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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
CORPORATION,

Appellant/Petitioner,

vs.

AIRTECH SERVICES, INC.,

Appellee/Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS AND CROSS-APPEAL ANSWER BRIEF
(With Separate Appendix)

DISCRETIONARY PROCEEDING TO
REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT
OF FLORIDA

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THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT SINCE PLAINTIFF PROVED THAT "UNDERWRITERS AT LACONCORDE" WAS A LEGAL ENTITY AND/OR THE REAL PARTY IN INTEREST.

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Wherever appropriate, references to the Appendix attached herewith will be designated by the symbol [A.]. 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.].

ISSUE PRESENTED

DID THE CIRCUIT COURT ERR IN ENTERING ITS ORDER STRIKING PREJUDGMENT INTEREST FROM THE FINAL JUDGMENT, AND DID THE THIRD DISTRICT COURT OF APPEAL ERR IN AFFIRMING THE CIRCUIT COURT ORDER STRIKING PREJUDGMENT INTEREST FROM THE FINAL JUDGMENT.

STATEMENT OF THE FACTS

Petitioner relies upon his Statement of Facts as previously submitted, but supplements the Statement of Facts with the following.

Respondent, AIRTECH SERVICES, INC. states that "The evidence at trial showed that on June 3, 1978, Marsh & McLennan (not 'UNDERWRITERS') paid the aircraft owner the sum of $147,500.00." This statement is a material misstatement of the record evidence. At trial, William Tomlin, as claims manager for Marsh & McLennan, testified that pursuant to a treaty between Marsh & McLennan and Underwriters at LaConcorde, Marsh & McLennan acted as broker (agent/representative) on behalf of Underwriters at LaConcorde in handling the investigation and settlement of the claim made by the insured International Aircraft Sales & Leasing Corp. under the insurance policy issued by Underwriters at LaConcorde to International Aircraft Sales & Leasing Corp. Mr. Tomlin further testified that although a Marsh & McLennan settlement draft was issued to the insured for settlement of the claim, the Marsh & McLennan settlement check was issued only after Underwriters at LaConcorde had wire transferred the settlement funds to the United States' bank account of its representative Marsh & McLennan. Once Marsh &

McLennan received the verification of Underwriters' funds into the Marsh & McLennan bank account, Marsh & McLennan then issued the settlement check to the insured. [T.179-181,205-206]

Further, testimony proving Marsh & McLennan acted in this matter solely as the agent/representative for its principal Underwriters at LaConcorde, was produced by James Slinn. Mr. Slinn testified that he was contacted by Marsh & McLennan, the insurance agent in the States that represented these Underwriters ("Underwriters at LaConcorde"), and Marsh & McLennan advised Mr. Slinn of the crash and asked Mr. Slinn's company to investigate. [T.493-494] Thus, from the testimony presented at trial it was evident that all actions taken by Marsh & McLennan with reference to this crash were taken as agent for their principal Underwriters at LaConcorde, and as such, the actions of Marsh & McLennan were the actions of their principal "Underwriters at LaConcorde".

Respondent, AIRTECH SERVICES, INC., also states that "Plaintiff failed to offer evidence as to the date of actual payment by the Plaintiff and therefore failed to satisfy the 'date certain' prerequisite for an award of interest. This is totally incorrect. The Court admitted into evidence: the June 3, 1978 settlement check of Underwriters' agents Marsh & McLennan made

payable to the insured; the June 19, 1978 check of Mr. Conners in the amount of $19,500.00 made payable to the Underwriters' agent Marsh & McLennan for Mr. Conners' purchase of the salvage; and the dated bills evidencing the expenses incurred by Underwriters as a direct result of this crash. Thus, the Court record did contain the evidence necessary to establish the date certain.

Respondent, AIRTECH SERVICES, INC., states that the lower Court struck prejudgment interest from the original Final Judgment due to its inability to ascertain a date certain. This is not true. The lower Court in its original Final Judgment awarded prejudgment interest from the "date certain" determined by the trial judge to be February 24, 1978, the date of loss. At the hearing on Defendant's Motion For New Trial And/Or Motion For Judgment In Accordance With Motion For Directed Verdict And Motion To Alter Or Amend, the Respondent, AIRTECH SERVICES, provided the lower Court with case law of the District Court of Appeal of Florida, Third District which held the trial Court was without authority to award prejudgment interest if the jury in its verdict did not award prejudgment interest.

At that hearing the Petitioner, Underwriters, argued against the argument of Airtech and cited decisions of the District Court of Appeal of Florida, First District and Fourth District holding the trial

court did have authority to award prejudgment interest even if the jury verdict made no allowance for the award of prejudgment interest.

The trial Court in granting that part of Respondent's Motion which dealt with Altering or Amending the Final Judgment stated that, although in his Honor's opinion he had authority to award prejudgment interest, since the rulings of the Third District were binding on his Honor, he must follow the rulings of the Third District and as such, his Honor was without authority to award <u>any</u> prejudgment interest since the jury in its verdict had not awarded prejudgment interest, and based upon this alone, his Honor was entering an Order striking <u>all</u> prejudgment interest from the Final Judgment. Thus, the only reason the lower Court struck its original award of prejudgment interest from the original Final Judgment was due to the Third District's case law holding that the trial Court has no authority to award prejudgment interest where the jury makes no award of prejudgment interest in the verdict.

The above referenced is confirmed by the review of the Answer Brief of Airtech Services, Inc. filed in the District Court of Appeal of Florida, Third District on Page 5 wherein Airtech states:

> "AIRTECH concedes that, where damages are liquidated it is proper to allow recovery of prejudgment

interest as part of Plaintiff's damages: 17 Fla.Jur.2d Damages, Section 81-82. However, since it is an element of Plaintiff's damages, interest must be assessed by the jury and included within the verdict: 32 Fla.Jur.2d Interest and Usury, Section 17."

In Page 6 of that Answer Brief in which Airtech states:

"The Third District has, on many occasions addressed this precise issue and has repeatedly held that, where the jury's verdict fails to allow interest, the trial Court lacks authority to assess interest over and above the jury's verdict: Grayson v. Fishlove, 266 So.2d 38 (Fla. 3rd DCA 1972)."

SUMMARY OF ARGUMENT

The Circuit Court erroneously granted Airtech's Motion to Strike Prejudgment Interest from the Final Judgment because the Court in the granting of that motion acted contrary to the Florida law on prejudgment interest. Under Florida law when a verdict liquidates damages on a Plaintiff's out-of-pocket, pecuniary losses, Plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.

The Third District Court of Appeal erroneously affirmed the Circuit Court's Order Striking Prejudgment Interest from the Final Judgment since the Third District in affirming the trial Court based its opinion on the theory that Florida law requires a jury/finder of fact determination on the question of prejudgment interest and as such, the trial Court can not award prejudgment interest when the question of prejudgment interest was not decided by a jury.

The Order of the Circuit Court and the decision of the Third District to affirm the Circuit Court's Order is antithetical to the Florida law on prejudgment interest which was succinctly stated in the recent Florida Supreme Court opinion in Argonaut Insurance Company, et al., v. May Plumbing Company, Northern Assurance Company, Commercial Union Insurance Company

and Chicago Insurance Company, 474 So.2d 212 (Fla. 1985). The Argonaut opinion held:

> "Once a verdict has liquidated damages of a date certain, computation of prejudgment interest is merely a mathematical computation; there is no 'finding of fact' needed; thus, it is purely a ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict ..." Id. at 213. (Emphasis added)

Since the Order currently before this Court was based upon the Third District Court of Appeal's interpretation of the old law prior to the Florida Supreme Court's decision in Argonaut, supra., the Circuit Court Order Striking Prejudgment Interest from the Final Judgment and Third District Court of Appeal's ruling affirming the Circuit Court Order is erroneous and the Appellant/Petitioner is entitled to a reversal of those rulings, and a reversal of those rulings are mandated by the Argonaut opinion. Further, Appellant/ Petitioner is entitled to have its award of prejudgment interest reinstated in the original Final Judgment.

CROSS-APPEAL

The trial court correctly instructed the jury that violation of a Federal Aviation Regulation was negligence per se when it was clear that the jury instruction given correctly paraphrased the regulation in effect at the time of the accident. As such, the

Defendant was not prejudiced by the trial court's instruction and the decision of the Third District which affirmed the trial Court's action should be affirmed by this Honorable Court.

The trial court was correct in denying Defendant's Motion for a Directed Verdict at the close of Plaintiff's case since the record evidence showed that "UNDERWRITERS AT LACONCORDE" was a legal entity, real party in interest and/or otherwise sui juris. As such, the decision of the Third District which affirmed the trial court's action should be affirmed by this Honorable Court.

ARGUMENT

THE CIRCUIT COURT ERRED IN GRANTING THE MOTION TO STRIKE PREJUDGMENT INTEREST FROM THE FINAL JUDGMENT AND THE THIRD DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT ORDER ON THE HOLDING THAT PREJUDGMENT INTEREST IS ALLOWABLE ONLY IF THE JURY/FINDER OF FACT DECIDED THE QUESTION OF ENTITLEMENT TO PREJUDGMENT INTEREST.

Petitioner Underwriters' counsel appealed to the District Court of Appeal, Third District, the lower Court's Order striking all prejudgment interest from the Final Judgment. In its opinion filed April 23, 1985, the Third District Court of Appeal affirmed the Order of the lower Court striking prejudgment interest. [A.1-6]

The Third District Court of Appeal in its written opinion stated three times that its decision was based solely on the following:

> "We disagree and hold that prejudgment interest is a question for jury determination; ...." [A.2] (Emphasis added)

> "The Third District Court of Appeal, however, considers an award of prejudgment interest a question for jury determination without regard to whether the damages are liquidated. In Schulman v. Cort Aviation Corp., 330 So.2d 114, 115 (Fla. 3d DCA 1976) this court stated that where 'the verdict rendered by the jury [does] not allow or provide for the allowance of interest, it [is] error for the court, in entering judgment on the verdict, to add to the sum assessed

> by the jury an additional sum for interest thereon.' Where interest is an element of damages, and the jury fails to award interest, the trial judge is not authorized to include interest in the judgment." [A.3] (Emphasis added)
>
> "In conclusion, we reiterate our previous holding that prejudgment interest is an element of damages to be decided by the jury ..." [A.5] (Emphasis added)

LaConcorde timely filed its notice to invoke this Court's discretionary jurisdiction on the basis that the decision of the Third District Court expressly and directly conflicts with the decisions of the First District Court of Appeal and Fourth District Court of Appeal on the same question of law.

The Florida Supreme Court on July 3, 1985, rendered its decision in the case of Argonaut Insurance Company, et al., v. May Plumbing Company, Northern Assurance Company, Commercial Union Insurance Company and Chicago Insurance Company, 474 So.2d 212 (Fla. 1985). [A.7-10] In deciding Argonaut, supra., the Florida Supreme Court held:

> "Once a verdict has liquidated damages as of a date certain, computation of prejudgment interest is merely a mathematical computation; there is no 'finding of fact' needed ..." Id. at 213. (Emphasis added)

The holding of the Third District Court of Appeal in its decision in this case currently before

this Honorable Court is in direct and complete opposition to the Florida Supreme Court's holding on the law in Florida that there is no finding of fact by the jury needed in awarding prejudgment interest.

Respondent in its answer brief has failed to respond to the actual point on appeal which is: 1) the Third District Court of Appeal based its decision to affirm the trial court on erroneous law and 2) the lower Court applied the decisions of the Third District Court of Appeal which were based on the erroneous law to this case and struck its award of prejudgment interest from the Final Judgment solely because the jury did not award prejudgment interest in its verdict and as such, a trial Court in the Third District was without authority to award prejudgment interest.

In fact, Respondent Airtech at Page 8 of its Answer Brief admits that the opinion of the Third District Court of Appeal which is the basis of this appeal is erroneous. Respondent states:

> "The Argonaut Court affirmed the trial Court's authority to assess prejudgment interest once the 'verdict has liquidated damages of a date certain.' Once this occurs, the interest computation becomes 'purely ministerial' and may be assessed by the trial Court on a post-trial basis."

Based on this admission by Respondent this Honorable Court should rule in favor of Petitioner on this appeal

since that is an admission of the correctness of Plaintiff's position on the point on appeal.

It must be noted that in Respondent's Answer Brief on the Merits filed in the Third District Court of Appeal the Respondent, Airtech argued the following:

> "AIRTECH concedes that, where damages are liquidated it is proper to allow recovery of prejudgment interest as part of Plaintiff's damages: 17 Fla.Jur.2d Damages, Section 81-82. However, since it is an element of Plaintiff's damages, interest must be assessed by the jury and included within the verdict: 32 Fla.Jur.2d Interest and Usury, Section 17."

In Page 6 of that Answer Brief in which Airtech states:

> "The Third District has, on many occasions addressed this precise issue and has repeatedly held that, where the jury's verdict fails to allow interest, the trial Court lacks authority to assess interest over and above the jury's verdict."

Respondent instead of continuing to argue the correctness of these rulings by the Third District Court of Appeal, now, when arguing before the Supreme Court changes its argument to argue new areas that were not appealed and that are not before this Honorable Court.

The Respondent, Airtech, after admitting the decision of the Third District was in error, is now changing horses in mid-stream by ignoring the fact that the Third District specifically stated three times in

its Opinion that the basis for its affirming the lower Court's Order striking prejudgment interest from the Final Judgment was because the trial Court is without authority to award prejudgment interest where the jury in its verdict made no allowance for prejudgment interest.

Even if the arguments now made in its Answer Brief were before this Court, they are without merit.

Respondent argues that evidence of date certain was not presented. However, this is not so. In the case of Bergen Brunswig Corporation v. State Dept. of Health & Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982) the Court stated:

> "In the present case the jury verdict established the amount of damages, and the record evidence indicates that, due to appellee's dissatisfaction with appellants' performance, the parties' contractual relationship was terminated by formal notice prior to the commencement of the proceeding below. The jury verdict in this case thus had the effect of fixing damages as of a prior date, and therefore prejudgment interest should have been awarded." Id. at 767. (Emphasis added.)

In the case currently before this Court, the verdict established the amount of Underwriters at LaConcorde's damages and the record reflects the necessary evidence to ascertain the date certain. The trial judge determines the date certain by applying the

record evidence to the applicable law governing date certain. Thus by applying the Bergen Court's holding to the facts in Petitioner's case it is obvious that the jury verdict in Petitioner's case had the effect of fixing damages as of a prior date, and therefore prejudgment interest should have been awarded.

In Florida, the date certain can vary depending on what type of action is maintained. If the insured is suing to recover its damages then the date certain is the date of loss. If the insurer is suing in a subrogation action to recover the damages it paid its insured then the date certain is the date of its payment to its insured.

However, Florida law can arguably be interpreted to change the date certain in a subrogation action to a date other than the date the insured paid its insured, if, as in this case salvage was sold after payment to the insured. In the case of Bergen Brunswig Corporation v. State Dept. of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982), the Court stated that damages become liquidated as of the date the damages of Plaintiff are mathematically calculable. Petitioner, Underwriters at LaConcorde, through its agent Marsh & McLennan paid its insured on June 3, 1978. However, Underwriters at LaConcorde, through its agent March & McLennan, received on June 19, 1978 the sum of

$19,500.00, an amount which then by way of offset reduced Underwriters' damages. Thus, this date of payment of this offset may arguably be the date which should be used as the date certain. But since the salvage amount is an offset, possibly the date certain is still the date Underwriters through its agent paid its insured.

The undersigned attorney for Underwriters at LaConcorde in his capacity as an officer of the Court brought this information to the Court's attention in order for the Court to have all the potentially applicable case law on the subject prior to entering its ruling.

The fact that the date certain can vary depending on the record evidence does not prohibit the awarding of prejudgment interest. The Court in awarding prejudgment interest is to determine, based on the record evidence, the date certain and enter the award from that date.

Respondent, argues that the jury in its verdict must specifically set forth the date certain before prejudgment interest can be awarded by the lower Court. This is totally incorrect. A review of the jury verdict in the Argonaut case affirmatively shows that Argonaut's jury in its verdict did not set forth a date certain. A copy of that jury verdict is attached for the Courts'

convenience and review. [A.11-12] Further, Respondent's argument has no merit based on the Bergen Court's holding, quoted above, in which the Court specifically pointed out that that jury in its verdict did not set forth the date certain, instead the date certain was obtained by review of the record evidence.

A review of the jury verdict in Argonaut reflects that in that case the Court determined the date certain. Thus, the Argonaut case does not support the Respondent's position that the jury must set forth the date certain in its verdict. But the Argonaut case does support Petitioner's argument that the date certain is based on a date determined by the Court from the evidence presented at trial. In the trial of this case, Underwriters' evidence at trial included the date of loss of February 24, 1978, the date of payment to the insured by way of check dated June 3, 1978 and the date of set-off as evidenced by the salvage check dated June 17, 1978. The Respondent in his brief states "The burden of proving payment is not a great one." This is correct and this burden was met by Underwriters as a review of the record evidence will verify.

Respondent in its argument to this Honorable Court on page 12 and 13 of its Answer Brief on the Merits states the following:

> "In Argonaut, this Court approved of the position adopted by the

> First District in Bergen Brunswig Corporation v. State Dept. of Health & Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982)."
>
> The rule enunciated in Bergen was that:
>
> "... for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date." Id. at 767. (Emphasis added)

It must be noted that Respondent did not advise this Honorable Court that the Bergen Court's decision when read in its entirety specifically refutes the Respondent's argument that the jury in its verdict must specifically set forth the date certain of Plaintiff's damages.

The Respondent conceded that the Argonaut decision affirmed the point on appeal that the Third District Court of Appeal's decision is erroneous since the trial judge can award prejudgment interest where prejudgment interest was not set out in the jury verdict. However, Respondent after conceding the above, cites three cases, Cary & Co. v. Hyer, 107 So. 684 (Fla. 1926), Shoup v. Waits, 107 So. 769 (Fla. 1926), and State ex rel Boulevard Mortgage Co. v. Thompson, 151 So. 704 (Fla. 1933) the latest of which is 1933 for the argument that this Honorable Court's Argonaut decision is in error. The Respondent, argues for four pages that

these three cases should be read in a manner so as to totally change this Honorable Court's clear and concise ruling in Argonaut that once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation. There is no finding of fact needed. For this Honorable Court to rule in accordance with Respondent's ludicrous argument would result in returning the Florida law on prejudgment interest to a state of total confusion which existed prior to the Argonaut decision. It is evident from review of Respondent's Answer Brief in the Third District Court of Appeal and in the Supreme Court that Respondent will argue an interpretation of any theory, no matter how incorrect to avoid payment of the damages rightfully owed to Underwriters in this case.

Respondent in its Answer Brief advises this Honorable Court that the Court's decision in Shoup v. Waits, 107 So. 769 (Fla. 1926) is distinguishable from the Argonaut decision as follows:

> "Indeed, a careful inspection of these earlier cases provides a clue as to precisely how they are distinguishable. For example, in Shoup 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 of the lumber was meager, as was also their proof of an account stated' 107 So.2d at 770."

Respondent's above statement is purposely incorrect. A review of the Shoup decision reveals the Court's finding in Shoup was:

> "Although the Plaintiffs' proof of delivery of the lumber was meager, as was also their proof of an account stated, it was not so deficient as to authorize a directed verdict for the defendant, and was therefore properly submitted to the jury." Id. at 770.

The fact that the proof of delivery was meager was intended by this Honorable Court to refer only to that aspect of the assignments of error which dealt with the Defendant's Motion for Directed Verdict.

The Shoup Court in reference to prejudgment interest stated:

> "Although interest upon the amount found to be due by the jury, from the due date to the date of the verdict, is allowable as an element of damage, like all other elements of damage it must be ascertained by the jury and assessed in the verdict. 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." Id. at 770.

At no point in its opinion in Shoup did the Court relate the lack of meager evidence with its denial of prejudgment interest. Respondent's arguments on this

point are patently misleading and incorrect and if relied upon by this Honorable Court would lead this Honorable Court to a result not intended by the Shoup Court.

Respondent's citing of State ex rel Boulevard Mortgage Co. v. Thompson, and his argument with reference thereto is again patently incorrect since that Court did not relate denial of prejudgment interest to procedure, but cited Shoup only for the theory that prejudgment interest was not awarded by the verdict and as such was not to be awarded by the Court in the Final Judgment.

Respondent's argument in relation to Brewster v. Alachua Tire and Fuel Services, Inc., 442 So.2d 313 (Fla. 1st DCA 1983) is not valid for the point Respondent cites it to support which is "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." This is no longer the law in Florida having been superceded by this Honorable Court's decision in Argonaut. The Respondent was fully aware of the Argonaut and Bergen decisions, but ignored those decisions and instead cited the Brewster case as authority to be relied upon by this Honorable Court.

The Respondent, after admitting that the Third District erred in its holding that the trial Court is

without authority to award prejudgment interest, attempts to lead the Court's attention away from the point on appeal by arguing that the real issue on appeal is something other than the Third District's ruling that the issue of prejudgment interest must be awarded in its jury verdict. In order to accomplish this the Respondent argues that Underwriters failed to produce evidence that Underwriters incurred the debt. This argument is not the point on appeal, and is totally without merit as is evidenced by the record evidence. The testimony at trial showed that the actions taken by Marsh & McLennan in this case were solely on behalf of and in its capacity as representative/agent of its principal Underwriters at LaConcorde. It is well settled in the law of Florida that the acts of the representative/agent are considered to be the act of the principal. 2 Fla.Jur.2d Agency and Employment, Section 88 states:

> "A principal is entitled to the rights and benefits which result from his agent's authorized act. Thus, it is well recognized that the act of an agent within the scope of his authority or employment is in legal effect the act of the principal, and the latter is entitled to all the advantages flowing therefrom."

When the Florida agency law is applied to the record evidence it is apparent that Respondent's argument on this point has no merit and should be ignored.

Respondent, AIRTECH SERVICES, INC. further states "Plaintiff failed to make a proper timely request on a post-trial basis for an award of interest." This is a totally ludicrous argument. Since the lower Court awarded prejudgment interest in its Final Judgment there was no reason nor requirement for Plaintiff to file a post-trial Motion to Request Prejudgment Interest since the trial Court had already awarded prejudgment interest in the Final Judgment.

The only point on appeal which should be argued before this Court and a decision made thereon is:

> "Whether the Third District Court of Appeal was correct in its ruling that the issue of prejudgment interest must be submitted to the jury for determination and where the verdict does not provide for the allowance of interest the trial judge is not authorized to include interest in the judgment."

It is clear from review of the opinion filed by the Third District in this case that the Third District Court of Appeal affirmed the lower Court's Order striking prejudgment interest solely because the Third District felt the trial Court was without authority to award prejudgment interest where the jury verdict made no allowance for interest. Respondent's Answer Brief on the Merits to this Honorable Court does not in any manner address the above which is the basis of the ruling of the Third District Court of Appeal and which is the point on appeal.

Respondent's argument in its initial Answer Brief on the Merits filed in the Third District affirmatively show that the basis for the trial Court striking of all prejudgment interest from the Final Judgment was solely due to the prior rulings of the Third District Court of Appeal which held that the trial Court is without authority to award prejudgment interest where the matter was not submitted to the jury for determination and no allowance for interest was made in the verdict. The arguments currently being pressed in Respondent's Answer Brief on the Merits to this Honorable Court had no bearing on the trial Court's decision to strike all prejudgment interest from the Final Judgment. If those arguments had any bearing on the trial judge's decision then the trial judge would not have awarded prejudgment interest in the original Final Judgment. The original Final Judgment on its face affirmatively shows that in the opinion of the trial Court the record evidence supported an award of prejudgment interest and that a date certain could be obtained by a review of the record evidence.

CONCLUSION

In conclusion, it is respectfully submitted, that the Third District Court of Appeal applied an erroneous rule with regard to the recovery of prejudgment interest.

The Third District Court of Appeal erred in affirming the trial Court's Order striking the award of prejudgment interest, which the trial Court had awarded in the original Final Judgment, since the Third District Court of Appeal's decision was based solely on application of the following incorrect law.

> "Where interest is an element of damages, and the jury fails to award interest the trial judge is not authorized to include interest in the judgment."

The correct law which should have been applied by the Third District as is evidenced by this Honorable Court's Argonaut decision is:

> "Once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation. There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict."

It is respectfully requested that this Honorable Court reverse the District Court with

reference to its denial of prejudgment interest on the Petitioner's liquidated damages because Petitioner had requested interest in its Complaint, but the trial court did not submit that issue to the jury.

It is, further respectfully submitted that the trial court applied an erroneous rule with regard to prejudgment interest which resulted in the trial court striking its original award of prejudgment interest from the original Final Judgment. It is respectfully requested that this Honorable Court reverse the Order of the trial Court which struck the award of prejudgment interest from the original Final Judgment and requests this Honorable Court reinstate the initial Order of the trial court which granted prejudgment interest and tax costs in favor of the Petitioner Underwriters at LaConcorde.

ISSUE ON CROSS APPEAL

I. THE JURY WAS NOT CONFUSED OR MISLED AND AIRTECH WAS NOT PREJUDICED BY THE JURY INSTRUCTION.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT SINCE PLAINTIFF PROVED THAT "UNDERWRITERS AT LACONCORDE" WAS A LEGAL ENTITY AND/OR THE REAL PARTY IN INTEREST.

PETITIONER/CROSS-APPELLEE'S ANSWER BRIEF

ARGUMENT - I.

THE JURY WAS NOT CONFUSED OR MISLED AND AIRTECH WAS NOT PREJUDICED BY THE JURY INSTRUCTION.

Petitioner/Cross-Appellee's position is that the Cross-Appeal should be dismissed since this Honorable Court is without jurisdiction to consider the points and issues raised in the Cross-Appeal since:

1. Respondent/Cross-Appellant Airtech did not file any documents of Notice of Cross-Appeal to this Honorable Court.

2. Petitioner/Cross-Appellee, Underwriters at LaConcorde's appeal was based on conflict jurisdiction, but said conflict was not certified by the District Court as being of great public interest and as such this Honorable Court's jurisdiction is limited solely to resolution of the conflict which is this Honorable Court's basis for jurisdiction. Petitioner/Cross-Appellee, Underwriters at LaConcorde in support of the above relies on its Motion to Strike, Amended Motion to Strike and Dismiss, and its January 9, 1986 Notice of Supplemental Authority which were previously filed with this Honorable Court. Petitioner/Cross-Appellee, Underwriters at LaConcorde again requests this Honorable Court to dismiss the Respondent/Cross-Appellant, Airtech Services, Inc.'s Cross-Appeal.

However, due to this Honorable Court having previously denied the Motion to Dismiss the Petitioner/ Cross-Appellee responds to the Cross-Appeal Brief as follows.

The evidence presented at trial established that AIRTECH was responsible for performing a "progressive inspection" of the aircraft. F.A.R. Section 43.15(d)(1) Progressive Inspection requires that it "... be conducted as prescribed in the progressive inspection schedule ..." AIRTECH admitted at trial that it did not perform the Gear Retraction Inspection as required by F.A.R. Section 43.15 or the DC-6 Inspection Program. [T.1013,1014,1016]

Duncan James Slinn testified that if AIRTECH failed to perform the inspections set forth in the DC-6 Inspection Program, [T.155, Plaintiff's Exhibit "6"] they were in violation of the Federal Aviation Regulations as to the maintenance of the aircraft. [T.498] Based on AIRTECH's admissions as set forth above, and Mr. Slinn's testimony, the Court correctly charged the jury with regard to "negligence per se." AIRTECH cannot be heard to complain when by its own admission it acknowledges that it failed to comply with F.A.R. Section 43.15(a) or (d).

The Court's jury instruction although technically incorrect as to F.A.R. Section 43.15(a)(2),

is a proper paraphrase of the duties and responsibilites of AIRTECH, and therefore, taken as a whole the jury was properly charged on the issues.

AIRTECH complains that F.A.R. Section 91.169(e) was not in effect at the time of the accident. However, AIRTECH's counsel was fully aware of the fact that F.A.R. Section 91.217 was in effect at the time of the accident and that all applicable parts of F.A.R. Section 91.217, pertinent to the jury instruction, are identical to the requirements spelled out in F.A.R. Section 91.169(e), and that it was in 1982 merely renumbered with minor changes which are inapplicable to the instant case. [T.1005]

The trial court ruled that Plaintiff's Exhibit 6 was identical to an F.A.R. Section 91.169(e) inspection, and that AIRTECH should have performed an inspection in accordance with same, because the first page of Plaintiff's Exhibit 6 states that:

> "This Manual was written for and approved under F.A.R. 91.217(b)(5) for specific use by INTERNATIONAL AIRCRAFT SALES & LEASING CORPORATION, on Douglas DC-6 Aircraft.
>
> ...
>
> This Manual meets the requirements of F.A.R. 91.217(b)(5) and is approved for use in complying with that F.A.R. by the Federal Aviation Administration, General Aviation

District Office, Opa Locka,
Florida."

...

The harmless error doctrine is applicable to jury instructions. Ashland Oil, Inc. v. Pickard, 269 So.2d 714 (Fla. 3rd DCA 1972) and City of Hialeah v. Robinson, 163 So.2d 523 (Fla. 3rd DCA 1964).

Florida Statute Section 59.041 Harmless Error; Effect, states:

> "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."

Jury instructions must be viewed in light of the evidence before reversible error can be ascertained. (Emphasis supplied). If it appears that the jury has not been confused or deceived, the judgment must be affirmed. Stewart v. Drawdy, 277 So.2d 803 (Fla. 2d DCA 1973). In determining whether a specific instruction is erroneous, it should be considered with all the other instructions given, and the pleadings and evidence in the case, Staicer v. Hall, 130 So.2d 113 (Fla. 2d DCA

1961). (Emphasis supplied). The proper test is whether the charge as a whole adequately presents the law upon the issues. Busser v. Sabatasso, 143 So.2d 532 (Fla. 3rd DCA 1962). In passing on a single instruction, it is to be judged in the light of all other instructions given, bearing upon the same subject and if when so judged, the law appears to have been fairly presented to the jury, an assignment of error based on the challenged instruction cannot prevail. Staicer v. Hall, supra. and Life Insurance Company of North America v. Aguila, 389 So.2d 303 (Fla. 5th DCA 1980) and Yacker v. Teitch, 330 So.2d 828 (Fla. 3rd DCA 1976).

Taken as a whole, the charges and instructions were not so harmful as to result in a miscarriage of justice and the harmless error statute applies. Florida Power & Light Company v. McCollum, 140 So.2d 569 (Fla. 1962) and North Shore Hospital, Inc. v. Luzi, 194 So.2d 63 (Fla. 3rd DCA 1967) and City of Hialeah v. Robinson, supra.

The District Court of Appeal, Third District stated in Busser v. Sabatasso, supra.

> "... Hardly any charge to the jury would escape error if taken paragraph by paragraph..."

It is difficult to achieve mechanical perfection in the trial of a lawsuit. Technical errors almost inevitably occur. The test is whether under the

particular facts of the case, the instructions could have mislead the jury or prejudiced AIRTECH's right to a fair trial. American National Bank of Jacksonville v. Norris, 368 So.2d 897 (Fla. 1st DCA 1979).

The Florida Supreme Court has held in Germak v. Florida East Coast Ry. Co., 117 So. 391 (Fla. 1928) that a judgment would not be reversed based on technical inaccuracies appearing in jury charges, which could not reasonable have been harmful in view of all of the evidence. See also, Kline v. Publix Super Markets, Inc., 178 So.2d 739 (Fla. 2d DCA 1965) and Owca v. Zemzicki, 137 So.2d 876 (Fla. 2d DCA 1962).

When one compares the two wordings of F.A.R. Section 43.15, it becomes apparent that the wording found in the jury instruction narrowed the duty imposed on the Defendant. Under the wording in effect at the time of the occurrence, AIRTECH was required "... to determine whether the aircraft or portion(s) thereof under inspection, meets all applicable airworthiness requirements ..." Under the newer reading only airworthiness, with respect to the inspection work performed, must be certified. Since the wording complained of actually narrowed and reduced Defendant's duty to inspect and certify, any error in so instructing was clearly without prejudice to AIRTECH. The duty of care mandated by the F.A.R. in effect at the time of the

occurrence encompassed that which was mandated by the current F.A.R. and the jury instruction. If a jury found AIRTECH to have breached a duty under the current F.A.R., then it follows that the duty was also breached under the version of F.A.R. in effect at the time of the occurrence.

The wording of the jury instruction which was based on the current F.A.R. Section 43.15 correctly reflected the contents of the F.A.R.'s at the time of the occurrence. A reading of F.A.R. in effect at the time of the occurrence clearly shows that each person performing an inspection on the DC-6B type aircraft in commercial operation must do so in accordance with the "...progressive inspection schedule..." These same requirements are now reflected in the wording of current F.A.R.'s and were correctly paraphrased in the jury instructions given by the trial court.

The jury was correctly instructed on the law as it is now and as it was in February 1978, and was neither confused or misled. No miscarriage of justice occurred and AIRTECH's right to a fair trial was not prejudiced.

ARGUMENT - II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT SINCE PLAINTIFF PROVED THAT "UNDERWRITERS AT LACONCORDE" WAS A LEGAL ENTITY AND/OR THE REAL PARTY IN INTEREST.

The argument of Defendant, AIRTECH on this point boils down to a question of whether or not Plaintiff proved by competent substantial evidence that "UNDERWRITERS AT LaCONCORDE" was the real party in interest entitled to bring this cause of action. We do not take issue with the applicable law cited by AIRTECH, but do take issue with AIRTECH's interpretation and argument of the law. Plaintiff respectfully submits that Plaintiff clearly proved by adequate, competent and substantial evidence that UNDERWRITERS AT LaCONCORDE were the real party in interest and were entitled to bring this cause.

Inasmuch as Defendant AIRTECH did not present any evidence whatsoever at trial to create an issue on whether or not UNDERWRITERS AT LaCONCORDE were the real party in interest or were entitled to bring this action, their argument under this point must fail. If Plaintiff can demonstrate the existence of competent substantial evidence in the record which establishes that UNDERWRITERS AT LaCONCORDE were in fact the real party in interest who paid the claim and who were therefore by

law entitled to bring this subrogation action then Plaintiff must prevail.

We respectfully submit that the testimony of Mr. Boy cited by Defendant AIRTECH in their brief at page 19 is sufficient evidence to sustain Plaintiff's burden, especially in the the absence of any conflicting evidence which might create an issue. It must be noted that Defendant AIRTECH did not present any evidence at all from any source on the question of whether or not LaCONCORDE was the real party in interest or was entitled to bring this subrogation action.

As noted in AIRTECH's brief, Mr. Boy testified that the insurance policy was placed with "a company called LaCONCORDE". He went on to state that it was an insurance company, but that he didn't really know anything about the make-up of LaCONCORDE as he went on the faith of the insurance agent who sold the policy. As will be hereafter demonstrated the policy indicated that it was placed with UNDERWRITERS AT LaCONCORDE. Mr. William Tomlin testified that he was the Claims Manager for the insurance broker, Marsh & McLennan and that UNDERWRITERS AT LaCONCORDE, by bank transfer wired the funds to him whereupon he issued a check drawn on the account of Marsh & McLennan to the insured for payment of their hull loss.

Section 624.04 of the Florida Statutes explains the broad definition of the term "Person" as it applies to an insurer writing insurance in Florida. Fla. Stat. Ann. Section 624.04 (West 1984):

624.04 PERSON DEFINED

> "Person" includes an individual, insurer, company, association, organization, Lloyds, society reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, solicitor, service representative, adjuster, and every legal entity. (Emphasis added)

Thus it is abundantly clear that UNDERWRITERS AT LaCONCORDE is an insurer, and as the insurer, forwarded their funds to their insured through their broker, Marsh & McLennan, thus Underwriters at LaConcorde easily falls within the foregoing definition of "Person" and are thus entitled as the real party in interest that paid out the funds, to bring their subrogation cause of action in their own name. The last four words of F.S.A. 624.04 "and every legal entity" are not relevant to this appeal since the record evidence affirms that UNDERWRITERS AT LaCONCORDE is an insurer and as such falls within the definition of "Person". The Third District, in Holyoke Mutual Insurance Company in Salem v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3rd DCA 1981) specifically addressed this question and clearly held that an insurer who had paid their

insured's loss was the subrogee of their insured's cause of action against the tortfeasor who caused the loss, and as such, was the real party in interest and was permitted, but not required, to prosecute and maintain their action against the tortfeasor in the insurer's own name.

The Certificate of Insurance effected through Marsh & McLennan utilized a Lloyds' Aircraft Hull Policy (U.S.A.), admitted into evidence as Plaintiff's Composite Exhibit 2 at trial, and Endorsement No. 9 thereof specifically provided as follows:

CHANGE OF NAME ENDORSEMENT

> Wherever in the said Certificate the name Underwriters at Lloyds, London or London Aviation Underwriters Association is used, the name Underwriters at LaConcorde is hereby substituted. (Emphasis added)

Thus, the policy clearly specifies that the insurance coverage was with UNDERWRITERS AT LaCONCORDE and that UNDERWRITERS AT LaCONCORDE was the insurer. Mr. William Tomlin, employed by Marsh & McLennan in their Coral Gables Office as Claims Manager identified the aforementioned insurance policy as a policy issued by Marsh & McLennan [T.180] as an insurance broker. He stated that there came a time when a claim was made, that he received the proof of loss in the amount of $147,500.00 and that Marsh & McLennan issued the draft

in said amount to the insured International Aircraft Sales and Leasing. Mr. Tomlin was asked if UNDERWRITERS AT LaCONCORDE submitted or presented the $147,500.00 to Marsh & McLennan and, if so, how? He replied:

> A: Well, it's a normal way of doing business with offshore companies, is for that company, the UNDERWRITERS, to wire the money to a bank here in the States. Once we receive the verification of the funds, we issue our check for the amount for that account.
>
> Q: Did that occur in this case?
>
> A: Yes it did.
>
> [T.181]
>
> ...
>
> Q: So, the insurance company paid out $147,500.00 and recovered from that $19,500.00 as salvage for the wreckage, is that correct?
>
> A: That's correct.
>
> [T.205-206]

Furthermore, Mr. Thomas Boy testified that he was employed by and was a part owner and corporate officer of International Aircraft Sales and Leasing Corporation and he identified Plaintiff's Composite Exhibit 2 as the Insurance Policy that was obtained by him for the aircraft in question. He stated that the policy was placed with "A company called LaCONCORDE". [T.142]

Mr. Boy was also asked:

> Q: Did you receive, in fact, $147,500.00 from your insurance company as a result of this loss?
>
> A: Yes we did.
>
> [T.158-159]

From the foregoing it is abundantly clear that Plaintiff presented ample, competent and substantial evidence to show that it was the insurer, the subrogee and the real party in interest. Defendant presented no evidence whatsoever to the contrary and did not in any way create an issue.

We respectfully submit that Defendant's argument is without merit. The only testimony or evidence before the Court showed that the insured's policy of insurance was with UNDERWRITERS AT LaCONCORDE through their broker Marsh & McLennan, and as Mr. Tomlin explained, it was UNDERWRITERS AT LaCONCORDE who forwarded the funds to him so that Marsh & McLennan could pay the insured's claim. Thus it is clear that neither the insured nor Marsh & McLennan were the real party in interest, but that UNDERWRITERS AT LaCONCORDE were in fact the only real party in interest because they were the insurer named in the policy and they actually provided the funds which paid the insured.

We respectfully submit that the argument of Defendant AIRTECH on this point is much ado about

nothing and that Plaintiff's judgment should be affirmed.

CONCLUSION

The trial court did not abuse its discretion in its rulings on the two points of alleged error as set forth in the Respondent/Cross-Appellant AIRTECH's Brief and as such the trial court's rulings below which were affirmed as correct by the Third District should be reaffirmed by this Honorable Court.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits and Cross-Appeal Answer Brief was mailed to GILBERT E. THEISSEN, ESQ., Walsh, Theissen and Boyd, P.A., 633 S.E. Third Avenue, Suite 402, Ft. Lauderdale, Florida 33301-3182, on this 31st day of January, 1986.

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