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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,237

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

Appellant/Cross Appellee,

vs.

AIRTECH SERVICES, INC.,

Appellee/Cross Appellant.

CROSS REPLY BRIEF

OF

AIRTECH SERVICES, INC.

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SUMMARY OF ARGUMENT

The Cross-Appellant, AIRTECH SERVICES, INC., hereby adopts the SUMMARY OF ARGUMENT on the Cross Appeal as set forth in its Initial Cross Appeal Brief.

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.

Although UNDERWRITERS concedes that the trial court's instruction as to F.A.R.§43.15 was "technically incorrect"[1], it attempts to gloss over this error by arguing that it was "harmless". As will be demonstrated, the error was fundamental since it in essence directed a verdict in favor of UNDERWRITERS on the question of negligence.

AIRTECH readily concedes the similarities between §91.169(e)[2] and §91.217[3] and, were this the only deficiency in the instruction, it might very well be considered "harmless".

However, when this admitted error was combined with the phraseology utilized by the court in its instruction to the jury, it had the functional affect of directing a verdict in favor of the Plaintiff.

Perhaps the single most critical issue at trial was the type of inspection AIRTECH was required to perform as part of its repair work on the aircraft. Federal regulations require certain inspections to be made periodically in order to insure the continuing airworthiness of an aircraft. Generally speaking, the longer the interval, the more extensive the inspection must be. For instance, a 100 hour inspection would be less extensive than a 500 hour inspection which in turn would be less extensive than an annual inspection.

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1. At p.30 of UNDERWRITERS' Reply/Cross-Answer Brief.

2. Which was not in effect at the time of the accident.

3. Which was in effect at the time of the accident.

By the same token, there is no Federal regulation which mandates a full inspection of the aircraft every time a "squawk" is reported unless the inspection program, due to the passage of time otherwise requires it. For example, if a tire blows out, there is no requirement that, in changing the tire, the repair facility must also, ipso facto inspect the entire aircraft unless it is otherwise required by the passage of time or if the operator specifically requests this type of inspection.

Throughout the trial, UNDERWRITERS contended that AIRTECH was required to perform a complete Gear Retraction Inspection as required by Federal regulations and/or the DC-6 progressive inspection program. By the same token, AIRTECH, throughout the same trial admitted that it did not perform this particular Gear Retraction Inspection. But AIRTECH also contended that it was not required to perform this inspection because it was neither called for by the passage of time nor was it specifically requested by the operator.

Even UNDERWRITERS' own expert, Mr. Slinn admitted that AIRTECH was obligated by Federal regulation to perform the complete Gear Retraction Inspection only if it was requested by the operator [T.508-510, 519-520].

Thus, the crux of this case was not whether or not AIRTECH performed a complete Gear Retraction Inspection but whether or not AIRTECH was ever asked to perform such an inspection.

Unfortunately, the trial court's instruction literally removed this issue from the jury's consideration since the second paragraph of the trial court's instruction charged in essence that the jury must find AIRTECH negligent per se if AIRTECH failed to "perform the inspection in accordance with [Plaintiff's Exhibit 6]." The jury was literally compelled to this conclusion since the instruction implied that AIRTECH was required to perform an inspection in accordance with

Plaintiff's Exhibit 6 because it was the inspection program "in effect and approved pursuant to §91.169(e)", regardless of whether or not it had actually been requested or otherwise required under the program itself.

In one fell swoop, the trial court removed the single most critical issue in the case from the jury's consideration by instructing them that, in effect it was irrelevant whether or not a complete Gear Retraction Inspection had been requested. Since AIRTECH admitted from the outset that it did not perform this type of inspection[4], the jury was left with no alternative but to find AIRTECH negligent per se.

AIRTECH submits that when dealing with regulatory language, the violation of which results in negligence per se, extreme precision is required when giving jury instructions so that the interests of justice will be served. The trial court in utilizing an incorrect Federal regulation in conjunction with misleading phraseology misled the jury and thus deprived AIRTECH of a fair trial. The judgment below should be reversed and remanded for a new trial.

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4. Since AIRTECH also contended that it had not been requested nor was it otherwise required under the program itself when the repairs were being made.

II.

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT SINCE PLAINTIFF FAILED TO PROVE THAT "UNDERWRITERS AT LA CONCORDE" WAS A LEGAL ENTITY.

In responding to AIRTECH's argument on this point, it is submitted that UNDERWRITERS misses the point entirely. UNDERWRITERS appears to confuse the issue of "standing" and/or "real party in interest" with the separate issue of "legal existence". "Standing" appears to be closely allied to the concept of "real party in interest" and requires an entity to have sufficient interest in the litigation to warrant the court's consideration of its position: Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla. 4th DCA 1982). It is, however, a separate and distinct issue from the question of "legal existence".

In order to maintain a cause of action, an entity must be both the "real party in interest" and have "legal existence". Although UNDERWRITERS goes to great lengths to point out that it is a "real party in interest", not one word of its Brief addresses the question of whether it had "legal existence". This question to date remains unanswered.

Since the issue of Plaintiff's legal existence was raised in the pretrial proceedings, it was Plaintiff's burden to prove or at least offer some evidence on this issue. The controversy on this issue was recognized by the Plaintiff in its own Pretrial Stipulation and, notwithstanding this, Plaintiff failed to offer any evidence tending to show the legal existence of UNDERWRITERS AT LACONCORDE.

UNDERWRITERS contends that it is" abundantly clear" that it falls within the definition of persons set forth in F.S.§624.04. However this Court's attention is directed to the last four words of that definition wherein the Statute states:

> ""Person" includes an individual, insurer, . . ., and every legal entity."

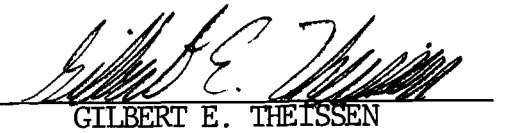
This is the very crux of AIRTECH's argument. There was no evidence offered by Plaintiff that UNDERWRITERS AT LACONCORDE is, in fact a legal entity. For this reason, the trial court should have granted a directed verdict.

Reduced to its essentials, AIRTECH's argument on this point is basically this: AIRTECH timely raised the issue of legal existence. The burden of proof therefore shifted to the Plaintiff. Plaintiff failed to offer any evidence on this issue and therefore failed to meet its burden. The trial court was therefore required to direct a verdict in favor of AIRTECH and its failure to do so was error.

CONCLUSION

Based on the authorities set forth hereinbefore, AIRTECH respectfully requests this Honorable Court to: (1) Grant a new trial as a result of the trial court's erroneous and prejudicial instruction regarding violation of F.A.R.§43.15 and/or (2) Remand with instructions to grant a directed verdict against the Plaintiff for its failure to prove an essential element of its cause of action.

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 20th day of February, 1986, to H.C. Palmer, III, Esq., of McDonald & McDonald, 1393 S.W. First Street, Suite 200, Miami, Florida 33135.

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