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STATE OF FLORIDA

CASE NO. 78,957

ON REVIEW FROM DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT
4th DCA CASE NOS. 90-0917
90-0932

WACKENHUT CORPORATION, and
DELTA AIRLINES, INC.,

Petitioners/Cross-Respondents,

vs

FELICE LIPPERT,

Respondent/Cross-Petitioner.

RESPONDENT'S ANSWER BRIEF

Jos. D. Farish, Jr.
FARISH, FARISH, & ROMANI
Denco Bldg., 316 Banyan Blvd.
P.O. Box 3887
West Palm Beach, Florida 33402
(407) 659-3500
Attorneys for: Respondent/Cross-Petitioner
Florida Bar No. 0023740

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I.

PREFACE

The Respondent/Cross-Petitioner, FELICE LIPPERT, was the Plaintiff *in* the Circuit Court of the Fifteenth **Judicial.** Circuit in and for Palm **Beach** County, Florida, and the Appellee *in* the Fourth District **Court** of **Appeal.** The Petitioners, THE WACKENHUT CORPORATION and DELTA AIRLINES, INC., were the Defendants in the trial court **below,** and the **Appellants** at the Fourth District Court of **Appeal.** The Respondent, FELICE LIPPERT, is herein filing **a** combined Brief, which will serve as **her** answer to the Petitioners' Initial Brief on the Merits, **as well.** as her Initial Brief on the issue she has raised **in** her **Cross-Notice** to Invoke the Discretionary **Jurisdiction** of this Court. **Far** the purposes of this **Brief,** FELICE LIPPERT will **be** referred to **as the** Respondent, and DELTA and WACKENHUT will be referred **to** as Petitioner Delta, **Petitioner** Wackenhut, or collectively as the **Petitioners.** The **following** symbols **will** be used: "R" **- will** indicate a reference to the record on appeal **and** will **be** followed by **the** page in the **record.**

II.

STATEMENT OF THE CASE

On April 1, 1986, Respondent FELICE LIPPERT filed a Complaint against the Petitioners, DELTA AIRLINES, INC., and WACKENHUT CORPORATION in the Fifteenth Judicial Circuit in and for Palm Beach County. (R. 1562-1564). The Complaint alleged that as the Respondent was about to go through the screening process at Palm Beach International Airport, she handed a carry-on and/or handbag to a Petitioner Wackenhut guard to be placed on the conveyor belt that passed through an X-Ray scanner, as was required before bringing any articles into the sterile area. (R. 1562-1564). The Complaint further alleged that the X-Ray scanner was being manned and operated by Petitioner Wackenhut as agent for Petitioner Delta. After the Respondent relinquished possession of the handbag by handing same to Petitioner Wackenhut's employee, it was lost and the Respondent has never seen the handbag again. (R. 1562-1564).

Petitioners thereafter filed Motions for Partial Summary Judgment seeking to limit their potential liability to $1,250.00. (R. 2105-2158, and 2198-2229). The basis for these Motions were the Department of Transportation Regulations governing contracts of carriage, the actual ticket of Petitioner Delta, and the tariffs filed by Petitioner Delta with the Civil Aeronautics Board. (R. 2201-2229). Based upon these Motions and the documents filed with them, the trial court with Judge Vaughn J. Rudnick presiding, granted the Partial Summary Judgment limiting the Petitioners' liability to $1,250.00. (R. 2273-2276).

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Subsequent to that, decision, Judge Edward Rogers was assigned to take over the case and was in fact, the presiding Judge at trial. At a hearing prior to the trial, Judge Rogers did state that because of Judge Rudnick's earlier ruling that he would have to instruct the jury that the Petitioners' liability would be limited to $1,250.00 if they were found liable. (R. 2455). At the very same hearing, Judge Rogers noted that if he had been the presiding Judge at the time, that, he would have handled the Motions differently. (R. 2469).

During the course of the trial the Respondent presented evidence with respect to her actual losses. At. the jury charge conference with the trial Judge, the court decided that the verdict form which would be sent to the jury would include a question asking the jury to determine total damages to the Respondent, if in fact they found the Petitioners liable. (R. 1333). The reason the Trial Judge gave the aforesaid jury instruction was because both the Respondent and the Petitioners had presented testimony (lay and expert) as to the full values of the Respondent's lost jewelry. (R. 1221-1231). The purpose of said jury instruction was to resolve all factual questions and issues. (R. 1333). The trial court. also determined that, the proper instruction to be given to the jury was for a negligent standard of care, not a gross negligent standard as had been sought. by the Petitioners. (R. 1302-1303).

The jury returned a verdict fur the Respondent and damages were awarded for $431,609.00 to be apportioned 65% to Petitioner Delta and 35% to Petitioner Wackenhut. (R. 2680-2681). The Court

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then entered a Final Judgment on March 1, 1990, *in* which it noted that the Respondent's recovery was limited to $3. ,250.00 by virtue of the previously entered Partial Summary Judgment- (R. 2794-2795).

Subsequent to the entry of that Judgment, Respondent filed a Motion far Rehearing (R. 2801-2802), and the Petitioners filed Motions for Clarification of the Final Judgment, and/or relief from Final Judgment. (R. 2803-2804, 2806-2807). The Trial. Court then sua sponte entered an amended Final Judgment on March 21, 1990. (R. 2810-2811). In that Judgment the court, noted that the prior Final Judgment was too equivocal to be final, thus it felt the need to amend the Final. Judgment. (R. 2810-2811). The court set aside the previously entered Summary Judgment and entered A Final Judgment in favor of the Respondent in the amount of $431.609.00 plus interest and costs. (R. 2810-2811). In so doing, the court noted it "is: not unmindful that the Summary Judgment was entered by a prior Judge assigned to this division". (R. 2810-2811).

Before the court, entered its initial Final Judgment, Petitioners had both filed Motions for new trial (R. 2682-2686, 2690-2693) and Motions for remittitur of jury verdict or in the alternative a Motion fur set-off of the jury verdict. (R. 2687-2689). The Court, after entering its amended Final Judgment, then denied all of the Petitioners outstanding Motions. (R. 2811, 2813).

The Petitioners then filed Notices of Appeal. with the Fourth District, and that) Appeal was subsequently heard by that court. On June 12, 1991, the Fourth District Court of Appeal entered its

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opinion on this matter. In issuing its ruling, the Fourth District noted that the initial Partial Summary Judgment entered by the first trial court limiting the Petitioners" liability to $1,250.00 was erroneous. The Court also held that the trial court's instruction to th jury on ordinary negligence as opposed to gross negligence was correct. This is because while the Petitioners were required to have the security checked by Federal Regulation. that, in itself did not create a gratuitous bailment situation. As such, a requirement of gross negligence was not, warranted. Yet in spite of the Fourth District's decision to uphold all the decisions of law made by the trial court, the Fourth District reversed the verdict previously entered in favor of the Respondent. The court did this because it felt that "the Petitioners" attorneys had been prejudiced by the trial court's repeated assurances to them that the damages in this case would be limited to $1,250.00 regardless of the jury's findings". The Fourth District made this decision in spite of the fact that the Petitioner's never raised the argument of prejudice by the trial court in their Brief or at any other time in that proceeding, and in spite of the fact that in the record it is clear that the Petitioners presented a bulk of testimony with regard to that very issue, to wit,: expert opinion of the values of the Respondent's loss of jewelry. (R. 1221-1231). Yet it is for that reason alone that the Fourth District, reversed the decision of the trial court, and in doing so it certified the following question to the Florida Supreme Court:

> WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARRIER LIMITS LIABILITY FOR CHECK BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER

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CHOOSES INSTEAD TO RETAIN CUSTODY OF A PACKAGE, PURSE, HANDBAG. ETC., AND THE PASSENGER IS THEN REQUIRED TO RELINQUISH POSSESSION OF THE ITEM FOR THE PURPOSES OF X-RAY **OR** OTHER EXAMINATION OR INSPECTION. DOES THE CARRIER'S TARIFF LIMIT ITS LIABILITY, OR THAT OF ITS AGENTS FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR **INSPECTION** PROCESS?

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III.

STATEMENT OF FACTS

On March 8, 1986, the Respondent FELICE LIPPERT and her husband were preparing to fly to New York. (R. 12). On that date, the Respondent and her husband arrived at the Palm Beach International Airport where they were scheduled to board a Delta Airline's flight for their trip. (R. 646). They checked their baggage at curbside, and proceeded into the Delta terminal. Inside the terminal, Respondent, her husband, and their carry-on handbags had to pass through an FAA required checkpoint before they would be allowed to board the plane along with their handbags.

When they arrived at the Delta screening point it was extremely crowded, as there were several flights preparing to depart. (R. 1063). There were an estimated 300 to 400 people all in a small area, and people were lined up waiting to go through the magnetometer. (R. 648). There were two magnetometers set up to do the screening, but only one was in operation at the time the Respondent arrived. (R. 648). All ticketed. prospective passengers and the public must pass through magnetometers before entering the sterile area. There were also conveyor belts set up which would pass articles through X-Hay machines. and thus enabling security personnel to screen all articles entering the sterile area. The equipment being used was owned by Petitioner Delta who then contracted with Petitioner Wackenhut to provide the security personnel who would do the actual screening. (R. 1065).

When the Respondent approached the screening devices. she had in her possession two handbags, a black one containing an expensive

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ring, and a Louis Vitton bag which was about the size of a small handbag and contained all of her other jewelry which had a value in excess of $400,000.00. (R. 650). The Respondent's husband was directly behind her as they reached the screening devices. (R. 651). When it was her turn to pass through the screening devices. the Respondent handed her two bags to a Petitioner Wackenhut employee to be placed on the conveyor belt and then she saw her bags enter the flap on the X-Ray scanner. She then proceeded to pass through the magetometer. (R. 649). As the Respondent passed through the magnetometer she got beeped, and was told to go through it again. (R. 649). The Respondent then stepped back through the device and went through it again without being beeped even though she had removed no items from her person. (R. 650). The Respondent then proceeded to the end of the conveyor belt, where there were no security personnel of either Petitioner stationed. only to find the Louis Vitton bag was nowhere to be seen and only the black bag was there waiting to be re-claimed. (R. 650). At that, point in time the conveyor belt had stopped, and Respondent's husband had his request to look inside the X-Ray scanner for the Louis Vitton bag denied by Petitioner Wackenhut personnel manning the checkpoint. (R. 651). When the belt began moving again the Louis Vitton bag did not come out, nor was it, ever found. (R. 651).

After realizing that her bag was gone, Respondent started screaming that her bag was missing, at which point her. husband called fur the Sheriff's Deputy who was stationed nearby. (R. 79-80). At that point the Respondent and her husband began searching

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for the bag. Respondent ran through the crowd to other gates where planes were departing while her husband checked in restrooms and with Petitioner Delta employees. (R. 81). At that point an employee of Petitioner Delta finally came upon the scene, and A request. was made of him to allow a search *of* the plane the Respondent and her husband were scheduled to board, as well as other planes that were preparing to depart- That request, was refused. (R. 81). Only after a Petitioner Delta supervisor came on the scene several minutes later, was the Respondent's husband permitted to board *the* plane. (R. 82). Once on board, the Respondent's husband advised their intended travelling companion of the situation, while the attendant from Petitioner Delta who had boarded with him stood by and did nothing. (R. 86). In fact, he didn't even make an announcement with regard to the lost bag. (I?- 86).

Thereafter, Respondent's husband left the plane and continued searching for the bag while Respondent began filling out reports. (R. 88). Additional requests were made of the supervisor for Petitioner Delta to hold up the flights to perform searches, or in the alternative to perform searches once the planes arrived at their destinations. (R. 88). These additional requests were denied as well. (R. 88). In fact, Petitioner Delta felt no responsibility to do anything about this situation, and was indifferent to it. (R. 1003-1004).

At the time when this incident took place, Petitioner Delta was the only- airline at Palm Beach International Airport that allowed non-ticketed persons as well as ticketed passengers to pass

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through the screening devices into the sterile area of the terminal. (R. 365). In addition, the location of the screening devices at the Delta terminal. was such that, there was a stairwell immediately adjacent to the screening area that led directly down to the baggage claim area.. (R. 364). On the date in question, the screening area was staffed with security personnel supplied by Petitioner Wackenhut and there was a Palm Beach Sheriff's Deputy stationed approximately six to eight feet from the screening devices. (R. 421-423). However, there were no Petitioner Wackenhut or Petitioner Delta security persons stationed at the end of the X-Ray scanning device, or any means of identification at the end of the scanning device to insure that property could be safely retrieved by its rightful owners. (R. 236).

In addition, the equipment being used by the Petitioners at the time of this incident, was inadequate as it had become outmoded. (R. 370). The state of the art equipment at the time of this incident was a regular television monitor. (R. 369). The reason the Petitioner's equipment was inadequate was because it interfered with the ability of the operator to *see* what was going around him or her., which is of large importance to a security person. (R. 370).

Furthermore, Petitioner Delta encouraged its passengers not to check bags containing valuables like jewelry, and in fact, such cautions were printed on the hack of their ticket stubs. (R. 993). Yet at the same time while advising passengers not to check their bags containing valuables, the Petitioners did not adequately advise passengers that,they could have a private hand search rather

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than releasing their bags to *go* through the X-Ray scanner. (R. 129) in addition, Petitioner. Delta did not even have **in** place any emergency procedures which **would trigger** ***in*** **the** event of a bag being lost or stolen. (R. 1068). Nor did the Petitioners **have** in place **any** type of **mirrors,** as had **been** suggested 'by the Respondent's expert, that would enable people to see **and** follow **their** bags as **they** paused through the X-Ray scanner. and came out on the other side- (R. 370).

Petitioner Delta **had** a contract with the Department of Airports of Palm Beach County in which they charged **fees for various** items. (R. 1069). Part of the ticket, price that was charged 'by Petitioner Delta was **for the** Sheriff's Deputy who was assigned **to** the security areas, and the Petitioner Wackenhut guards. (R. 1069). **It** was further admitted by **an** employee of Petitioner Delta that the passengers in effect paid for all of these security charges when they **paid for** their ticket. (R. 1070). Yet despite **all** of the security that the Respondent paid to be provided to her when she purchased. her ticket, the Louis Vitton **hag** containing her jewelry **disappeared** never to be seen again.

Two pieces **of** the lost jewelry, contained in the Respondent's handbag, were eventually recovered and positively identified. A pair of earrings that belonged to the Respondent were located at Sotheby's Auction in New York in preparation **fur** sale. (R. 178). They had been altered from their **original state** as the centerpiece rubies had. been removed and replaced with yellow diamonds. (R. 178). The **earrings** had been placed with Sotheby's on consignment **by** Jerry Blickman. (R. 293). Mr. Blickman **had** purchased the piece

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from some members of a New York city jewelry exchange. (R. 521). It was eventually determined that these "'New York jewelers' had obtained the piece from a Philadelphia jewelry broker named Joyce Groussman, who has refused to disclose her source. (R. 530, 532). These particular earrings had been insured by the Respondent, and her carrier has paid a claim on the loss in the amount of $75,000.00, which was a portion of the Respondent's damages, same being a subrogation claim in behalf of her insurance carrier.

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IV.

CERTIFIED QUESTION

WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARKIEH LIMITS LIABILITY FOR CHECK BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER CHOOSE INSTEAD TO RETAIN CUSTODY OF A PACKAGE, PURSE, HANDBAG, ETC., AND THE PASSENGER IS THEN REQUIRED TO RELINQUISH POSSESSION OF THE ITEM FOR THE PURPOSES OF X-RAY OR OTHER EXAMINATION OR INSPECTION, DOES THE CARRIER'S TARIFF LIMIT ITS LIABILITY, OR THAT OF ITS AGENTS FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR INSPECTION PROCESS?

IV.

RESPONDENT'S ANSWER TO CERTIFIED QUESTION

AS WAS CORRECTLY DETERMINED BY THE FOURTH DISTRICT COURT OF APPEAL, THE $1,250.00 LIMIT OF LIABILITY AS ESTABLISHED BY TARIFFS OF AIRLINES AND THEIR AGENTS, WAS INAPPLICABLE TO THE INSTANT CASE DUE TO THE FACTS OF THIS CASE AS THEY EXISTED. FURTHERMORE, THE PETITIONERS, DELTA AND WACKENHUT, RECEIVED BENEFITS FROM THE BAILMENT WHICH WAS CREATED BY THE SCREENING OF PROPERTY AT THE X-RAY SCANNING CHECKPOINT, DESPITE THE FACT THAT THEY WERE ORDERED TO ERECT SUCH A CHECKPOINT EY FEDERAL LAW, THUS THE STANDARD OF ORDINAHY NEGLIGENCE WHICH WAS APPLIED BY THE TRIAL COURT AND THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT.

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V.

ISSUE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ORDERING A NEW 'TRIAL IN THE UNDERLYING INSTANT CASE, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW.

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VI.

SUMMARY OF ARGUMENT

Based on the facts situation that arose in this case, the limitaion of liability which is established by tariffs that airlines file along with their contracts of carriage, WAS inapplicable. As is clearly indicated on the back of the tickets the Petitioner issued in this case, the limitation of liability is in effect for baggage, and goes on to define baggage as property which is checked in the cargo compartment of the plane or carried into the cabin of the aircraft. In this case, neither of those situations occurred as the Respondent never checked her baggage, and the baggage never made it into the cabin of the plane. Therefore, it was not baggage and the limitation of liability should not apply, as was correctly decided by the Fourth District Court of Appeal.

In addition thereto, it is clear that a bailment was created when the Respondent was forced to relinquish her property to the Petitioners at the scanning checkpoint. Both the Petitioners and the Respondent received a benefit from the bailment that was created. As such, a mutual bailment WAS created in this case, not, a gratuitous bailment; as was argued by the Petitioners. With such a mutual bailment in existence, the law of Florida prescribes that the standard of care which is applicable is that of' ordinary negligence. The Trial Court so charged the jury on that standard and the Fourth District was correct in determining that the Trial Court was correct in making that determination.

However, the Fourth District was incorrect in its decision to order a new trial in this case, as no prejudicial error was committed by the Trial Court to warrant such a reversal. The Trial Court made various statements throughout the course of the trial. which may have been incorrect, however, those statements which were made to Petitioners' counsel outside the presence of the jury had no effect whatsoever on the verdict that was returned, Case law *in* Florida *is* clear that when an error that is committed has no prejudicial effect or would warrant no decision different than the nne already obtained, there are no grounds for the ordering of a new trial. As such, the Fourth District Court of Appeal was *in* error when it so ruled and that order should be reversed and the verdict and judgment of the Trial Court should be upheld.

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VII.

ARGUMENT

I.

AS WAS CORRECTLY DETERMINED BY THE FOURTH DISTRICT COURT OF APPEAL. THE $1,250.00 LIMIT OF LIABILITY AS ESTABLISHED BY TARIFFS OF **AIRLINES** AND THEIR AGENTS, WAS INAPPLICABLE TO THE INSTANT CASE DUE TO THE FACTS OF THIS CASE AS THEY EXISTED.

In their Initial Brief as well as in the trial before the Circuit Court and the Appeal before the Fourth District, the Petitioners have consistently tried to rely on the tariff to limit their liability for the loss of the Respondent's property. There is no dispute that, pursuant to 49 U.S.C.A. Section 1301 et seq., an airline's tariff can constitute part of the contract between the airline and its passengers. Nor is there any dispute over whether or not Petitioner Delta correctly incorporated the terms of that contract into the ticket issued to the Respondent in the instant case. What is in dispute is that under the facts of this case that limitation of liability is inapplicable. An airline is permitted to limit its liability for lost or damaged baggage pursuant to 14 C.F.R. 254 (1986) Domestic Baggage Liability. That would hold true in the instant case, if this was a case of lost or damaged baggage. It is not. On the back of Delta's own ticket, baggage is defined as

> "Any article or other property of passengers which is acceptable for transportation under the conditions of carriage stated herein whether checked in the c compartment or carried in the cabin of the aircraft" (Petitioner's Initial Brief, App. 9)

However, the bag that was lost by the Respondent never attained the status of baggage. Under the definition on Delta's own ticket, a

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bag can become baggage *in* one of two ways. Either icy having it checked and receiving a claim ticket for it, or by carrying the bag onto the plane- Neither of these actions took place with regard to the bag that was lost by the Respondent.

The fact that the bag in question was not checked is nut *in* dispute- The Petitioners seem to have taken the position that since the Respondent intended to carry the bag on the plane, and since she was a ticketed passenger, that her bag automatically became baggage, thus the limitation on liability should apply. During the trial however, Barbara Seifert, who was the customer service supervisor for Petitioner Delta on the date of this incident, was asked by counsel for Petitioner Wackenhut about the bag that was lost in this case-

> Q. "Well we aren't dealing with baggage in this case are we ma"am?"
> A. "That is correct". (R. 1010).

So by the admission *of* Petitioners' own personnel, the 'bagthat was lost by the Respondent was net baggage. Yet the Petitioners insist that their liability should be limited to $1,250.00 as if this were 'baggage

In fashioning their argument, the Petitioners have repeatedly cited Federal laws and regulations as a basis for their position. Apparently, the Petitioners feel that if they beat on the issue of Federal law long enough, that they will either convince this Court that under these facts that Federal law should apply, or that they wili raise enough of a question to attempt, to hoist this matter before the United States Supreme Court. In doing so, the Petitioners have overlooked what the Fourth District Court of

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Appeal actually decided. 'That court did not dispute the Federal law regarding tariffs and contracts of carriage, it merely recognized that those limitations on liability are inapplicable to the facts of this case.

The Petitioners argue that the Fourth District's interpretation of baggage, was a strained interpretation, and unrealistic. When this factual situation is examined completely though, it becomes apparent that; the direct opposite of the Petitioners' statement is true. At the terminal in question, ticketed as well as non-ticketed persons were permitted to pass through the screening into the sterile area. (R. 365-366). Certainly if a non-ticketed person (or any of the general public) had gone through the screening process, they would have been screened and would have had to put any articles they were carrying through the X-Ray machine as well. Would the Petitioners then be claiming that the mere placing of those bags in the screening process would make them baggage as well'? To do so would clearly cause a strained interpretation of the definition of the word baggage. The same is true in the situation where a ticketed passenger is accompanied by a non-ticketed person. If after going through the screening devices the passenger decides that. she does not want to bring a certain bag on the trip and leaves it with the non-ticketed person, the bag left behind certainly has not become baggage. It has to reach the plane or be checked before it becomes baggage.

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This is the precise ruling made by the court in Tremaroli v. Delta Airlines, 458 N.Y.S.2d 159, 162 (New York City Civ. Court 1983). In Tremaroli, the Plaintiff placed his bag on the conveyor belt fur *it* to be screened by the X-Hay machine while he was going through the magnetometer. Id. at 160. When Ire got to the end of the belt he picked up a bag, the only one on the belt which resembled his, and proceeded onto the plane. Id. While waiting for. the plane to take off he discovered that the bag was not his, so he returned to the scanner only to find out that his bag was missing. Id. The court held that under those facts the tariff filed by the airline to limit their liability was inapplicable. Id. at 162. The court, held that a contract of carriage was never' established since the bag was never placed on the airplane. Id.

In the instant, case, the Respondent took the same course of action as *did* the Plaintiff in Tremaroli except that she didn't, take the wrong bag and walk away, there was simply no bag to be retrieved. (R. 649-650). The only possible difference factually *is* that the Plaintiff in Tremaroli may have been to some extent. contributorily negligent- The jury in the instant case found the Respondent was not contributorily negligent, under. appropriate instructions by the Trial Court. (R. 1480). Otherwise the two cases are virtually identical.

The Petitioners have tried to enforce their position by citing to a Federal Court case, Baker v. Lansdell Protective Agency, 590 F.Supp. 165 (S.D. N.Y. 1984). In Baker, a passenger bound fur London from New York claimed that jewelry had disappeared from her bag between the time she handed the bag to a security agent for

passage through an X-Ray scanner, and the time the bag was returned to her on the other side of the screening area. Id. at 167. The court in Baker granted the Defense's Motion for a Partial Summary Judgment limiting the Defendant's liability for any loss that may have occurred. Id. at 171.

The Baker case however is factually distinguishable from the instant, case in several aspects. First and foremost, being that it was an international flight, it was governed by the Warsaw Convention a different regulation, not by the Federal. law governing contracts of carriage and airline tariffs. The court in Baker noted that the Convention could only be read as applying to the loss of personal items when the loss occurs on board 'the aircraft or *in* the course in any of the operations of embarking or disembarking. Id. at 168. The court also held that because the Federal statute required all persons and property to be screened for weapons before boarding aircraft, that going through the screening process in that, case constituted part of the operations of embarking. Id. at 169. However, there was a large factual difference between the scenario in Baker and the situation in the instant case. In Baker, the security check point, was located in an area to which only passengers and not the general public were permitted access. Id. (emphasis added). The court made a point of noting that:

> "Under these circumstances, where Baker was engaging in an activity which is a legally mandated prerequisite to boarding an airplane. where she was undergoing the required security check at the express direction of Defendant's employees and in a part of the terminal restricted to passengers with tickets, it *is* appropriate to characterize Baker as being in the course of one of the operations of embarking". Id. at 170.

The area the Respondent was entering however, was not one that was restricted solely to passengers in the course of the operation of embarking. Anyone, passengers, visitors, even drifters and/or jewel thieves were entitled to pass through the security check point in question in this case. It would be totally illogical and nonsensical to hold that people wha had no intention of ever boarding the plane could be engaged in the process of embarking an airplane. Likewise, it would be just as nonsensical fur two people to pass through the scanner, one a ticketed passenger and one a visitor, and for one to be held to be embarking the plane and the other not. Under the Baker case facts, a person passing through the screening device could rightfully be held to be in the process of embarking the plane. But as the facts exist in the instant case that holding is simply inapplicable. The tariff in this case is to limit liability for loss during transportation, not loss that occurs in the waiting, greeting and/or holding area.

The Petitioners then incorrectly rely an the Federal case of Feature Enterprises, Inc. v. Continental Airlines, 745 F.Supp. 198 (S.D. N.Y. 1990), in support of their position that the tariff should be applicable in this case. In Feature Enterprises however, the bag that was lost by the Plaintiff containing his jewelry, was checked at curbside with a skycap. Id. at 199. Based on those facts and the tariff which was correctly filed. by Continental Airlines, the court, granted a summary judgment limiting the airline's liability to $1,250.00. Id. at 201. The Petitioners miss the point when they continue to argue that in this case the bag containing the jewelry was baggage even though it never made

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it into the cargo compartment of the plane. This is so because the facts in Feature Enterprises clearly **indicate** the Sag was checked. When **referring** back **to** definition of baggage on Petitioner Delta's own ticket, that language specifically refers to property whether checked or carried in the cabin of the aircraft. Again, under the factual scenario of Feature Enterprises, that, court **was** correct in **applying** the **tariff** in **limiting** liability to $1,250.00. That is simply not the same situation as exists **in** the instant **case**, and the Fourth District correctly ruled that the tariff should not be applicable.

Finally, in their Initial Brief on the **Merits,** Petitioners are **attempting to** do something **which they** were unable to **do** at, the trial **level..** That is namely to try to convince this Court **that** somehow the Respondent was comparatively negligent for losing her **jewelry and** that should **be** held against her. That matter was specifically addressed at the trial court **level,** and the jury found as **a** matter of fact that, the Respondent had not **Seen** negligent; in any **way** in **her** actions **pursuant** to the **Trial** Court standard jury instructions. (R. 1480, R. 1496-97). Yet **for** some reason the Petitioners continue to harp on the fact that her *actions* **fall** within the area of risk that the **government** has decided passengers **must** accept. That, in spite of the language on their own tickets, and their own policies **that.** passengers should nut. check bags containing large amount of **valuables** and **that** they should bring **them** on the **plane** themselves. In other **words,** they have put the passenger carrying valuables in **a** catch 2% situation. The Petitioners tell them that, if **they** check the baggage, the

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Petitioners are not going to be responsible for their loss if it's over $1,250.00. In addition, if they bring them on the plane and they are lost somehow on the plane, they are not going to be responsible for over $1,250.00. Now what the Petitioners are trying to argue, is that from the moment you step past the screening process your loss is *going* to be limited to $1,250.00. That is simply a strained Limitation of liability. Nowhere in any of the Federal regulations did Congress propose that airlines and security companies did not have to act with reasonable care in handling the property of their passengers. To uphold the argument as put forth by the Petitioners would change that, and give them carte blanche to do whatever they please with regard to their passengers' property. That, is legally and morally wrong, and is simply not what Congress intended. nor *is it* what, the Fourth District Court of Appeal or the Trial Court and jury found.

II.

PETITIONERS DELTA AND WACKENHUT, RECEIVED BENEFITS FROM THE BAILMENT WHICH WAS CREATED BY THE SCREENING OF PROPERTY AT THE X-RAY SCANNING CHECKPOINT, DESPITE THE FACT THAT THEY WERE ORDERED TO ERECT SUCH A CHECKPOINT BY FEDERAL LAW, THUS THE STANDARD OF ORDINARY NEGLIGENCE WHICH WAS APPLIED BY THE TRIAL COURT AND THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT.

It is generally recognized that, bailments are classified into one of three categories: 1) Those for the sole benefit of the bailor; 2) Those for the sole benefit of the bailee; and 3) Those for the benefit of both parties. 5 Fla.Jur.2d, Bailments, Section 3. These classifications are important,, as the difference between them determine the standard of care which a bailee owes to the bailor. while maintaining possession of the bailor's property.

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Clermont Marine Sales, Inc. v. Harmon, 347 So.2d 839 (Fla. 2d DCA 1977); Marine Office-Appleton and Cox Corp. v. Aqua Dynamics, Inc., 295 So.2d 370 (Fla. 3d DCA 1975). In this case the dispute is whether or not the bailment that occurred was one for the mutual benefit of the parties. If it was, then the Petitioners should be held to a standard of ordinary care and be liable for ordinary negligence. ITT Consumer Services Corp. v. Travelers Indemn Co., 256 So.2d 74 (Fla. 3d DCA 1971), cert. den. 263 So.2d 229.

The Petitioners' argue that this was not a case of bailrnent for mutual benefit, but that it was actually a gratuitous bailment for which the duty of care owed by the bailee *is* a lesser one than *is* associated with a bailrnent for mutual benefit,. Armored Car Service, Inc. v. First National Bank of Miami, 114 So.2d 431, 435 (Fla. 3d DCA 1959). In Armored Car, the court defined a bailment for mutual benefit as one where the parties "contemplate some price or compensation in return for the benefits flowing from the fact of bailrnent". Id. at 434. With regard *to* that definition, Vernon Colley, who was Petitioner Delta´s station manager on the date of this lose, stated on cross-examination at the trial, that ticketed passengers are paying to have their bags screened as part *of* their ticket price. (R. 1069)· In fact Mr. Colley stated that when the FAA first began requiring these screenings, that, the cost for providing them was set off as a separate surtax on the ticket, but today it is all included as part of the price. (R. 1070). As hard as they may want to try, the Petitioners certainly cannot claim that they are not being compensated for providing the screening devices and procedures that are required by the FAR.

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The Petitioners have repeatedly argued that they receive no benefit, whatsoever from providing the screening that *gives* rise to the bailment in this case. They have consistently put forth the claim that since they were required by law to screen all passengers before allowing them to board the plane, that the bailment created therefrom was a bailment by operation of law (gratuitous bailment). That argument may be applicable to people passing through the screening: devices who are not ticketed passengers, for the airline is receiving no compensation from them, but for any ticketed passenger who passes through the screening device, they are paying Delta and *its* agents for the screening through part of their ticket price. Even with regard to the visitors or public, Delta may be receiving a benefit, even though not in the form of direct compensation. People may have chosen to fly Delta solely because non-ticketed friends were able to accompany them past the screening devices up to the gate as a public relations gesture. As it was, Petitioner Delta was aware that other airlines were not allowing the public into the sterile area. (R. 1076). Thus, it had to be a conscious decision on its part to allow anyone into the sterile area. In fact, it did this to make people feel more comfortable. (R. 274). Petitioner Delta wouldn't have been able to do this if it did nut screen all persons. Thus, Petitioner Delta would be receiving a benefit in the sense that they were getting more customers due to their providing of the screening devices. That argument is unnecessary in the instant case as there is no dispute

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that the Respondent was A ticketed passenger. (R. 647). As such, she had already compensated the Petitioners for the screening of herself and her carry-on articles when she purchased her ticket.

In addition, Part 108 of the Federal Aviation Regulations says, that the security systems be put in place by the airlines are to provide for the safety of persons <u>and property</u> (emphasis added) traveling in air transportation. 14 CFR 108.7(a)(1). To that, end, the Petitioners receive a benefit from the screening in that it serves to protect their in flight, personnel and their property, to-wit' the planes, from being injured or destroyed. Consequently, the passengers and even people who are not passengers receive that same benefit as well. Passengers receive this benefit during the actual transportation, as is the purpose of the FAA regulation, but non-ticketed persons as well as the Petitioners' ground crews are receiving that benefit as well, in that they are being protected from weapons or explosive devices while waiting in the greeting/holding area before the passengers actually board the plane.

The mutual. benefit derived from this bailment can be seen in another light as well. Petitioner Delta was in business to make money. Their means for doing this was to provide airline flights to the public for which they charged a fee. In or-der to legally provide that. service they had to supply a
screening device <u>before</u> providing anyone air transportation. The Respondent wanted to get from Point. A to Point B as quickly and conveniently as possible. In order to do that she had to obtain the service of an airline. In order to obtain such a service she

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had to pay a fee for it as well as comply with the legal requirements for flying, (i.e. passing through the screening device). Thus, Goth parties were to obtain a benefit. The Petitioners would make money, and the Respondent would get from one destination to another. Thus, the bailment that was created during the process was one that was mutually entered, so that both parties could obtain the benefit they were seeking. Of course they were not receiving these long range benefits directly from the bailment, but it was an integral part of their achieving them. 'Therefore, fur the Petitioners to claim that they were providing this service gratuitously and without benefit just does not appear logical in light of the facts of this case, and the jury, trial court, and appellate court, so decided.

A Federal court, case which the Petitioners have not cited in their Brief is the case of Gin v. The Wackenhut Corporation, '141 F.Supp. 1454 withdrawn (D. Hawaii 1990), 1990 W.L. 95967. Gin was a Federal District Court case from Hawaii involving a loss of jewelry at the Miami International Airport. In Gin, the Plaintiff suffered a loss of his jewelry as it was going- through thr screening process, where the security checkpoint was manned by employees of the Wackenhut Corporation. Id. at 95974. That court in issuing its ruling stated. it felt that security companies such as Wackenhut have a duty to safeguard the belongings of persons passing through the security checkpoint. (R. 95984). The court noted that in the Gin case. one of Wackenhut's employees testified that the company considered its only priority to be that of carrying out FAA regulations promulgated in the Code of Federal

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Regulations, and that this viewpoint was maintained despite the fact that Wackenhut knew passengers could nut, keep a visual watch over their bags throughout the inspection process- Id. The court went on to note that the requirement for having the security checkpoints was a Federal regulation imposed upon airlines, but "the fact that a Federal agency has imposed certain duties upon a company does not mean that company then rises above any need to consider that it may have had. other responsibilities to the public". Id. at 95985; Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). The Court held that an ordinary negligence standard was applicable in that, case. Id. at 95985.

No Florida court had ever addressed this issue before, in regard to the specific facts of the instant case. The case that appears to be closest. factually is Tremaroli v. Delta Airlines, 458 N.Y.S.2d 159 (19/33), from New York. The court in Tremaroli under similar circumstances found there had been an implied bailment created because the airline had come into lawful possession of another's property other than by mutual contract of bailment. Id. at 160. The court then went on to apply a simple negligence standard in determining the bailee's liability. Id.

The court in Tremaroli reached the right, decision 'but used a different label at least as it would apply under Florida law. Clearly, under the more detailed facts in the instant case there was more than an implied bailment created. It was fully understood by both parties that in order far the Respondent, to receive the benefit of transportation that, she was seeking, that she would have

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to relinquish possession of her **handbags** to the Petitioners' custody before entering the sterile area. **As** the Petitioners **were** being compensated for this through the ticket **price,** it is apparent that **at the** very least there was **a** mutual contract of bailment. This *is* precisely the ruling that was **made** by the Fourth **District** Court of **Appeal,** when it determined in **its** June 12, 1991 opinion, that the bailment that was created in this situation was indeed a **mutual** bailment **and** not a gratuitous bailment. As suck, the Fourth District's **ruling** that, the trial **court was** correct *in* applying an ordinary negligence standard in this case should be upheld.

ISSUE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL ORDERING A NEW TRIAL **IN** THE UNDERLYING INSTANT CASE, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND THE SUPREME COURT OF FLORIDA ON THE SAME **QUESTION** OF LAW.

As thia Court has already accepted jurisdiction of this case with regard **to** the question that was certified to **it by** the Fourth District Court of **Appeal,** the Respondent *is* seeking to have this Court **review** the entire decision of the Fourth District Court of Appeal pursuant **to its** jurisdiction under Florida Rule **of** Appellate Procedure 9.030(a)(2)(A)(ivj. In this **case** the decision rendered by the Fourth District Court, of Appeal directly **and** expressly conflicts with decisions rendered throughout this state **at** the appellate level **as** well as **the Supreme** Court level. **Based** upon those authorities this court has jurisdiction to consider. this matter-

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The opinion of the Fourth District Court, of Appeal, upholds every *decision* the trial court made with regard to the law the court applied before, during, and after the underlying trial of this case. However, the Fourth District ruled that with regard to the issue of damages, the trial court had misled counsel for the Petitioners (Cross-Respondents) by stating that damages would be limited to an amount previously determined by a predecessor judge, who had erroneously entered a partial summary judgment *against* the Respondent. In an effort to avoid duplication and expense, the trial court allowed the full issue of damages and liability to be decided by the jury.

The jury returned *a* verdict. fur the Respondent, and then in an attempt to fashion a comprehensible final. judgment, the trial court entered a judgment; for the Respondent in the full amount of the jury verdict. The underlying appeal then ensued. The Fourth District Court of Appeal, in ruling on the case, held that all of the Legal decisions made by the trial court were correct, yet it reversed the decision for a new trial on both the issues of liability and damages.

The decision rendered by the Fourth District Court of Appeal. *is in* direct conflict. with that of E.O. Roper, Inc., et al v. Wilson Toomer Fertilizer Company, 116 Fla. 796, 156 So. 1383 (1934). The holding in Roper was that where

> "the record as a whole shows that the judgment rendered accords with justice in the premises. and that a reversal of the cause for the correction of such technical errors as may have occurred must inevitably lead to the rendition of a new judgment identical with that now appealed from. reversal *is* not authorized". Id. at 884.

The Fourth District's opinion directly conflicts with the Roper

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opinion in that it states that every thing that legally would have an effect, on the outcome of a new trial, was done correctly, yet the court insists that the matter be re-tried. The legal principles which would contrail *in* any subsequent trial would be identical to those of the first trial, thus it is inconceivable that, the outcome could be any different than the original. Clearly, to require a new trial under those circumstances, (as the Fourth District has done) conflicts with this Court's prior decision in Roper.

The opinion by the Fourth District Court of Appeal states that, the Petitioners were prejudiced by the trial judge's statements that the Summary Judgment. entered by the prior trial judge would be upheld. This order was entered, in spite of the fact that the Fourth District Court of Appeal admitted that. the Summary Judgment entered by the previous judge was erroneously entered. How then were the Petitioners prejudiced? At no time before the Fourth District Court of Appeal issued their opinion in this case, had the Petitioners made any showing of how they had been prejudiced by the trial court's actions.

The trial court's statements regarding limited liability were never made *in* front of the jury. How then would the Petitioners have acted differently during the trial if the court. had not told them their liability would be limited? Would they have "tried harder"? That is inconceivable. The Petitioners put on evidence of the value of the jewelry, they had expert testimony, and they contested the testimony that was put on by the Respondent. They

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argued about the valuation of the jewelry in their closing argument. (R. 1457). What could they have possibly done any differently'? The answer is, absolutely nothing.

The Fourth District Court of Appeal *in* fashioning its decision apparently overlooked one of its own prior decisions which held that errors which do not effect the outcome of the trial are not, harmful. Anthony v. Douglas, 201 So.2d 917, 919 (Fla. 4th DCA 1967). That, court noted that the test is whether, but for the error complained of, a different result would have been reached by the jury. Id. See Cornelius v. State, 49 So.2d 332 (Fla. 1950); Banco Nacional de Cuba v. Steckel. 134 So.2d 23 (Fla. 3d DCA 1961).

The Fourth District Court of Appeal acknowledged that all of the trial court's actions with regard to the jury instructions were correct. In ordering a new trial, the Fourth District Court of Appeal has set *in* motion a duplicate trial for which the outcome is already known. That is a tremendous waste, of judicial resources, not to mention an unduly burdensome expense to all of the parties involved. Clearly, the order requiring a new trial was entered in derogation of the law of Florida, and even the Fourth District Court of Appeal's own previously established principals of law.

The Third District Court of Appeal has taken a similar position in Seaboard Airline Railroad Company v. McCutcheon, 158 So.2d 577 (Fla. 3d DCA 1963). In Seaboard, the court held that a verdict should not have been set aside unless the error is sufficiently grave so as to be prejudicial. Id. In Seaboard,

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after making a careful examination of the record, the court determined that the error in question was not prejudicial, Id. at 578.

In the instant case it appears as though the Fourth District Court, of Appeal did not make a careful examination of the record. For if it had, it would have seen that the error whirh may have been committed by the trial court's mis-statements, could not have had such a prejudicial effect so as to change the outcome of the verdict;, When this Court looks carefully at the record of this case, it will see that while the trial court's statements about the limitation of liability may have been incorrect, they were not; in the presence of the jury and certainly not sufficient so as to cause prejudicial error. The jury instructions were proper, both sides presented conflicting evidence of values of the lost property. The jury rendered its verdict. What would a new trial accomplish? It would be a waste of the judicial process, cause added costs to all involved! As such, *the* Fourth District Court of Appeal's decision to order a new trial in this case. should be reversed as no prejudicial error was committed on the part of the trial court.

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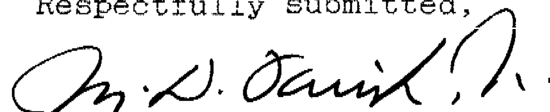
VIII.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court affirm in part the decision of the Fourth District Court of Appeal below, and reverse that part of its opinion which ordered a new trial.

Respectfully submitted,



Jos. D. Farish, Jr.
of Counsel

FARISH, FARISH, & ROMANI
Denco Bldg., 316 Banyan Blvd.
P.O. Box 3887
West Palm Beach, Florida 33402
(407) 659-3500
Attorneys for: Respondent/Cross-Petitioner

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Bonita Kneeland, **Esquire,** P.O. Box 1438, Tampa, Florida 33601, **and** to Shelly H. Leinicke, Esquire, **1** East Broward Boulevard, #5, Fort Lauderdale, **Florida** 33301 this 10th day **of** January, 1992.

Attorney