

FLORIDA SUPREME COURT
TALLAHASSEE FLORIDA

DISCRETIONARY JURISDICTION

CERTIFIED FOURTH DISTRICT COURT

CASE NO. 72,448
DCA-4 88-0062

SAM SPECTOR , BETTY SPECTOR

PLAINTIFFS / PETITIONERS

FILED
SID J. WHITE

vs.

JUN 1 1988

TRANS WORLD AIRLINES, INC.

CLERK, SUPREME COURT
Deputy Clerk

DEFENDANT / RESPONDENT

BRIEF FOR PETITIONERS SAM SPECTOR AND
BETTY SPECTOR

SAM AND BETTY SPECTOR

pro-se for Plaintiffs/Petitioners

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CITATIONS OF AUTHORITY

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INTRODUCTION

This initial brief is filed on behalf of Plaintiffs/
Petitioners SAM SPECTOR and BETTY SPECTOR (hereinafter SPECTOR)
Defendants/Respondents TRANS WORLD AIRLINES, INC., (hereinafter
TWA) The parties will be referred to as follows: SPECTOR FOR
Petitioner and TWA FOR Respondent. The symbol "R" will be used
to designate the record on appeal. SPECTOR'S Appendix will be
designated as "A". All emphasis has been supplied by SPECTOR
unless otherwise indicated.

STATEMENT OF THE CASE

Plaintiffs/Petitioners SAM & BETTY SPECTOR Appeal
from the FOURTH DISTRICT COURT OF APPEAL, Case No.DCA 88-0062,
Opinion filed April 6, 1988, which has Certified that the
Discretionary Jurisdiction of the Supreme Court may be
invoked to review. Rule 9.125 (b) Fla. R. App. P. section
(b) makes clear that certification by the District Court
is self-executing.

STATEMENT OF THE FACTS

Plaintiffs/Appellants, SAM AND BETTY SPECTOR (hereafter SPECTOR) purchased tickets from TRANS WORLD AIRLINES, INC., (hereafter TWA) for international flights from Miami to Tel Aviv Israel via New York and Athens Greece. On the return flights, SPECTOR travelled from Tel Aviv to Miami, via Paris France and New York. SPECTOR stayed three (3) days in Paris. as scheduled before proceeding to their final destination. SPECTOR contracted for Kosher meals during the flight and did not receive them. Further when SPECTOR disembarked in Paris, their luggage proceeded to New York. SPECTOR sued TWA in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach Ciunty, Florida case no. 85-76- CA (L) D. In their second amended complaint asserted claims for breach of contract for failure to provide kosher meals, misrepresentation-Fraud in the inducement of a contract and for the wilful misconduct to remove SPECTOR luggage in Paris. TWA removed the state court action to United States Southern District Court on the Basis of Diversity Jurisdiction. The removed action was styled and numbered SAM AND BETTY SPECTOR v. TRANS WORLD AIRLINES, INC., No. 85-8126-Civ-Gonzalez. The case was assigned to United States District Judge Jose A. Gonzalez Jr. Federal Judge granted TWA Motion to Dismiss on June 19, 1985, and stated;

" the basis for the plaintiffs claims is a breach of contract for which damages are sought for mental and phsical discomfort. However where the gravamen is breach of contract, even if such breach be wilful and flagrant, there can be no recovery for mental pain and anguish resulting therefrom".

Federal Judge cited COHEN v. VARIG, 405 N.Y.S. 2d 44 (N.Y. App, Div. 1978) (full text A-3) On May 10, 1988 SPECTOR filed a timely Motion for Supplemental Pleadings to incorporate into the pleadings [damage to plaintiffs luggage] Thirty-Nine days later (39) Judge GONZALEZ denied this Motion as Moot (A-2), even though Motion to amend pleadings were made in accordance with Federal Rules of Civil Procedure, Rule 15(d). No further proceedings took place in SPECTOR I.

On July 24, 1985, plaintiff filed a complaint (hereinafter referred to as SPECTOR II) In the County Court in and for Palm Beach County, Florida. Case no: M-85-9301-S, asserted claims for breach of contract. Failure to provide Kosher Meals. Willful Misconduct for failure to remove SPECTOR'S luggage in Paris France. Third to include luggage damaged by TWA, which SPECTOR had by Motion to amend pleadings to include in SPECTOR I. and denied as moot contrary to Federal Law. SPECTOR II was assigned to County Court Judge EDWARD FINE.

SUMMARY OF ARGUMENT

1. SPECTOR'S NOTICE OF APPEAL TO THE FOURTH DISTRICT COURT WAS TIMELY, WITHIN THE 30 DAYS OF RENDITION PURSUANT TO RULES 9.020 (g) 9.040 (b) (c) FLA. R. APP. P. AND COMMITTEE NOTES PERTAINING TO THE ABOVE RULES.

2. FLORIDA SUPREME COURT SHOULD GRANT WRIT OF CERTIORARI ON THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION OF THE WARSAW CONVENTION A TREATY. THE LAW MUST BE APPLIED IN THE STATE COURT BECAUSE IT EXPRESSES FEDERAL POLICY WHICH A STATE COURT MUST FOLLOW.

3. SPECTOR MADE A TIMELY MOTION TO AMEND THE PLEADINGS IN SPECTOR I. DISTRICT JUDGE GONZALEZ ERRED IN LETTING THIS MOTION "MOOT". ITS INCLUSION PERMITTED UNDER FEDERAL LAW WOULD HAVE CHANGED THE THEORY OF THE CASE.

4. SPECTOR II PLEADINGS WERE RULED BY COUNTY COURT JUDGE EDWARD FINE TO BE A TRIABLE ISSUE, CONCLUDING THAT SPECTOR I AND SPECTOR II WERE NOT BASED ON THE SAME CAUSE OF ACTION. THAT THE WARSAW CONVENTION CONTROLLED, INASMUCH AS PLAINTIFFS WERE TRAVELLING ON INTERNATIONAL FLIGHTS.

5. SUCCESSOR COUNTY COURT JUDGE I.C.SMITH REFUSED TO GIVE CREDENCE TO PREDECESSOR'S RULINGS ON ISSUES OF LAW. TRIAL COURT MOTION TO DISMISS ON PLEADINGS WAS BASED ON SPECTOR I ONLY. REFUSED TO ALLOW THE ISSUE OF THE WARSAW CONVENTION TO PROCEED TO TRIAL.

ARGUMENT

POINT I

NOTICE OF APPEAL TO THE FOURTH DISTRICT
COURT OF APPEAL FOR WRIT OF CERTIORARI
WAS TIMELY RENDERED.

a) Notice of Appeal to the 4th DCA was timely filed in the lower tribunal pursuant to Fla. R. App.P. 9.020 (g). Circuit Court acting in its Appellate capacity rendered judgment on December 7, 1987. SPECTOR filed notice of Appeal on January 6, 1988, within the 30 day limit. A copy of SPECTOR'S notice of Appeal is noted by the Clerk of the 4DCA having been filed January 6, 1988 (A-4) This notice shows receipt by the Clerk as January 7, 1988, which is disputed by the Clerk of the Circuit Court (motion for rehearing A-5) whose records indicate that Notice of Appeal was forwarded by Courier the same day January 6, 1988, which should satisfy the objection raised by TWA as being untimely. For the sake of argument following the dispatching by Courier of SPECTOR'S Notice of Appeal and arriving late in the afternoon at the DCA's Clerks office could have been tabled the actual clocking in ceremony to the following day. The timely notice should not depend upon such rigid interpretation by TWA in their effort to prevent this matter from going to trial.

b) Assuming for the sake of argument that the clocking in by the Clerk of the 4DCA is jurisdictional and not ministerial, SPECTOR'S Notice of Appeal was timely pursuant to rule 9.040

(b) (c)

(b)" Forum. If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate. cause

(c) " Remedy, If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; "[committee] notes 1977 revision. Sections (b)(c) implement Article V, section 2 (a) of the Florida Constitution" "Under these provisions a party will not automatically have his case dismissed because he seeks an improper remedy or Invokes the jurisdiction of the wrong court. The Court must instead treat the case as if the proper remedy had been sought and transfer it to the Court having jurisdiction. ALL FILINGS IN THE CASE MUST HAVE THE SAME LEGAL EFFECT AS THOUGH ORIGINALLY FILED IN THE COURT TO WHICH TRANSFER IS MADE."

THE RULE SPECIFICALLY STATES THAT THE DAY OF FILING BE ONE RECOGNIZED.

POINT II

SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE OF THE QUESTION THUS PRESENTED IN THE ENFORCEMENT OF A UNITED STATES TREATY.

" The Warsaw Convention is a sovereign treaty and as, such is the Supreme Law of the land, preempting local laws in areas where it applies. Warsaw Convention, art. 17, 49 U.S.C.A. § 1502 Note; U.S.C.A. CONST. Art 6,2 BURNETT v. TRANS WORLD AIRLINES, INC., (121 Avi. 18,405) 368 F. Supp 1152. IN NOEL v. LINEA AEROPOSTAL VENEZOLANA 247 F. 2d 677,679 (2d Cir. 1957) the court observed in discussing the proper interpretation of the Warsaw Convention.

" Although Jurisdiction of the first count under the Warsaw Convention is allegedly based on diversity, the law to be applied is not state law buta Federal Treaty. It is applied in State Court because it expresses a state policy which a Federal Court must follow, but because it expresses Federal policy which a state court must follow "

Precedent has been established. UNITED STATES SUPREME
SUPREME COURT, LAWLER v. NATIONAL SCREEN SERVICE, (349 U.S. 322

99 Led 75 S. Ct, 865) "On WRIT of Certiorari to review a judgement of the United States Court of Appeal for the Third Circuir affirming a judgment of the United States District Court for the eastern district of Pennsylvania which dismissed, on the grounds of res judicata an action for treble damages under the Anti-Trust laws reversed.."

On the grounds that the Court erred in concluding that both law suits were based on the same cause of action.

POINT III

a) Federal District Judge JOSE A. GONZALEZ JR. erred when he granted Motion to Dismiss on the grounds that no legal remedy existed for Mental Distress and physical inconvenience. which is true, but he failed to consider that the Warsaw Convention controlled under International flights. He supported his Order by citing COHEN v. VARIG, 405 N.Y.S. 2nd 44 (N.Y. App.Div.1978) While the Court held no remedy for Mental distress etc, it awarded the Plaintiff compensatory damages under Article 19, of the Warsaw Convention. The full text of this Court's decision is appendixd (A-3)

" The Court held that the Warsaw Convention controlled inasmuch as Plaintiffs were travelling on an international flight. The Court found that the provisions of the convention limiting claims for lost baggage to \$20.00 per kilogram, or \$700.00 were not applicable since Varig's refusal to unload plaintiffs luggage constituted "WILLFUL MISCONDUCT" within the meaning of Article 25 (1) of the Convention (49U.S. Stat. 3014,3020.

" Article 19 of the Convention provides that [t]he carrier shall be liable for damages occasioned by delay in the transportation by air of Passengers, baggage or goods."

The Court awarded monetary damages in accordance with article 19.

The Court in this case found no Willful Misconduct under Art. 25.

b) Judge GONZALEZ erred in not accepting the timely supplemental motion to include damaged luggage to the pleadings. This was prejudicial to the Plaintiff, it was properly filed under Federal rules of Civil Procedure Rule 15(d). He held it for 39 days and ruled it moot on the same day he granted Motion to Dismiss on the pleadings. This ruling was legally unsupportable. The inclusion of the damaged luggage was compensible and would have changed the theory of Dismissal. A deniel of "MOOT" is not a JUDGMENT ON THE ISSUE. It is defined as a subject for argument, unsettled and undecided. See ADAMS v. Union R. Co. 21,R.I.134,42a, 515 44 LRA 273

c) Thirty-Nine days (39) before the courts motion to dismiss, plaintiffs made the attempt to amend SPECTOR I to include the damaged luggage, Plaintiffs argument in this regard has merit;

" Inasmuch as the general rule in the Federal Courts is to liberally permit amendments where justice so requires, even though such amandment may change the theory of a case.

DUSSOUY v. GULF COAST INVESTMENT CORPORATION, 660 F. 2d,594 (5th Cir. 1981) And reaffirmed LANGSTON v. INSURANCE CO. OF NORTH AMERICA , 827 F. 2d, 1044 (5th Cir. 1987)

Successor Judge Final Judgment dated June 25, 1987 (A-8) makes the following rulings which gives no credence to predecessor Judge on issues of law.

- a) " Acknowledges Plaintiffs were on international flight but refuses scheduled trial to proceed on issues OF THE WARSAW CONVENTION.
- b) " The doctrine of res judicata precludes litigation of issues tried in a prior suit and those issues which could have been litigated".

A review of the record shows that an amendment was offered to include the issue which should have been litigated.

LANGSTON v. INSURANCE CO OF NORTH AMERICA AND CIGNA, Defendants, 827 F. 2d, 1044 (5th Cir. 1987) DUSSOUY v. GULF COAT INVESTMENT CORP., 660 F.2d 594, (5th Cir. 1981) Court held where justice so requires to permit amendments, even though such amendment may change the theory of the case.

FLEMING v. TRAVENOL LABORATORIES INC., 707 F. 2d *@((5th Cir. 1983) the Courts hold a second suit meets the doctrine of res judicata ONLY where the Plaintiff FAIL TO AMEND a pending action.

The Courts have recognized that where the Plaintiff pleaded a claim that the law did not recognize, the general rule was that it was a formal defect, and a judgment sustaining the demurrer in such a case did not bar a later suit based on the same event or transaction in which the missing allegation was added to the complaint. KEIDATZ v. ALBANY, 39 Cal. 2d 826 249, P. 2d 264 (1952) The first judgment determined merely that the facts there alleged were insufficient. It did not determine that those facts plus one or more were insufficient. The

POINT IV

PREDECESSOR JUDGE RULED THAT THE PLEADINGS
IN SPECTOR II ARE VALID COMPENSATORY DAMAGE
CLAIMS, WHICH WERE NOT ADDRESSED BY THE
FEDERAL COURT JUDGE.

a) Predecessor Judge's order dated December 13, 1985

(A-6) makes the following rulings:

- " The Plaintiffs and the Defendant both recognize that before the Court today are compensatory damage claims that, for the sake of argument were not addressed by the United States District Court Judge.
- b) " The Federal Judge never considered the compensatory damage claims for which there is a remedy at law.
- c) " The purpose of the Doctrine of res adjudicata is to end a controversy and to end it justly 32 Fla. Jur. 2d, sect.- 79,n.9,10 sect. 97 n.21."
" The Doctrine will not be invoked where it will work an injustice, for the primary purpose for which the Courts are is to administer Justice." (idem section 97, N.21) UNIVERSAL CONST. CO. v. CITY OF FORT LAUDERDALE, 68 so. 2d 33. SUPREME COURT OF FLORIDA EN BANC. " RES JUDICATA should not be so rigidly applied to defeat the ends of justice."
- d) " Paragraphs in Pleadings four, five and six are not BARRED BY THE DOCTRINE OF RES JUDICATA. (A-10)
- e) " ORDER dated May 19, 1986 (A-7) THIS CASE IS GOVERNED BY THE WARSAW CONVENTION.

POINT V

SUCCESSOR JUDGE's MOTION TO DISMISS ON PLEADINGS WAS IN
ERROR. IT FAILED TO ADDRESS THE RECORD IN SPECTOR II

Plaintiff moved to amend the pleading in the first suit adding the omitted allegation.

The Plaintiff in his Motion for Supplemental Pleadings pursuant to Rule 15D, Federal rules of Civil Procedure, complied with the rules. Federal Judgment denied Motion as Moot. Only a judgment directly on the motion for the "omitted allegation:" has bar effect.

The Plaintiff should have his day in Court to test the legal sufficiency of the move to amend. It is a fact that Federal Judge Gonzalez did not rule on the merits. Accordingly the doctrine of res judicata does not apply.

c) Predecessor Judge having held pre-trial conferences. cleared all motions, set trial by Jury August 8, 1986 (postponed twice by successor Judge) Newly appointed (from the bar assoc.) JUDGE I.C. SMITH on his own motion sets a new pre-trial conference stating he finds the issues for a jury too complex, more like an anti-trust (R. 233-240) SPECTOR met with Attorney BEASLEY at a mutual agreed site, and agreed to a JOINT pre-trial stipulation. agreement to be drawn up by Attorney BEASLEY and to be submitted to SPECTOR for signature. BEASLEY purposely delayed submitting this agreement until presented in Court. JUDGE SMITH in questioning BEASLEY why no JOINT signatures replied he was too busy. R.233-240) Despite this devious ploy to have the consider his stipulation only, Jusge chooses the Defendants stipulation (A-9). Quoting Judge Smith's opening statement (R-225-227)

" My Courtroom does not have a Jury box.

Why was it necessary to have two stipulated statements. Attorney BEASLEY: Your Honor I got too busy and did not submit to the Plaintiff the stipulation in time.

JUDGE SMITH: Lets go over the Defendant's stipulation.

JUDGE SMITH addressing himself to BEASLEY, HOW COULD THIS CASE HAVE GOTTEN SO FAR.

To SPECTOR, reading from a prepared decision, identified as JUDGE DOWNEY, in a glaring belligerent tone stated: HOW ARE YOU GOING TO GET AROUND THIS. Dismisses the pleadings, and heeding attorneys request in his motion to dismiss, THE COURT RESERVES JURISDICTION TO CONSIDER THE ISSUES OF COSTS.

End of Quotes.

It is noteworthy that the Predecessor Judge and the Fourth District Court of Appeals denied similar motions. SPECTOR submits JUDGE SMITH showed Bias, Hostility, that he was result orientated. Lack of Judicial demeanor in addressing the Plaintiff as described above. That he had a judicial responsibility to conduct himself in accordance with Rule 7.140 (e) Small Claims Rules. That he had no intention to proceed with the scheduled jury trial. In his own words it was too complex.

d) JUDGE SMITH in choosing only TWA'S pre-trial stipulation (contrary to his own orders) failed to address himself to the other issues so stipulated by TWA. (A-9)

TO ILLUSTRATE

PLEADINGS BY PLAINTIFF

1. Contracted Kosher Meals
2. damaged luggage.
3. failed to remove luggage in Paris

STIPULATED BY DEFENDANT

failed to provide same
admits damage to luggage
admits misticketting
luggage & permitting it to
proceed to NYC.

4. Warsaw Convention applies

admits the obligation and duties between the are governed by the Warsaw Convention.

" the applicability of the Warsaw Convention, both parties admit Plaintiff is limited to \$1680.00 recovery (article 19 of convention) unless Plaintiff can prove willful misconduct on the part of TWA (article 25)

JUDGE SMITH refusal to permit the issue of the WARSAW CONVENTION, a TREATY of the UNITED STATES GOVERNMENT to proceed to trial was a mistake in not recognizing that FEDERAL LAW PREVAILS over STATE LAW, such decision deprived SPECTOR of his Constitutional rights to " DUE PROCESS".

POINT VI

Circuit Court JUDGE DANIEL T.K.HURLEY, sitting as Appellate Judge, in affirming on the authority of LANGSTON v. INSURANCE CO. OF NORTH AMERICA, 327 F. 2d 1044 (5th Cir.1987) erred in not examining the entire text of the decision which ruled that a Plaintiff who amends by motion, such motion should be accepted by the Federal Judge, even though such amendmend may change the theory of the case. FLEMING v. TRAVENOL LABOR-ATORIES INC., 707 F. 2d 82 (5th Cir. 1983) holds that a second suit is warranted where the Plaintiff moves to amend a pending action.

The Judge erred in not recognizing from the record that the Warsaw Convention controlled this action. A TREATY that Federal Policy is clear , a STATE COURT MUST FOLLOW.

CONCLUSION

Plaintiffs, SAM SPECTOR and BETTY SPECTOR, respectfully submit that the Trial Court Judgment entered May 12, 1987 must be denied based upon the authority set forth in this brief. That the facts stated above, the second suit involved a different cause of action and the result was not affected by the circumstance that the complaint in the former suit.

This action developed on an International flight which is controlled by a United States Treaty. Warsaw Convention. The State must comply with Federal Policy.

The Judgment of the Lower Tribunals should be reversed and remanded to the Palm Beach County Court for trial by jury.

WE HEREBY CERTIFY that a true and correct copies of the Brief and its Appendix has been personally delivered to a UNITED STATES POST OFFICE to be mailed on the 25th day of May 1988 to: DANIEL F. BEASLEY Attorney for TWA, OF FOWLER WHITE, BURNETT, HURLEY, BANICK & STRICKROOT P.A., 25 West Flagler Street. Miami, Fl. 33130

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