous." at 688

A similar result was obtained in the later case of Shoupe v. Waits supra. In that case, Plaintiff sued the Defenedant to recover a balance due for the value of lumber sold to the Defendant on account. The jury rendered its verdict for the Plaintiff with no specific mention of interest. The trial court, in rendering judgment included an additional sum as prejudgment interest on the principal amount awarded by the jury and Defendant appealed. On appeal, the Supreme Court again reversed and in so doing held:

> "In an action of this nature, there being no reference to interest in the verdict, there is no authority, in entering up the judgment thereon, to add to the sum assessed by the jury as damages an additional sum for interest thereon. The judgment is to that extent erroneous." at 770

See also State ex rel Blvd. Mortgage Co. v. Thompson supra which cited its earlier decisions with approval and reached a similar result.

Each of these three decisions reached a legal conclusion

diametrically opposed to that reached by the Argonaut decision, i.e.: That it is the jury's function rather than the trial court's function to assess prejudgment interest. These decisions are therefore indistinguishable on the point of law involved.

However, since the Argonaut Court stated that it was not making new law but merely reasserting "the stare decisis controlling effect of Supreme Court decisions from the past century, cases from which this Court has never receded" 474 So.2d at 214, one must assume that these earlier decisions are somehow distinguishable either factually or procedurally.

Indeed, a careful inspection of these earlier cases provides a clue as to precisely how they are distinguishable. For example, in Shoupe v. Waits supra, it appears that the decision may have turned on the evidentiary context since the Court noted that "Plaintiff's proof of delivery ... was meager, as was also their proof of an account stated" 107 So.2d at 770.

Similarly, in State ex rel Blvd. Mortgage Co. v. Thompson supra, the decision may have turned on the procedural context. In that case, Plaintiff sought mandamus to compel the trial court to amend a judgment to include prejudgment interest on the original judgment. The Supreme Court denied relief, noting inter alia that "if the Plaintiff objected to the verdict, the time to raise that objection was when it was presented in the trial court" 151 So. at 704.

Unless the Argonaut decision intended to flatly overule its last three pronoucements on this issue and make new law [2], the implication is clear: Depending upon the evidentiary and/or procedural context of the case, it may indeed be improper for the trial court to assess interest in a judgment. In other words, notwithstanding Argonaut, a party seeking interest still has the obligation to present sufficient facts and make a proper request before the trial court may assess interest.

Having reached this conclusion, we now turn to an examination of the evidentiary and procedural context of the case sub judice in order to determine the correctness of the trial court's ruling in this case.

THE EVIDENTIARY CONTEXT

Argonaut held that it is the trial court's duty to include interest where the verdict has liquidated damages as of a "date certain". In the case at bar however, Plaintiff failed to present evidence of any such "date certain" and therefore it was impossible for the trial court to have mathematically and/or ministerially calculated the amount of interest due.

In Argonaut, this Court approved of the position adopted by the first District in Bergen Brunswig Corp. v. State Dept. of Health and Rehabilitative Services 415 So.2d 765 (Fla. 1st DCA 1982).

---

[2]Something which the Argonuat Court expressly stated it was not doing: 474 So.2d at 213.

The rule enunciated in Bergen was that:

> "For the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of pre-judgment interest when a verdict has the effect affixing damages as of a prior date." 415 So.2d at 767

However, even under this rule, there are certain evidentiary requirements, as is graphically demonstrated by post-Bergen decisions from the first District. In Brewster v. Alachua Tire and Fuel Services, Inc. 442 So.2d 313 (Fla 1st D C A 1983), the Guarantor of a note appealed a trial court's final order adding prejudgment interest to the jury's award of compensatory damages. On appeal, the first District agreed that the trial court should not have assessed prejudgment interest on a post-trial basis, even though it recognized that "Whenever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date." at 314.

Notwithstanding its recognition of the rule adopted in Argonaut, the first District recognized that a jury verdict for a liquidated claim is eligible for post-trial assessment of interest:

> "Only where it conclusively determines the exact amount due and the date from which interest can be computed." at 314

Since there was no special verdict or finding which fixed the date upon which the debt became due, the trial court's award of prejudgment interest was struck.

The point here is that even with the "better rule" approved by the Argonaut Court, it may still be inappropriate for the trial court to assess interest if the plaintiff fails to provide a sufficient evidentiary basis upon which to mathematically calculate the amount of interest due. And it is for precisely this reason that the trial court in the case at bar was correct in its refusal to assess interest because Plaintiff failed to present evidence as to when it suffered its "out-of-pocket pecuniary loss". Because of this omission, Plaintiff failed to satisfy the "date certain" prerequisite enunciated in Argonaut.

In the case at bar, the action was brought by an entity described as "Underwriters at LaConcorde"[3]. The actual owner of the property itself was never made a party to the action. Although Plaintiff introduced certain evidence purporting to show the amount of money paid to its insured, it introduced no evidence whatsoever to indicate when its out-of-pocket expenditures were made barring any such evidence, the trial court was simply unable to mathematically calculate on a purely ministerial basis the amount of interest allegedly due.

---

[3] The precise legal status of this "entity" was never established at trial and this omission is the subject of further discussion in AIRTECH'S Cross-appeal.

The evidence offered by Plaintiff to show the amount of its damages consisted of various checks and bills (See Exhibits 7, 9-15 and ix for identification) none of which indicate the date that Plaintiff made any payment. Neither of the checks offered at trial (Exhibits 7 and ix for identification) were drawn from Plaintiff's account and none of the bills offered (Exhibits 9-15) bore any evidence of when, if at all they were paid by the Plaintiff.

In short, Plaintiff offered no evidence as to the date(s) Plaintiff incurred its "out-of-pocket pecuniary loss". In the absence of a finding of the "date or dates certain", the trial court on the facts presented was powerless to ministerially calculate interest and therefore was correct in its refusal to do so.

Petitioner may attempt to argue that interest is payable from the date of the accident (February 24, 1978) rather than the date(s) of payment.[4] However, according to Argonaut the critical date is the date of Plaintiff's actual "out-of-pocket pecuniary loss".

In the case where the Plaintiff is the actual property owner itself, the date may in fact be the date of the accident. However,

---

[4] If so, this would be a complete reversal of its positions at the trial and appellate level since Plaintiff has consistently admitted that the date of the accident is not the proper date (See page 9 of Plaintiff's Initial Brief to the third District; page 16 of Plaintiff's Reply Brief and pages 4-5 of their Memorandum of Law to the trial court (RA 836-837).

in the case of an insurance carrier, the pecuniary loss is not sustained until the date payment is made: Alarm Systems of Florida, Inc. v. Singer 380 So.2d 1162 (Fla. 3rd DCA 1980), A.O. Smith Harvestore Products, Inc. v. Suber Cattle Co. 416 So.2d 1176 (Fla. 1st DCA 1982). To allow otherwise in the case of a subrogated insurer would result in a double recovery by awarding interest on money before the money was spent. It would also serve to enrich those insurers which delayed the longest in payment of their claims.

The burden of proving payment is not a great one. It could have been accomplished quite easily in this case and is a small price to pay for one seeking "the natural fruit of money". It is particularly fitting in the case of a subrogated insurer since it is, after all, the fact of "payment" which gives rise to the very cause of action sued upon.

Having failed to satisfy the "date certain" prerequisite to an award of interest, Plaintiff cannot now complain of the trial court's actions below. Thus, the trial court did not err in deleting pre-judgment interest from the original Final Judgment.

THE PROCEDURAL CONTEXT

Alternatively, AIRTECH contends that the trial court's deletion of prejudgment interest should be affirmed within the procedural

context of this case. Specifically, AIRTECH contends that the trial court was correct because Plaintiff failed to make a proper and timely request for interest on a post-trial basis thus waiving its right to claim error on appeal.

Regardless of whose duty it is to assess a particular element of damage, it is axiomatic that there must first be a proper and timely request for same. If the issue is for the jury and the party fails to submit proper written instructions, 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. Golconda 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 and timely motion is required: Lobel v. Southgate Condominium Assoc. 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 this case however, the third District's opinion makes it clear that Plaintiff neglected to make a proper request for the jury. Similarly, the Record on Appeal makes it equally clear the Plaintiff failed to ever make a proper request before the trial judge in the form of a post-trial motion.

The original Final Judgment dated November 3, 1983 was prepared and submitted to the Court by Plaintiff's counsel. Defendant was not provided with an advance copy of the proposed judgment prior to its submission to the trial court and hence did not have an opportunity to review or object to same prior to its execution. [5] The final judgment incorporated the following language: "Plus interest at the legal rate from February 24, 1978". February 24, 1978 was the date of the accident and not the date of any payment(s) made by the Plaintiff. As indicated previously, Plaintiff has repeatedly confessed this to be error [6].

Plaintiff's tactic was obviously successful and the trial court, having received no objection from defense counsel, executed the proposed judgment notwithstanding the erroneous phraseology incorporated by Plaintiff's counsel.

Upon receipt of the executed judgment and realizing what had occurred, Defendant immediately and timely filed its Motion to Amend the Final Judgment [RA 825-826] which the trial court, after argument granted. At no time did Plaintiff file any post-trial motion requesting assessment or calculation of interest or seeking to correct the error invited by Plaintiff.

Once ten days had elapsed from rendition of the original

---

[5] This tactic certainly violates the spirit of Fla. R. Civ. Pro. 1.080(h)(1) as well as the custom and practice of the area.

[6] See footnote 3 Infra.

judment: Fla. R. Civ. Pro. 1.530(g), the trial court was without jurisdiction to alter the judgment in any respect save that as requested in Defendant's Motion to Amend. Thus, the only matter properly pending before the trial court was Defendant's motion to delete the admittedly improper language pertaining to interest. Since the language was improper and Plaintiff failed to request any alternative relief, the trial court correctly granted the relief sought by Defendant.

One might argue that, notwithstanding Plaintiff's failure to timely file its own motion, the trial court still had the obligation to only "partially" grant Defendant's Motion to Amend and to fix an alternative date for the computation of interest, proceed to calculate same and then insert it in an amended judgment. Perhaps, in an appropriate situation, this could have been done but in the case sub judice this could not have been done for several reasons.

First, is the fact that Plaintiff never asked the trial court to do this by way of timely motion. At no time did Plaintiff by way of post-trial motion request the trial court to (1) pick an alternative date, (2) calculate the amount of interest due, (3) insert that amount in an amended judgment and/or (4) hear additional evidence if necessary to accomplish any of the foregoing.

Second, is the fact that there was no evidentiary predicate upon which to determine the date(s) of payment by Plaintiff.

Lacking such evidence, the trial court would have been powerless to calculate on a purely ministerial basis the amount of interest due.

Third, is the fact that the Plaintiff itself cannot decide which date is the appropriate "date certain". In its proposed judgment, Plaintiff picked February 24, 1978. Thereafter, while still at the trial level, Plaintiff admitted error and argued that June 3, 1978 was the correct date.[7] On appeal to the Third District, Plaintiff changed its position a third time and now contends that June 19, 1978 is the correct date.[8]

Under these circumstances, it is certainly no wonder that both the trial court and the third District ruled in the fashion they did.

Since Plaintiff failed by way of post-trial motion to provide the trial court with the opportunity to either correct the error invited by Plaintiff or to calculate the amount of interest includable on a post-trial basis, Plaintiff has waived its right to complain of error on the part of the trial court.

---

[7] See pages 4-5 of Plaintiff's memo of law to the trial court in opposition to Defendant's Motion to Amend. [RA 836-937]

[8] June 19, 1978 is completely arbitrary. It has nothing to do with when Plaintiff made any payment or suffered any out-of-pocket loss. It is the date of a check from one F.A. Connor, a salvage buyer unaffiliated with Underwriters At LaConcorde, to Marsh and McLennan.

It is well settled that a party cannot, on appeal complain of error for which he is responsible or has invited: 3 Fla. Jur. 2d Appellate Review §294. This rule applies with equal force to situations where attorneys prepare and submit erroneous judgments: Reliance Fertilizer Co. v. Davis 124 Fla. 859, 169 So. 579 (1936).

The only request for post-trial relief before the trial court was Defendant AIRTECH'S Motion to Amend. Plaintiff's counsel chose to remain silent and to rely on its proposed judgment which it now concedes was erroneous. Under these circumstances, the trial court did not err in granting Defendant's Motion to Amend and said ruling should therefore be affirmed.

ISSUES ON CROSS-APPEAL

I. WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NEGLIGENCE PER SE FOR THE DEFENDANT TO HAVE VIOLATED A FEDERAL AVIATION REGULATION WHICH WAS NOT IN EFFECT AT THE TIME OF THE INCIDENT COMPLAINED OF.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT SINCE PLAINTIFF FAILED TO PROVE THAT "UNDERWRITERS AT LACONCORDE" WAS A LEGAL ENTITY AND/OR OTHERWISE SUI JURIS.

I.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NEGLIGENCE PER SE FOR THE DEFENDANT TO HAVE VIOLATED A FEDERAL REGULATION WHICH WAS NOT IN EFFECT AT THE TIME OF THE INCIDENT COMPLAINED OF.

The trial court instructed the jury that violation of certain Federal Aviation Regulations constitutes negligence per se in accordance with Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222 (Fla. 3rd DCA 1978).[9] The trial court however erred when it instructed the jury that violation of F.A.R. §43.15 would constitute negligence per se on the part of the Defendant, AIRTECH, since the language quoted by the Court and read to the jury was not effective until 1982, four years after the incident in question [T.1018-1021].

At. p.1115 of the trial transcript, the trial court charged the jury that the Defendant, AIRTECH, was negligent per se if they had violated §43.15 and paraphrased the applicable language as follows:

> "43.15 entitled Additional Performance Rules for Inspection. General.
>
> Each person performing an inspection required by Part 91 of this Chapter shall 1: perform the inspection so as to determine whether the aircraft or portions thereof under inspection meet all applicable airworthiness requirements, and

---

[9] Although the Florida Freight decision has been criticized: See concurring opinion in Jackson v. Harsco Corp. 264 So.2d 808, 810 Fla. 3rd DCA 1978), and St. Louis San Francisco Ry. Co. v. White 369 So.2d 1007, 1011 (Fla. 1st DCA 1979), the Supreme Court has yet to rule on this issue.

b: If the inspection is one provided for in 91.169(e) of this Chapter and, in this case, Plaintiff's Exhibit Six is the inspection in effect and approved pursuant to 91.169(e), the Defendant shall perform the inspection in accordance with the instructions and procedures set forth in the inspection program for the aircraft inspected."

As can be plainly seen by reference to a copy of the 1982 edition of §43.15 (App. p.3) the Court utilized the requirements of the 1982 regulation rather than the regulation in effect at the time of the incident complained of.

F.A.R. §43.15 was first enacted in 1964 and amended on September 12, 1968. It was thereafter amended on October 9, 1980, and once again in 1982.

If a Defendant is to be charged with a violation of a statute or regulation, it obviously must be in effect at the time of the alleged violation: Drady v. City of Tampa, 215 So.2d 493 (Fla. 2d DCA 1968). In Drady the Second District reversed a judgment in favor of the Plaintiff where portions of the 1955 edition of the National Building Code was offered into evidence although the building in question was constructed prior to the adoption of the Code. The trial court instructed the jury that violation of the code was negligence and the Second District reversed holding that the introduction of the 1955 edition of the Code was "immaterial, improper and tended to confuse the jury" at p. 492.

In the case at bar, the accident and alleged negligence occurred in 1978. By reference to the legislative history of F.A.R. §43.15 the 1968 edition was in effect at the time of the incident complained of. It is therefore the 1968 edition which should have been read or paraphrased to the jury rather than the 1982.

The 1968 edition of §43.15 is set forth in toto at p.1 of the appendix to this brief. By comparing the 1968 version with 1982 version (App. p.3) it is plain that there are numerous material differences between the two versions. Most significantly, the second paragraph of the Court's charge is a paraphrase of §43.15(a)(2) eff. 1982 and by comparison to §43.15 eff. 1968 we see that Subsection (a)(2) was not even in effect in 1978.

Furthermore, the trial court compounded the error in at least three additional respects by: (1) referring to §91.169(e) which was not in effect in 1978; (2) determining that Plaintiff's Exhibit Six was identical to a §91.169 (e) which was not in effect in 1978; (2) determining that Plaintiff's Exhibit Six was identical to a §91.169(e) inspection and; (3) utilizing phraseology which inferred that AIRTECH, under the facts of the case <u>should</u> have performed an inspection in accordance with Plaintiff's Exhibit Six.

For the Court's review, the 1972 and 1978 versions of §91.169 are included in the appendix at pp. 5 and 7 respectively. By reference to the legislative history, we see that the 1972 version was

in effect at the time of the incident complained. Notwithstanding this fact, the trial court charged the jury in accordance with Subsection (e) which, as can be plainly seen, was not even in existence at the time of the incident.

Secondly, the trial court apparently ruled, as a matter of law, that the inspection procedures set forth in Plaintiff's Exhibit Six were identical to the inspection procedures provided for in §91.169(e). The record is, however, devoid of any evidence whatsoever that this was the case. §91.169(e) was not introduced into evidence nor was it read to the jury. In addition, there was no testimony, expert or otherwise substantiating this type of relationship.

As a final nail in the coffin, it is submitted that the trial court's phraseology compelled the jury to conclude that AIRTECH was required to inspect the aircraft in accordance with Plaintiff's Exhibit Six and that their failure to do so constituted negligence per se.

In essence, the jury was instructed that, "if the inspection is one provided for in §91.169(e), [AIRTECH must] perform the inspection in accordance with [Plaintiff's Exhibit Six]." Unfortunately, 91.169 (e),was neither read to the jury nor offered into evidence and therefore the jury would have absolutely no way of determining whether or not the regulation applied to the facts of the case.

In addition, the trial court also instructed the jury that: "Plaintiff's Exhibit Six is the inspection in effect and approved pursuant to 91.169(e)". The prejudicial effect of this language is enormous since it, in essence tells the jury that AIRTECH's failure to inspect the aircraft in accordance with Plaintiff's Exhibit Six was negligence per se, without regard for any other factors bearing upon the case.

Where jury instructions tend to mislead and/or confuse and in fact may have mislead the jury, a new trial is warranted: 32 Fla. Jur. Trial §164. In the case at bar, the trial court's instruction on this matter was improper both in substance and in form and therefore a new trial should be granted.

II.

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT SINCE PLAINTIFF FAILED TO PROVE THAT "UNDERWRITERS AT LACONCORDE" WAS A LEGAL ENTITY OR OTHERWISE SUI JURIS.

At time of trial, Plaintiff failed to introduce any evidence whatsoever concerning the legal existence, status or capacity of the entity described as "UNDERWRITERS AT LACONCORDE". AIRTECH contends that this omission constituted a vital deficiency in Plaintiff's case and therefore the trial court should have directed a verdict in favor of Defendant AIRTECH.

Normally, it is not necessary for a Plaintiff to allege the capacity or legal existence of a party Plaintiff: Fla.R.Civ.Pro. 1.120(a). However, once the Defendant raises this issue, the burden shifts to the Plaintiff to prove legal existence and/or capacity: 2A Moore's Federal Practice ¶9.02; Mach v. Mayo, 80 Fla. 372, 86 So.222 (1920).

Legal existence and/or capacity to sue is the sine qua non to the maintenance of a civil action: 39 Fla.Jur. 2d Parties §8, 59 Am.Jur.2d Parties §21, 31. It is therefore a material fact essential to recovery. It is elemental that the burden of proof rests on the Plaintiff to establish by competent evidence each material fact essential to recovery: Smith's Bakery, Inc. v. Jernigan, 134 So.2d 519 (Fla. 1st DCA 1961), Georgia-Pacific Corp. v. Squires Development, 387 So.2d 986 (Fla. 4th DCA 1980).

In the case sub judice, Plaintiff failed to prove the legal

existence and/or capacity of "UNDERWRITERS AT LACONCORDE", a material fact essential to recovery, and it was therefore the duty of the trial court to take the case from the jury and direct a verdict for the Defendant: Smith's Bakery, Inc. v. Jernigan, supra, Georgia-Pacific Corp. v. Squires Development, supra. See also: Atlantic Aircraft Corp. v. English, 198 So.2d 862 (Fla. 3rd DCA 1967).

The only trial testimony which even approached the issue of Plaintiff's legal status or capacity was that presented by Thomas Boy [T. 138-179] and William Tomlin [T.179-214]. Of these two witnesses, Mr. Boy's testimony came the closest when he was asked:

> "Q. O.K. Do you know, sir, who the insurance policy was placed with, what underwriters?
>
> A. Yes.
>
> Q. Who were they?
>
> A. A company called LaConcorde."[5]
>
> [At T. 142]

However, on cross examination it was established that Mr. Boy really had no idea whatsoever as to the status and/or make-up of "LACONCORDE":

> "Q. You don't have any personal knowledge as to exactly what LaConcorde is, do you?
>
> A. Not really. It's an insurance company.
>
> Q. Do you know if it's a company?

---

5. The term "company" is a non-specific, generic term which may include individuals, partnerships unincorporated associations and/or corporations: Black's Law Dictionary, 4th Ed.

A. I really don't know anything about the makeup of LaConcorde. I go pretty well on the faith of the insurance agent who sells the policy."

[At T. 162-163]

The next witness to testify was Mr. Tomlin, the claims manager for Marsh and McLennan, the insurance agent or broker upon which Mr. Boy had placed his faith. Inexplicably, however, the question was not even put to Mr. Tomlin. Thus Mr. Tomlin's testimony failed to shed any further light on the precise legal existence and/or status of "UNDERWRITERS AT LACONCORDE".

In short, Plaintiff failed to proffer any evidence whatsoever concerning the legal existence, status, and/or capacity of "UNDERWRITERS AT LACONCORDE". Indeed, the following exchange during directed verdict argument illustrates the fact that the Plaintiff's counsel himself recognized the deficiency:

"THE COURT: He wants to know if it's a corporation a person or what?

MR. PALMER: Your Honor, I can't tell you because I can't put evidence into the record that's not there.

I think Mr. Tomlin specifically stated- Now, off the record, if you'd like to know, I'll tell you.

It's identical to the Underwriters at Lloyds, which is a corporation. It is a syndicate, actually a large conglomerate - "

[T. 706-707]

Although the trial court came exceedingly close to granting a directed verdict [T.718-719], the motion was ultimately denied on the basis that the matter presumably had been resolved by a predecessor judge on a pretrial basis [T.710].

The matter had, in fact, not been resolved on a pretrial basis and, indeed, could not have been resolved prior to trial as will be demonstrated.

Plaintiff's Complaint [App. p. 11] alleged that UNDERWRITERS AT LACONCORDE was a "foreign insurer" and, as a result of AIRTECH's negligence became obligated to pay its insured "pursuant to the proof of loss attached hereto as Exhibit A". The proof of loss [App. p. 14] attached to the Complaint was signed by Thomas Boy on April 21, 1978, in favor of Marsh and McLennan and not UNDERWRITERS AT LACONCORDE.

By its literal terms it indicates that Marsh and McLennan insured the aircraft owner and further provides:

> "In consideration of the payment to be made I/We hereby subrogate to [Marsh and McLennan] all my/our right, title and interest in and to the property for which claim is being made hereunder, and agree to immediately notify _____(for account of [Marsh and McLennan]) in case of any recovery of the property for which claim is being made hereunder."

Thus, the proof of loss by its literal term indicates that the aircraft was insured by Marsh and McLennan and, as of April 21, 1978, the aircraft owner had subrogated and/or assigned all

of its right, title and interest in the aircraft to Marsh and McLennan and not "UNDERWRITERS AT LACONCORDE".

Faced with this inconsistency, AIRTECH answered, affirmatively alleged that "UNDERWRITERS AT LACONCORDE" was not the real party in interest and propounded interrogatories designed to explore the legal existence, status and/or capacity of the party Plaintiff.

On or about August 27, 1982, the Plaintiffs served their answers to Plaintiff's interrogatories [App. p. 15]. The interrogatories were executed by John L. McWhorter[6] and contained the following question and answer:

> "11. Please state the full name and addresses of all subentities which make up the entity known as "UNDERWRITERS AT LACONCORDE" and for each sub-entity please specify the legal status, i.e., whether it be individual, corporate, partnership or other.
>
> "Underwriters at LaConcorde" is LaConcorde Compagnie D'Assurance whose address is 5 Rue de Londre, Paris, 9E, France and LaConcorde Compagnie D'Assurance is a corporation organized under the laws of France."

Thus, at that point, the issue appeared to have been laid to rest.

Unfortunately, several months later, Mr. McWhorter's deposition was taken [R.A. 378-429] and the responses were quite different:

---

[6] Mr. McWhorter is the proprietor of John L. McWhorter & Associates, Inc., a Miami based insurance claims adjusting firm.

"Q. What is Underwriters of LaConcorde, to the best of your knowledge?

A. The easiest way to describe them, it is just like Lloyds of London. It is a group of French underwriters in Paris, France, and underwriters insurance companies in other countries besides France, England, etc., who group together to provide aviation insurance coverage.

Q. So it is not one specific corporation or company like Allstate or State Farm?

A. No. I believe there would be a number of companies and underwriters participating in the coverage."

[Depo. p.34]

At this point, Defendant AIRTECH had received two mutually exclusive and conflicting descriptions of UNDERWRITERS AT LACONCORDE" from the same individual. At this point, AIRTECH's hands were tied. A good faith effort to resolve this issue on a pretrial basis was made and conflicting responses were received. Thus, AIRTECH had no recourse but to await trial to see what evidence Plaintiff would offer in order to resolve this issue.

Accordingly, Defendant AIRTECH, in its Unilateral Pretrial Stipulation [R.A. 248-251] formally advised Plaintiff that the unresolved question as to "UNDERWRITERS" legal existence and/or status as a real party in interest would be an issue for trial.

In response thereto, Plaintiff's filed their own Unilateral Pretrial Stipulation [R.A. 302-306] which also acknowledged the continuing controversy as to the legal existence and/or capacity

of "UNDERWRITERS". Furthermore, the Plaintiffs even included the following documents within their Exhibit List:

> "19. Marsh and McLennan's treaty agreements and records involving LaConcorde treaty with DC-6-B, N-6103C, Serial #44103.
>
> 24. Documentation of existence of Underwriters at LaConcorde."

Thus Plaintiffs were well aware of and indeed stipulated that the legal existence and/or capacity of "UNDERWRITERS AT LACONCORDE" would be an issue of fact and/or law for determination at trial. Thus, this is not the case of an unsuspecting Plaintiff lulled into complacency and then ambushed at trial. The issue in question was raised from the inception of this case, never sufficiently clarified and recognized by Plaintiff as an issue to be resolved at trial.

For unknown reasons, however, the issue was not resolved at trial, since Plaintiffs offered neither testimony nor documentation as to the legal existence or capacity of "UNDERWRITERS".[7]

While this deficiency may be considered technical, it is by no means trivial. Only legal entities, personal or corporate, may sue or be sued in the courts of this State: Florida Medical Assn., Inc. v. Spires, 153 So.2d 756 (Fla. 1st DCA 1963). Certain unincorporated voluntary associations are not recognized as having the capacity to sue or be sued: Florio v. State, 119 So.2d 305 (Fla. 2d DCA 1960). Furthermore, by statute, certain unauthorized

---

[7] Although listed as a witness, Mr. McWhorter was not called to testify and neither his deposition nor his answers to interrogatories were read to the jury.

insurers are not permitted to institute, file or maintain causes in the courts of this State: F.S.§626.903.

Thus, in view of this deficiency, the trial court should have directed a verdict or, at the very least granted a new trial: See Atlantic Aircraft Corp. v. English, supra. The trial court's failure to do either was error.

CONCLUSION

For reasons set forth in AIRTECH's cross appeal, AIRTECH respectfully requests this Honorable Court to reverse the trial court's judgment with instructions to grant AIRTECH's Motion for Directed Verdict and/or alternatively to remand with instructions for a new trial.

For the reasons set forth in AIRTECH's answer to UNDERWRITERS AT LACONCORDE's appeal, AIRTECH respectfully requests that the trial court's order striking prejudgment interest be affirmed.

By 

GILBERT E. THEISSEN
WALSH THEISSEN and BOYD
633 S.E. Third Avenue
Suite 402R
Fort Lauderdale, FL 33301-3182
Phone: 463-6655 Miami: 945-7429

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 18th day of December, 1985, to H.C. PALMER, III, ESQ., McDonald & McDonald, 1393 S.W. First Street, Suite 200, Miami, Florida 33135.

WALSH, THEISSEN and BOYD, P.A.
Attorneys for AIRTECH SERVICES, INC.
633 S.E. Third Avenue
Suite 402
Fort Lauderdale, FL 33301-3182
Phone: (305) 463-6655 Miami: 945-7429

By: _____
GILBERT E. THEISSEN