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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,957

THE WACKENHUT CORPORATION, a Florida corporation, and DELTA AIR LINES, INC.,

Petitioners,

vs.

FELICE LIPPERT,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT, CASES NO. 90-0917 & 90-0932

PETITIONERS' REPLY BRIEF ON THE MERITS

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CERTIFIED QUESTION

WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARRIER LIMITS LIABILITY FOR CHECKED BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER 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 LIMITS ITS LIABILITY, OR THAT OF ITS AGENTS, FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR INSPECTION PROCESS?

DELTA'S AND WACKENHUT'S ANSWER TO CERTIFIED QUESTION

DELTA'S AND ITS AGENT, WACKENHUT'S $1,250 LIMIT OF LIABILITY IS ESTABLISHED BY THE CLEAR AND UNAMBIGUOUS TERMS OF THE CONTRACT OF CARRIAGE (TICKET) WHICH INCORPORATED, BY REFERENCE, THE LAW AS SET FORTH IN DELTA'S VALIDLY FILED TARIFF. FURTHERMORE, ANY BAILMENT CREATED BY THE SCREENING OF PROPERTY BEING CARRIED INTO THE STERILE AREA OF AN AIRPORT ARISES BY FORCE AND OPERATION OF LAW AND CONSTITUTES A CONSTRUCTIVE OR GRATUITOUS BAILMENT FOR WHICH A GROSS NEGLIGENCE STANDARD APPLIES.

REPLY ARGUMENT

I.

DELTA'S AND ITS AGENT'S $1,250 LIMIT OF LIABILITY IS ESTABLISHED BY THE *CLEAR* AND UNAMBIGUOUS TERMS OF THE CONTRACT OF CARRIAGE (TICKET) WHICH INCORPORATED, BY REFERENCE, THE LAW AS SET FORTH IN DELTA'S VALIDLY FILED TARIFF.

The Plaintiff/Respondent's argument that the carry-on hand bag allegedly lost in this case is not "baggage" (and therefore the tariff and contract of carriage were not applicable) is insupportable. Lippert's complaint itself alleges that she placed "carry-on baggage" on a conveyor belt. It also refers repeatedly to the missing property as "hand baggage." (R. 1562-1564) Equally illogical is the argument that the definition of baggage in the Delta ticket requires that the passenger's property be either in the cargo compartment or in the cabin of the aircraft before it becomes "baggage." The definition of "baggage" in the ticket states that it consists of the following:

> . . . Any article or other property of passengers which is acceptable for transportation under the conditions of contract stated herein, whether checked in the cargo compartment or carried in the cabin of the aircraft.

(R. 2219, Pet. App. p. 9) (emphasis added). Obviously, baggage "is a passenger's article or property . . . acceptable for transportation . . . whether it is to be checked or carried."

For Lippert to argue that the ticket definition of baggage excludes unchecked property until it is actually inside the cabin of the plane is akin to arguing that checked luggage is not

"baggage" until it is actually inside the cargo compartment of the plane. This would lead to the untenable result that if checked luggage is lost while in transit to the plane, the limit of liability would not apply. Clearly, this has never been the case, as it is far more likely that checked property is lost on its way to a plane's cargo compartment or on its way back to the terminal. Simply because the court in Tremaroli v. Delta Airlines, 458 N.Y.S.2d 159 (N.Y. City Civ. Ct. 1983) (the equivalent of a county court decision) and the Fourth District Court of Appeal adopted this position, does not make this result any more logical.

Both Tremaroli and the Fourth District below ignored the firmly established law stating that the language in tariffs "should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results." Penn Central Company v. General Mills, Inc., 439 F.2d 1338, 1341 (8th Cir. 1971) (and cases cited therein). Courts are not permitted to avoid the plain meaning of a tariff and construe it against the drafter where an ambiguity is created only as "the result of a straining of the language." Id. The position of the Fourth District also totally ignores the fact that the Delta tariff which clearly limits to $1,250 liability for any "fare-paying passenger's baggage, or other property (including carry-on baggage)" is incorporated into the ticket.

Lippert's brief takes evidence out of context in an effort to avoid the operation of the governing tariffs in the contract of carriage contained in the ticket. For example, the Plaintiff extracts an incomplete portion of the trial testimony of Barbara

Seifert, a customer representative of Delta, in an effort to prove that Delta "admits" that the carry-on baggage was not "baggage." What actually transpired at trial was this: Lippert's attorney questioned Ms. Seifert regarding what form she filled out after the carry-on bag was reported missing. He asked her about whether she had filled out a particular form for Lippert's lost bag. She replied that the form he was questioning her about concerned checked bass. (R. 1010) On cross-examination, she was asked to clarify the type of document about which the Plaintiff's attorney had questioned her. She testified that she understood that his questions referred specifically to a "baggage type report" and agreed that she had not been dealing with baggage in this case. (R. 1109-1011)

When the trial transcript of this exchange is read in its full context it is obvious that Ms. Seifert's statement on cross exam referred to the report she had been questioned about by the Plaintiff's attorney which pertained to checked baas, not unchecked property, as was the case here. The shorthand reference to "baggage" by Delta's attorney was understood by both he and Ms. Seifert as checked baggage which was not applicable in this case. Moreover, throughout the questioning of Ms. Seifert, the Plaintiff's counsel himself referred to Lippert's property interchangeably as either a "bag" or "baggage," as did the witness. (R. 969, 970, 976, 979, 999, 1003). In no way does Ms. Seifert's testimony constitute an "admission" by Delta Airlines that hand-carried property would not come within the ambit of the generic

term of "baggage" as defined in the Delta ticket to include "any article or property of passengers which is acceptable for transportation." In addition, the tariff specifically states that hand-carried items would be limited to $1,250 in liability.

Speculation as to the Defendants' liability to non-ticketed persons is irrelevant. Non-ticketed persons have not contracted to a limitation of liability as have those persons who purchase tickets. This distinction is in accord with the federal regulations, the federal statute, the Delta tariff and the Delta ticket. Property, including carry-on articles, belonging to a fare paying passenger is, by the terms of both the contract and tariff, subject to a $1,250 limit of liability. This is not changed by the fact that non-ticketed individuals also are subject to the screening device. There is no support for the argument that the contract of carriage should not apply simply because the area where Lippert passed through the screening device was not limited solely to fare-paying passengers.

The case of Baker V. Lansdell Protective Agency, 590 F.Supp. 165 (S.D.N.Y. 1984) is directly on point. In Baker, the court determined that the Plaintiff was engaged in an activity that was a legally mandated pre-requisite to boarding an airplane when she handed a bag containing $200,000 worth of jewelry to a security agency working for the airline for passage through an x-ray scanner. The fact that the passenger was in an area reserved for passengers at the time that the jewelry disappeared was not crucial to the Baker holding. The court took numerous factors into

consideration in reaching its decision, of which restriction of the area was only one. It cannot be stated that the Baker court would have reached a different result if non-ticketed person had also been permitted in the area. The bottom line was that the Plaintiff in Baker was objectively in the process of embarking. This is exactly the same as the situation involving Lippert.

Furthermore, the concept of "embarking" is based on an objective test rather than a subjective one. The test is simple. Anytime a passenger is performing an act required as a condition of boarding a plane, the act necessarily falls within the concept of "embarking." Any ruling that embarkment is a subjective act would be destructive to the airlines. It is the public policy of the United States to protect the airlines and their fare-paying passengers by making the small class of persons carrying items of high value personally responsible for any loss. D.O.T. Order 87-12-2 (Pet. App. B) Compliance with this policy is, particularly important in light of the recent bankruptcies of Pan American Airlines, Eastern Airlines and TWA. Otherwise, it would be impossible for airlines to control potential liability or costs.

There is, however, a far more compelling reason to analogize this case to Baker. Just like the Warsaw Convention, airline tariffs have the "force and effect of law." (cites) According to Delta's tariff, the limitation of liability applies in the following manner:

> Such liability, if any, for the loss, damage or delay in the delivery of a fare-paying passenger's baggage or other property (whether checked or otherwise delivered into the

> custody of Delta), shall be limited to an amount equal to the value of the property, plus consequential damages, if any, and shall not exceed the maximum limitation of $1,250 for all liability for each fare-paying passenger.

(R. 2228, Pet. App. p. 13) Thus, the limitation of liability applies at any time a fare-paying passenger's property or baggage is lost while in Delta's custody.

This provision of the tariff is not limited to any particular time or place in the passenger's travels or dealings with Delta. Without a doubt, the tariff applies to the pre-boarding security check. Moreover, the Federal Aviation Act does not permit a state to substitute its law in place of a federally-authorized tariff which has the force and effect of law. Furthermore, Lippert's complaint alleges that she placed her carry-on bag in the custody of Delta (through its agent), and it was lost. Lippert's case clearly falls within the ambit of the applicable law in this case -- the airline tariff.

The purpose of a screening device is to make sure that no one who is embarking on a plane or is otherwise accessible to travelers has a weapon or other incendiary device. Thus, the x-ray screening is obviously part of the embarking procedure for ticketed passengers. The security screening which took place in this case was also clearly a service of Delta. Several courts have held that the Federal Aviation Act unmistakably manifests the intent of Congress to preempt state common law tort claims as related to the services of air carriers and the safety of passengers. See O'Carroll V. American Airlines. Inc., 863 F.2d 11 (5th Cir. 1989),

cert. denied, 490 U.S. 1106 (1989); Gabor V. Delta Airlines, Inc., 735 F.Supp. 1030 (S.D. Fla. 1990).[1]

Finally, the answer brief complains that the Defendants are arguing that Lippert is comparatively negligent in this case. This complaint misses the point: Responsibility for a passenger's large cache of uninsured jewelry is clearly not the type of risk which airlines or their agents are required to assume. Both the ticket and the tariff alert the passenger to the need to obtain excess valuation insurance if the passenger intends to carry jewelry or other similar valuable items in either checked or unchecked baggage. The Fourth District misinterpreted this tariff when it stated that it "mandated" that valuables be carried and not placed in checked baggage. The tariff, instead, states that such property should be carried by the passenger or, if they are to be placed in checked or unchecked baggage, excess valuation insurance should be purchased. (R. 2229, Pet. App. p. 14) Lippert could certainly have kept possession of her property and submitted herself to a hand search. By placing the jewelry in an unchecked bag and placing it in the custody of Delta, she immunized the airline from liability underthetariffs. See, Coughlin V. Trans World Airlines, Inc., 847 F.2d 1432 (9th Cir. 1988) (holding that air carrier may

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[1] The issue of preemption is a question of subject matter jurisdiction, see e.g. Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir.), cert. denied, 484 U.S. 986 (1987); Carpenter's Health & Welfare Fund of Philadelphia & Vicinity v. Kenneth R. Ambrose, Inc., 665 F.2d 466, 469-70 (3d Cir. 1991), and jurisdictional matters may be raised for the first time on appeal, Adkins v. Burdeshaw, 220 So.2d 39, 40 (Fla. 1st DCA 1969); Florida Automobile Dealers Industry Benefit Trust, V. Roosevelt N. Small, ____ So.2d ___ (Fla. 1st DCA 1992) [17 FLW D277).

limit liability for loss or destruction of passenger's property, provided that the carrier allows the passenger to protect baggage by carrying it on board or purchasing excess valuation insurance).

The tariffs have the force of law. They should not be ignored because of a desire to impose limitless liability if a passenger's loss occurs during a mandatory pre-flight security check. The tariffs clearly apply to any property of a ticketed passenger which is acceptable for transportation. An airline and its agents should not be exposed to extraordinary damage claims by passengers who bring uninsured valuables on their travels.

In sum, the United States government specifically permits airlines to limit liability through tariff and ticket. Under both Delta's tariff and ticket, any property of a fare-paying passenger placed in Delta's custody at any time falls within this limitation of liability which protects airlines from financial ruin while allowing them to hold down transportation costs for the consumer. The open-ended liability which the district court imposed an this airline and its agent during pre-flight boarding checks should be reversed.

II.

ANY BAILMENT CREATED BY THE SCREENING OF PROPERTY BEING CARRIED INTO THE STERILE AREA OF AN AIRPORT ARISES BY FORCE AND OPERATION OF LAW AND CONSTITUTES A CONSTRUCTIVE OR GRATUITOUS BAILMENT UPON WHICH A GROSS NEGLIGENCE STANDARD SHOULD BE APPLIED

After summary judgment was entered which determined the applicability of the limitation of liability established by the ticket and tariffs, the defense attorneys stipulated at trial that a bailment (gratuitous only) existed in this particular case.[2] If a bailment was created by a screening of Lippert's carry-on bags, it was a gratuitous or constructive bailment which arose by operation of law and in the absence of any voluntary undertaking. Armored Car Service, Inc. v. First National Bank of Miami, 114 So.2d 431 (Fla. 3d DCA 1959). Lippert apparently admits that the bailment arose by operation of law. However, the answer brief then argues that because the cost of providing the screening devices was incorporated into the ticket, Delta received compensation for the search.

Lippert's argument is without merit. Delta and Wackenhut do not profit from the security screening and must, as a matter of

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[2] There is authority, however, for the proposition that no bailment arises at all "unless the carrier has exclusive possession, care, custody and control of such baggage." Chafin v. Atlantic Coast Line R. Co., 58 So.2d 185, 186 (Fla. 1952). In Chafin, the Florida Supreme Court affirmed a directed verdict for a railroad company on the basis that the railroad could not be charged with guarding baggage which a passenger herself asked to be brought onto a train and placed in a baggage rack nearby when she "retained at least partial possession and control of her baggage." Id. at 187.

law, screen everyone's property whether or not the individual is a passenger. Because of this, the bailment is gratuitous and operates by operation of law. The mere fact that some minute portion of the ticket price is used to defray the expenses of this government-ordered security screening is irrelevant because of the absence of any profit. The only decision to address this issue is Tremaroli v. Delta Airlines, 458 N.Y.S.2d at 159. There, the court found that a constructive bailment arose by operation of law when property was turned over to airline personnel for x-ray screening.

Lippert insists on bringing this court's attention to the case of Gin v. The Wackenhut Corporation, 741 F.Supp. 1454 (D. Hawaii, 1990) (withdrawn at the request of the court), The Gin case was withdrawn based on an order vacating the findings of fact, conclusions of law and judgment in this case.[3] The Gin court was also a Hawaiian federal court attempting to interpret Florida law on bailment. Curiously, the Gin court adopted the Tremaroli reasoning that there was a bailment, but ignored the Tremaroli reasoning that a gratuitous bailment arose by operation of law. Because the entire decision, including all findings of fact and conclusions of law have been vacated, however, the Gin opinion has no place in this appeal.

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[3] A copy of the order vacating this decision is appendixed to this brief.

III.

IT WAS WITHIN THE SOUND DISCRETION OF THE FOURTH DISTRICT COURT OF APPEAL TO REMAND FOR A NEW TRIAL ON BOTH LIABILITY AND DAMAGES

The determination of whether to grant a new trial, and upon which issues such new trial should be granted, is generally left to the sound discretion of the trial court. See e.g., Rolands v. Signal Construction Company, 549 So.2d 1380 (Fla. 1989) (trial court should order new trial on all issues affected by the error): Edward M. Chadbourne, Inc. v. Van Dyke, ____ So.2d ____ (1st DCA 1991) [16 FLW D3096]. In the trial court below, a successor judge determined at a hearing prior to trial that he would follow a former judge's ruling and instruct the jury that damages would be limited to $1,250. The Defendants were misled by the representation that this jury would not make a determination as to both liability and damages. It was only during the jury charge conference that the trial judge reversed his ruling and permitted the jury to determine both damages and liability. Thus, the case changed from a $1,250 loss to a case potentially worth almost one half million dollars.

One cannot seriously argue that the Defendants were not prejudiced throughout the course of the trial by these actions. Certainly, the Defendants were innately prejudiced when what was initially determined to be a small case of minimal damages turned into a case involving a major risk. This case was tried with the informality of a small claims court matter and with the

understanding of all parties and the jury that the maximum judgment against the Defendants would be $1,250. This perception of the value of the case permeated the prosecution and the defense of this case, the jury's attentiveness, and the trial court's considerations of motions and objections. Certainly, this contaminated the jury verdict.

The jury was obviously misled in its understanding of the import of its verdict by the fact that both the testimony in evidence and the passenger ticket which was submitted to them indicated that, despite the extent of Lippert's personal loss, any liability of Delta or Wackenhut, was strictly limited by law and by contract. Specifically, during the testimony of Vernon L. Colley, an employee of Delta Airlines, Lippert's attorney established that there is a limit of liability and that this information is printed on the ticket. (R. 264) All travelers have actual or constructive notice of this limitation. The jury may have believed that its evaluation of Lippert's lost jewelry was advisory only, and that a limitation of liability, as per the airline's ticket, would still apply. Nothing in the jury instructions suggested otherwise. Indeed, the judge instructed the jury not to make any reduction for any comparative negligence by Lippert, as the court would take care of that matter itself. With the knowledge that its damage verdict was at most advisory, the jury had no need to carefully consider the evidence and could merely parrot Lippert's claim on the verdict form.

One cannot discount the likelihood that the jury would have

resolved the issues of the parties percentages of fault quite differently had they known that the ticket language regarding limitation of liability would not be honored and that no reduction would be made of the damages. In fact, it is highly likely that had the jury known that Lippert would actually receive the full damages set forth on the verdict, rather than the limited amount specified on the ticket, the jury would have evaluated the facts differently, and found Lippert comparatively negligent in this action.

Certainly, there was compelling evidence in this regard to support comparative negligence: (1) Lippert carried a large amount of uninsured jewelry with her on her travels; (2) Lippert purchased no *excess* insurance for the jewelry while traveling; (3) Lippert and 'her husband made no attempt to proceed separately through the security screening so that each could keep an eye on the other's property; and (4) Lippert made no request for a hand search of her carry on property containing half a million dollars in jewelry, despite the crowded conditions in the security area that day. (R. 755, 776, 773, 793,795, 797, 2452) The fact that the jury found no comparative negligence clearly points to a compromised verdict.

Certainly the question of whether there should be a new trial on all issues is not one of great public importance. This issue which Lippert raises on cross-appeal is not one which bears consideration by the Florida Supreme Court. The fact that the Fourth District believedthatthe entire trial was contaminated and

that sufficient prejudice was shown to warrant a new trial on all issues should be dispositive.

CONCLUSION

For the reasons addressed in the Petitioners' briefs, the certified question should be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joseph D. Farish, Esquire, Post Office Box 3887, West Palm Beach, Florida 33402 on February 4, 1992.

Respectfully Submitted,

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APPENDIX

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App. A — Order Vacating Findings of Fact and Conclusions of Law and Judgment

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 0 6 1990

at 2 o'clock and 35 min. P.M.
WALTER A. Y. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAX GIN and JOHNNIE FONG, as former partners of FONG AND GIN ENTERPRISES, a dissolved Hawaii General Partnership, Plaintiff, vs. THE WACKENHUT CORPORATION, Defendant.	CIVIL NO. 89-00097 SPK ORDER VACATING FINDINGS OF FACT, AND CONCLUSIONS OF LAW AND JUDGMENT Trial Date: 4/18/90 Judge: SAMUEL P. KING

ORDER VACATING FINDINGS
OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT

Pursuant to that certain order of the United States Court of Appeals for the Ninth Circuit, filed October 25, 1990, No. 90-15948, dismissing the appeal of Defendant THE WACKENHUT CORPORATION without prejudice to reinstatement should the District Court refuse to vacate its Judgment filed June 4, 1990 and its Findings of Fact and Conclusions of Law filed May 30, 1990, within thirty (30) days of the date of such order, and

The Court having considered the motion of Defendant THE WACKENHUT CORPORATION for a bench conference to vacate said findings, conclusions of law and judgment, and good cause appearing,

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law filed herein on May 30, 1990, and the Judgment filed herein on June 4, 1990, are hereby vacated and set aside in their entirety.

DATED: Honolulu, Hawaii, NOV 0 6 1990

SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

JOHN RAPP, ESQ.
Attorney for Plaintiffs

KEVIN S. W. CHEE, ESQ.
GREGORY K. MARKHAM, ESQ.
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, MAX GIN and JOHNNIE FONG, AS FORMER PARTNERS OF FONG AND GIN ENTERPRISES, A DISSOLVED HAWAII GENERAL PARTNERSHIP, PLAINTIFFS; VS. THE WACKENHUT CORPORATION, DEFENDANT -- CIVIL NO. 89-00097 SPK - ORDER VACATING FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT