Recent Developments in Air Carrier Litigation

Linda L. Lane
Kimberly R. Gosling
Don G. Rushing

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
Linda L. Lane et al., Recent Developments in Air Carrier Litigation, 76 J. Air L. & Com. 197 (2011)
https://scholar.smu.edu/jalc/vol76/iss2/1
RECENT DEVELOPMENTS IN AIR CARRIER LITIGATION

LINDA L. LANE*
KIMBERLY R. GOSLING**
DON G. RUSHING***

TABLE OF CONTENTS

INTRODUCTION ........................................ 198
I. TOKYO CONVENTION .................................. 198
II. MONTREAL CONVENTION ........................... 203
   A. Preemption Under the Montreal Convention ....... 203
   B. The Meaning of "Embarking" and "Disembarking" Under the Montreal Convention .... 210
   C. The Meaning of "Accident" Under the Montreal Convention .... 212
III. PUBLIC USE AIRCRAFT .......................... 214
IV. COMAIR FLIGHT 5191 ............................ 219
   A. Motions in Limine .............................. 220
   B. Motion for a Simultaneous Trial of Claims Against Comair and the United States ...... 221
   C. Motion to Reconsider Availability of Punitive Damages Under Kentucky Law ...... 222
V. CONTINENTAL FLIGHT 1404 ....................... 223
VI. AIR FRANCE FLIGHT 4590 ....................... 225
CONCLUSION ............................................. 225

TABLE OF AUTHORITIES ............................ 226

* Linda L. Lane received her B.A. from the University of California, Irvine, and J.D. from the University of Colorado, and she clerked for the Hon. Lewis T. Babcock, U.S. District Court, District of Colorado.
** Kimberly R. Gosling received her B.A. from Stanford University and J.D. from Harvard University, and she clerked for the Hon. Jeffrey T. Miller, U.S. District Court, Southern District of California.
*** Don G. Rushing received his B.S. from the U.S. Air Force Academy, M.B.A. from the University of Southern California, and J.D. from the University of California at Los Angeles, and he is a member of the SMU Air Law Symposium Board of Advisors.
INTRODUCTION

THE PAST YEAR brought interesting developments in a number of major cases involving air carriers: a matter of first impression that may come before the Supreme Court; decisions interpreting the scope of the Montreal Convention and defining the law regarding public use aircraft; and other developments in litigation involving high-profile accidents. This article summarizes these developments.

I. TOKYO CONVENTION

*Eid v. Alaska Airlines, Inc.* presents an important question of treaty interpretation affecting the ability of tens of thousands of commercial airline crews across the country to maintain safety and security onboard international flights.¹

The Tokyo Convention of 1963, signed and ratified at a time of increased hijackings and passenger disturbances, significantly enhanced an aircraft captain’s authority to take action against potential threats onboard international flights.² Specifically, the Tokyo Convention affords immunity to the captain and the airline whenever the captain acts with “reasonable grounds to believe” that a passenger committed, or is about to commit, any act that may, or does, jeopardize safety, good order, or discipline onboard the aircraft.³ Before the *Eid* case came before the District of Nevada, no U.S. court had interpreted the meaning of this treaty language.

On the evening of September 29, 2004, a group of Egyptian businessmen and their wives boarded Alaska Airlines Flight 694 in Vancouver, British Columbia bound for Las Vegas, Nevada to attend an energy convention.⁴ About one hour into the flight, the captain received a call on the aircraft interphone from a flight attendant.⁵ The flight attendant reported that she was having trouble with some first-class passengers and requested that security meet the airplane in Las Vegas.⁶ The captain asked whether there was “anything urgent, anything [I] need to know,” to which the flight attendant responded that she be-

---

¹ See generally *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858 (9th Cir. 2010).
³ *Id.* art. 6, para. 1.
⁴ *Eid*, 621 F.3d at 862.
⁵ *Id.* at 862, 864.
⁶ *Id.* at 877 (Otero, J., dissenting in part, concurring in part).
lied she had the situation under control. Following the conversation, the captain initiated cockpit lockdown procedures and turned on the fasten seat belt sign.

Several minutes later, the captain received a second phone call from a flight attendant, stating she had “lost control” of the first-class cabin. To the captain, it sounded like the flight attendant was crying. At this time, the captain heard “a bunch of yelling and screaming coming through the interphone.” The captain confirmed with the first officer that he too heard yelling and screaming. The captain said he “never heard anything like that in [his] entire career.” He “felt that there was a possibility that [his] airplane and [his] crew were in jeopardy.”

The captain decided to put the airplane on the ground as soon as possible at the nearest suitable airport—Reno, Nevada.

After the aircraft landed in Reno, the captain and the flight attendant met at the top of the jetway to discuss what happened onboard. The flight attendant reported to the captain that there were six first-class passengers causing a disturbance by congregating near the cockpit door, refusing to follow flight attendant instructions, and yelling at the flight attendant. She also told him that, after several verbal warnings, she gave the passengers a written warning at which point they “exploded.”

The flight attendant also reported to the captain that the passengers told her, “[y]ou Americans are so paranoid and all of these safety and security regulations [are] stupid.” Based on this report, the captain asked law enforcement to remove the passengers from the aircraft and to press charges against them.

The captain had the flight attendant return to the first-class

---

7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id. at 887.
15 Id. at 877.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id. at 878.
cabin to identify the offending passengers, all of whom deplaned.\textsuperscript{21}

Respondents, who were nine of the twelve first-class passengers and were traveling together as a group, sued petitioner Alaska Airlines in Nevada federal court.\textsuperscript{22} Respondents claimed that the airline violated its obligation under the Warsaw Convention,\textsuperscript{23} formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, which creates a cause of action against an airline for "damage occasioned by delay in the carriage by air of passengers" on international flights and preempts state tort law.\textsuperscript{24} Alaska Airlines moved for summary judgment on the Warsaw Convention claim, contending that the Tokyo Convention provided it immunity.\textsuperscript{25}

The district court granted summary judgment for Alaska Airlines, explaining that when a captain acts in accordance with the Tokyo Convention, neither the captain nor the owner or operator of the aircraft may be held liable.\textsuperscript{26} The court determined that the captain complied with the Tokyo Convention because "given even a cursory examination of all of the facts and circumstances of this matter" reasonable minds could not differ in concluding that the captain had reasonable grounds for his decision.\textsuperscript{27}

On appeal, the Ninth Circuit sua sponte invited the United States to submit an amicus brief setting forth the government’s views as to the correct application of the Tokyo Convention and the Warsaw Convention.\textsuperscript{28} The United States subsequently filed a brief urging that the Tokyo Convention requires a highly def-

\begin{itemize}
\item \textsuperscript{22} Eid, 621 F.3d at 865; see Olympic Airways v. Husain, 540 U.S. 644, 649 n.5 (2004). Plaintiffs also brought supplemental state law claims for defamation and intentional infliction of emotional distress. Eid, 621 F.3d at 865. The district court dismissed all of respondents’ state law claims as preempted by the Warsaw Convention. \textit{Id}. The district court subsequently denied respondents’ motion to file supplemental pleadings alleging seven new state causes of action. \textit{Id}.
\item \textsuperscript{24} Eid, 621 F.3d at 865.
\item \textsuperscript{25} Eid, 621 F.3d at 865; see Olympic Airways v. Husain, 540 U.S. 644, 649 n.5 (2004). Plaintiffs also brought supplemental state law claims for defamation and intentional infliction of emotional distress. Eid, 621 F.3d at 865. The district court dismissed all of respondents’ state law claims as preempted by the Warsaw Convention. \textit{Id}. The district court subsequently denied respondents’ motion to file supplemental pleadings alleging seven new state causes of action. \textit{Id}.
\item \textsuperscript{26} Eid, 621 F.3d at 865.
\item \textsuperscript{27} Eid, 621 F.3d at 865; see Olympic Airways v. Husain, 540 U.S. 644, 649 n.5 (2004). Plaintiffs also brought supplemental state law claims for defamation and intentional infliction of emotional distress. Eid, 621 F.3d at 865. The district court dismissed all of respondents’ state law claims as preempted by the Warsaw Convention. \textit{Id}. The district court subsequently denied respondents’ motion to file supplemental pleadings alleging seven new state causes of action. \textit{Id}.
\item \textsuperscript{28} See Brief for the United States as Amicus Curiae, Eid, 621 F.3d 858 (No. 06-16457).
\end{itemize}
recent review of an aircraft captain's actions.\textsuperscript{29} The court of appeals, however, entirely ignored the position of the United States on the correct interpretation of the Tokyo Convention.\textsuperscript{30} Accordingly, a divided court of appeals reversed the ruling that the Tokyo Convention entitled Alaska Airlines to summary judgment.\textsuperscript{31}

Focusing on the phrase "reasonable grounds to believe" in the Tokyo Convention, the panel majority held that the Tokyo Convention adopts a "reasonableness" standard as that term is used in American law, not a standard that is deferential to the captain.\textsuperscript{32} The court concluded, "[r]easonableness is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals."\textsuperscript{33} Although the panel majority declined to follow the First Circuit, it acknowledged that the First Circuit "adopted an 'arbitrary or capricious' standard for judging the behavior of airline crews" under the analogous statute for domestic air travel.\textsuperscript{34}

Applying its interpretation of "reasonable grounds to believe," the Ninth Circuit held that summary judgment was inappropriate.\textsuperscript{35} The panel majority hypothesized, "[a] jury could conclude that a reasonable captain should have tried to find out something about what was going on in the cabin" after the flight attendant reported she lost control and before making the decision to divert to Reno.\textsuperscript{36} The panel majority also reasoned that a jury could conclude that the captain lacked reasonable grounds because, accepting everything the flight attendant said, there was no evidence plaintiffs violated any laws.\textsuperscript{37} Finally, the panel majority surmised that a jury could conclude that the captain's refusal to allow respondents to reboard the flight after the police decided not to arrest them was unreasonable.\textsuperscript{38}

\textsuperscript{29} Id. at 9.
\textsuperscript{30} See Eid, 621 F.3d at 867–68 (applying a reasonableness test as opposed to a more deferential standard).
\textsuperscript{31} Id. at 872.
\textsuperscript{32} Id. at 868.
\textsuperscript{33} Id.
\textsuperscript{34} Id. (quoting Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 14 (1st Cir. 2008)); see also 49 U.S.C. § 44902(b) (2006).
\textsuperscript{35} Eid, 621 F.3d at 872.
\textsuperscript{36} Id. at 869–70 (emphasis added).
\textsuperscript{37} Id. at 871–72.
\textsuperscript{38} Id. at 872.
Judge Otero dissented, arguing that the Tokyo Convention requires courts to review a captain's conduct under a more deferential arbitrary and capricious standard, rather than a reasonableness standard. As the dissenting judge observed, the Convention does not define "reasonable grounds to believe" and "reasonable measures." And, the meaning of these terms is not "clear on their face." Judge Otero explained that, although "the term 'reasonable' is familiar in American law, . . . the relevant text in the instant case comes from a multilateral agreement among nations with significant differences in both procedural and substantive law." Given the context in which these terms are used and the Convention's broad provision of immunity, he concluded that Alaska Airlines and the United States were correct that the captain should receive considerable deference. The dissent reasoned that an "arbitrary and capricious" standard meets the principal goal of promoting air safety as well as the goal of protecting the rights of passengers to be free from unwarranted discrimination. A negligence standard, on the other hand, will result in hesitation by the pilot in circumstances where he should have acted [and] second-guessing by courts.

Alaska Airlines petitioned the Supreme Court for a writ of certiorari on January 24, 2011. The airline argued, Article 10 of the Tokyo Convention . . . affords immunity from civil suits to the aircraft captain and the airline regarding actions taken on international flights whenever the captain acts in compliance with the Convention. Articles 6 and 8 of the Convention authorize the captain to take reasonable measures when the captain has "reasonable grounds to believe" that a passenger has committed or is about to commit any act that may, or does, jeopardize safety, good order, or discipline on his aircraft.

The question presented in the petition is:

39 Id. at 879 (Otero, J., dissenting in part, concurring in part).
40 Id.
41 Id.
42 Id.
43 Id. at 879–80.
44 Id. at 886.
46 Id. at *i.
47 Id.
Whether the Tokyo Convention requires deference to be given to the aircraft captain’s decision, based on reports received from the cabin crew, to take action in response to passenger conduct that may jeopardize the safety of the aircraft or of persons or property therein or good order and discipline on board.\textsuperscript{48}

No decision is expected on certiorari until late in the term.

II. MONTREAL CONVENTION

The Montreal Convention,\textsuperscript{49} which became effective November 4, 2003, “applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.”\textsuperscript{50} The Montreal Convention was adopted to unify and replace the system of liability which derives from the much older Warsaw Convention.\textsuperscript{51} “[T]he Montreal Convention is unique in that it ‘represents a significant shift away from’” the Warsaw Convention, which primarily favored airlines in order to support the burgeoning industry, “‘to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers.’”\textsuperscript{52}

A. PREEMPTION UNDER THE MONTREAL CONVENTION

Courts have recently begun considering the preemptive scope of the Montreal Convention. In Garrisi v. Northwest Airlines, Inc., the Eastern District of Michigan considered whether the Montreal Convention preempted state law tort claims arising out of an incident on a March 24, 2007, flight from Detroit, Michigan, to Amsterdam, Netherlands.\textsuperscript{53} The plaintiff, Ms. Garrisi, was a passenger on the flight.\textsuperscript{54} “At the start of the flight, but before the aircraft left the airport, a flight attendant knocked a cup of hot coffee onto [Ms.] Garrisi’s lap,” causing injuries to Ms. Garrisi that required medical attention.\textsuperscript{55} “On March 24, 2010, [Ms.] Garrisi filed a complaint in Wayne County Circuit Court, (\textsuperscript{48}Ibid.
\textsuperscript{50}Id. art. 1, para. 1.
\textsuperscript{53}Id. at *1.
\textsuperscript{54}Id.
\textsuperscript{55}Id.
asserting a single state law claim of negligence."\textsuperscript{56} On June 10, 2010, Northwest [Airlines] timely removed the case to federal court on the grounds of diversity jurisdiction and \ldots federal question jurisdiction based on complete preemption under the Montreal Convention."\textsuperscript{57} Northwest then filed a motion to dismiss based on the Montreal Convention's two year statute of limitations.\textsuperscript{58}

The court first considered Northwest's claim that federal diversity jurisdiction existed.\textsuperscript{59} The court found the parties diverse; Ms. Garrisi was a citizen of Michigan, and Northwest was a Delaware corporation with its principal place of business in Georgia.\textsuperscript{60} The court, however, found that the amount-in-controversy requirement for diversity jurisdiction was not met because Ms. Garrisi's complaint sought damages only "in excess of $25,000."\textsuperscript{61} Although Northwest asserted that Ms. Garrisi's damages, if believed by a jury, would be in excess of $75,000, the court found that "the mere assertions" that her damages would exceed the jurisdictional amount were insufficient to invoke diversity jurisdiction.\textsuperscript{62}

Because the diversity jurisdiction claim failed, the court next considered Northwest's claim that it had federal question jurisdiction because the Montreal Convention completely preempted Ms. Garrisi's state law claims.\textsuperscript{63} First, the court noted that Ms. Garrisi was on a flight between two of the Montreal Convention's signatory countries—the United States and the Netherlands—and, thus, Northwest was engaged in "international carriage" within the meaning of the Convention.\textsuperscript{64}

Next, the court examined Article 29 of the Convention, which states, "'[i]n the carriage of passengers \ldots any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the \ldots limits of liability as are set out in this Convention.'"\textsuperscript{65} The court then undertook a survey of relevant case law, finding most persuasive the Supreme Court's decision in \textit{El Al Israel Air-}

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id. at}*2.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id. at}*2–3.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id. at}*3.
\textsuperscript{64} \textit{Id. at}*3–4.
\textsuperscript{65} \textit{Id. at}*4 (quoting Montreal Convention, \textit{supra} note 49, art. 29).
lines, Ltd. v. Tseng," which held that "the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the [Warsaw] Convention." In light of Tseng, the court held that the Montreal Convention preempts all state law causes of action for matters within the Convention's scope. The court reasoned that this promotes the "federal policy of uniformity and certainty" embodied by the treaty. Thus, the court found that removal was proper based on the presence of federal question jurisdiction. The court went on to grant Northwest's motion to dismiss, finding that Ms. Garrisi's claim was time barred by the Montreal's Convention's two year statute of limitations.

Not all courts, however, have found that the Montreal Convention completely preempts state law. In Cosgrove-Goodman v. UAL Corp., the court took a different view of Article 29 of the Montreal Convention. The plaintiff in Cosgrove-Goodman sued UAL Corporation (UAL) in the Circuit Court of Cook County, Illinois, for injuries sustained after she slipped on a greasy substance on the jet way floor. "UAL removed the case to federal court alleging federal question jurisdiction" on the basis of the Montreal Convention. The plaintiff then moved to remand the action back to the Circuit Court of Cook County.

In deciding whether the Montreal Convention preempted the plaintiff's state law claims, the Cosgrove-Goodman court, like the Garrisi court, sought guidance from cases interpreting both the Warsaw Convention and the Montreal Convention. Specifically, the court found persuasive the analysis in Narkiewicz-Laine v. Scandinavian Airlines Systems. In Narkiewicz-Laine, the Northern District of Illinois analogized Article 29 of the Montreal

---

66 Id. at *4–5.
68 Garrisi, 2010 WL 3702374, at *5.
69 Id.
70 Id.
71 Id. at *6.
73 Id. at *1.
74 Id.
75 Id.
76 Id. at *3.
Convention to the very similar Article 24 of the Warsaw Convention.\textsuperscript{78} The court noted that the Seventh Circuit recently considered the language of Article 24 of the Warsaw Convention and found that "'Article 24 expressly contemplates that an action may be brought in contract or in tort. The liability limitation provisions of the Warsaw Convention simply operate as an affirmative defense.'"\textsuperscript{79} Based on this reasoning, the \textit{Narkiewicz-Laine} court ultimately held that the conditions and limits of the Montreal Convention are defenses to state law breach of contract claims, and "they do not provide a basis for federal-question subject matter jurisdiction."\textsuperscript{80}

The \textit{Cosgrove-Goodman} court found this reasoning persuasive.\textsuperscript{81} It also found support for denying federal question jurisdiction in the plain language of Article 29.\textsuperscript{82} The court noted that Article 29 ""specifically contemplates"" that actions for damages may be ""founded . . . under this Convention or in contract or in tort or otherwise.""\textsuperscript{83} The court reasoned that if it held the Montreal Convention to completely preempt state law, it ""would render meaningless the words "or in contract or in tort or otherwise.""\textsuperscript{84} The \textit{Cosgrove-Goodman} court therefore found it lacked subject matter jurisdiction over the plaintiff's claims because the face of the complaint only invoked state law.\textsuperscript{85} Remanding the case to the Circuit Court of Cook County, the court noted that

\textsuperscript{78} \textit{Narkiewicz-Laine}, 587 F. Supp. 2d at 890. \textit{Compare} Montreal Convention, \textit{supra} note 50, art. 29 ("In the carriage of . . . cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention . . . ."), \textit{with} Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. 24, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, \textit{opened for signature} Sept. 25, 1975, \textit{reprinted in} Sec. Rep. No. 105-20 ("in the carriage of cargo, any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this convention . . . .").

\textsuperscript{79} \textit{Narkiewicz-Laine}, 587 F. Supp. 2d at 890 (quoting Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776, 785 (7th Cir. 2008)).

\textsuperscript{80} Id.

\textsuperscript{81} \textit{Cosgrove-Goodman}, 2010 WL 2197674, at *3.

\textsuperscript{82} Id.

\textsuperscript{83} Id.; \textit{see also} Montreal Convention, \textit{supra} note 49, art. 29.

\textsuperscript{84} \textit{Cosgrove-Goodman}, 2010 WL 2197674, at *3 (quoting Nankin v. Cont'l Airlines, Inc., No. CV 09-07851 MMM (RZx), 2010 WL 342632 (C.D. Cal. Jan. 29, 2010)).

\textsuperscript{85} Id. at *4.
the liability limits in the Montreal Convention would act as an affirmative defense to the plaintiff’s claims for damages.\textsuperscript{86}

In \textit{Atia v. Delta Airlines, Inc.}, the Eastern District of Kentucky considered whether the Montreal Convention preempts a plaintiff’s claim for breach of contract against Delta Airlines (Delta).\textsuperscript{87} The case arose out of Delta’s refusal to transport the plaintiff from Los Angeles, California, to Tel Aviv, Israel.\textsuperscript{88} The court began with the premise that the Montreal Convention “preempts all . . . state-law claims falling within its scope.”\textsuperscript{89} The issue, in the court’s view, was whether nonperformance of a contract falls within the Convention’s provisions.\textsuperscript{90} Delta contended that the Montreal Convention preempted the plaintiff’s breach of contract claim because it arose out of events that occurred during the embarkation of an international flight.\textsuperscript{91} The plaintiff, on the other hand, responded “that her claim [fell] outside the scope of the Convention because she allege[d] non-performance of a contract.”\textsuperscript{92}

In making its determination, the \textit{Atia} court found most persuasive the reasoning in \textit{Wolgel v. Mexicana Airlines},\textsuperscript{93} a Seventh Circuit decision interpreting the Warsaw Convention.\textsuperscript{94} In \textit{Wolgel}, the Seventh Circuit held “that there was no need for a remedy in the [Warsaw] Convention for total nonperformance of [a] contract, because in such a case the injured party has a remedy under the law of his or her home country.”\textsuperscript{95} Thus, the Seventh Circuit held that the Warsaw Convention did “not apply to a case of nonperformance of a contract.”\textsuperscript{96}

The \textit{Atia} court buttressed its reliance on the \textit{Wolgel} decision with the plain language of the Montreal Convention.\textsuperscript{97} Article 19 of the Convention, which Delta alleged governed the plaintiff’s case, states only that “[t]he carrier is liable for damage occasioned by delay in the carriage by air of passengers.”\textsuperscript{98} Be-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at *3–4.
\item \textit{Id.} at 695–96.
\item \textit{Id.} at 699.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Wolgel v. Mexicana Airlines}, 821 F.2d 442 (7th Cir. 1987).
\item \textit{Atia}, 692 F. Supp. 2d at 700.
\item \textit{Wolgel}, 821 F.2d at 444.
\item \textit{Id.}
\item \textit{Atia}, 692 F. Supp. 2d at 701.
\item \textit{Id.; see also} Montreal Convention, \textit{supra} note 49, art. 19.
\end{enumerate}
\end{footnotesize}
cause the plaintiff's claims were for complete nonperformance, not mere delay, the court found them outside the Convention's scope. 99

A case that focuses on the differences between the Warsaw Convention and the Montreal Convention, rather than on their similarities, is *Eli Lilly & Co. v. Air Express International USA, Inc.* 100 In *Eli Lilly*, the court considered whether the liability limits in the Warsaw Convention preempted Eli Lilly's claims for breach of a long-term service agreement and two air waybill contracts. 101

The case arose "out of the spoliation of temperature-sensitive insulin products, which" defendant Air Express International USA, Inc. (DHL) shipped from France to the United States and "were exposed to sub-freezing temperatures en route." 102 "Seeking to recover for damage to the insulin products," Eli Lilly sued DHL for breach of its long-term service agreement and two air waybill contracts for the carriage of the damaged products. 103 "The district court dismissed the claim for breach of the service agreement" as preempted by the Montreal Convention, but granted Eli Lilly "summary judgment on the issue of liability for breach" under the service agreement, holding that the Montreal Convention did not govern DHL's liability but rather the service agreement's liability provision governed. 104 DHL appealed, contending that the limitations of the Montreal Convention should apply regardless of the liability provision in the service contract. 105

The Eleventh Circuit agreed with DHL. 106 It noted that Article 22(3) of the Montreal Convention limits potential liability for damage to cargo, and these limits can be increased in only two ways. 107 First, under Article 22(3), the consignor may make

---

99 *Atia*, 692 F. Supp. 2d at 701. The court also considered claims of discrimination made by the plaintiff against a Delta employee. *Id.* at 698. These claims, the court found, were preempted by the Montreal Convention because the events leading up to the claim "took place during embarkation of an international flight." *Id.* at 703.

100 See generally *Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305 (11th Cir. 2010).

101 *Id.* at 1307.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 1318.

107 *Id.* at 1308; see also Montreal Convention, *supra* note 49, arts. 22, 25.
"‘a special declaration of interest’" at the time the package is handed over to the carrier.\textsuperscript{108} This provision mirrors Article 22 of the Warsaw Convention and, thus, "did not represent a change in the law."\textsuperscript{109} Second, Article 25 of the Montreal Convention allows a consignor to "'stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention.'"\textsuperscript{110} As the court noted, "Article 25 is new; there is no parallel provision in the Warsaw Convention or its subsequent amendments."\textsuperscript{111} Thus, the issue before the court was whether the liability provision of the long-term service agreement was a stipulation within the meaning of Article 25.\textsuperscript{112}

The court noted that it must first "discern whether the parties intended to incorporate" the long-term service agreement liability provision into the contracts of carriage (the air waybills).\textsuperscript{113} Concluding that the parties did not so intend, the court noted that "[t]he service agreement took effect January 1, 2003, eleven months before the Montreal Convention entered into force."\textsuperscript{114} At the time, the governing law was the Warsaw Convention, which contained no provision parallel to Article 25 allowing "a carrier [to] stipulate that a contract of carriage would be subject to increased limits on liability."\textsuperscript{115} The court found that, under the Warsaw Convention, such a stipulation "may have been invalid."\textsuperscript{116} This suggested "that the parties did not intend such a result."\textsuperscript{117} Moreover, the court noted that the service agreement made no mention of either the Warsaw Convention or the Montreal Convention.\textsuperscript{118} Therefore, the court held there was "no indication that the parties intended to opt out of the Montreal Convention liability regime."\textsuperscript{119} The court nevertheless left open the question of whether a stipulation in a service agree-

\begin{footnotes}
\item[108] \textit{Eli Lilly & Co.}, 615 F.3d at 1308 (quoting Montreal Convention, \textit{supra} note 49, art. 22).
\item[109] Id.
\item[110] Id. at 1308–09 (quoting Montreal Convention, \textit{supra} note 49, art. 25).
\item[111] Id. at 1309.
\item[112] Id. at 1314.
\item[113] Id.
\item[114] Id. at 1315.
\item[115] Id.
\item[116] Id.
\item[117] Id.
\item[118] Id.
\item[119] Id. at 1316.
\end{footnotes}
ment could constitute an effective stipulation under Article 25 if the parties had so intended.

B. THE MEANING OF “EMBARKING” AND “DISEMBARKING” UNDER THE MONTREAL CONVENTION

Under the Montreal Convention, a carrier is liable for a passenger’s “death or bodily injury” only where “the accident which caused the death or injury took place on board the aircraft or in the course of the operations of embarking or disembarking” from international carriage.\(^{120}\) In *Fedelich v. American Airlines*, the court examined the scope of what constitutes “disembarking” an international flight.\(^{121}\) There, the plaintiff injured herself when she fell “at an international baggage carousel in the San Juan International Airport” in Puerto Rico on her way home from the Dominican Republic.\(^{122}\) Defendant American Airlines argued that the Montreal Convention governed the accident because the plaintiff was in the process of disembarking.\(^{123}\) The plaintiff, on the other hand, contended that Puerto Rico’s tort law governed the case and “she [was] entitled to recover due to [American Airlines’] negligence in maintaining its premises.”\(^{124}\)

The court stated that the inquiry into whether the plaintiff was “disembarking” within the meaning of the Convention should focus on three factors: “(1) the passenger’s activity at the time of the injury, (2) where the passenger was located, and (3) the extent to which the carrier was exercising control over the passenger at the moment of injury.”\(^{125}\) The court should address these three factors not as separate inquiries but in unison.\(^{126}\) The court noted that the act of disembarking should normally be construed narrowly, “strongly relating the accident with the physical act of [leaving] the plane.”\(^{127}\)

In considering the three factors, the court noted first that the “[p]laintiff was injured [while] retrieving her luggage from the international baggage carousel, a location far removed from

---

\(^{120}\) Montreal Convention, *supra* note 49, art. 17, para. 1.


\(^{122}\) *Id.* at 276.

\(^{123}\) *Id.* at 276–77.

\(^{124}\) *Id.* at 283.

\(^{125}\) *Id.* at 284 (citing *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 317 (1st Cir. 1995)).

\(^{126}\) *Id.*

\(^{127}\) *Id.*
[the area] where passengers descend from the aircraft.” The court also pointed out that “although connected to her flight, baggage retrieval was not an action necessary to become separated from the plane.” The court noted that the “[p]laintiff was free to roam around, and choose her path, unlike when the airline directs passengers to line up and enter the plane.”

The court concluded that, at the time of the fall, the “[p]laintiff was free from AA’s direction, removed from the arrival gate, and in the baggage claim area, a space where courts have held passengers are no longer in the process of disembarking.” Thus, the court found that the Montreal Convention did not govern the plaintiff’s claim, but rather Puerto Rican tort law governed.

On the other hand, in Matveychuk v. Deutsche Lufthansa, AG, the Eastern District of New York took an expansive view of what constitutes “embarking” on an international flight. In Matveychuk, the plaintiff was denied access in Frankfurt, Germany, to the final leg of her international travel between Newark, New Jersey, and Minsk, Belarus. The airline denied plaintiff boarding on her flight to Minsk because, due to a delay in her flight from New Jersey to Germany, she arrived at the gate approximately 20 minutes late. Despite the fact that the plane was still at the terminal, the gate agent informed the plaintiff she would not be permitted to board. The agent then instructed the plaintiff to go to the rebooking desk to arrange another flight. On her way to the rebooking desk, the plaintiff stopped in the restroom and injured herself.

The parties disagree as to how the plaintiff was injured. She claims that “the gate agent followed her into the restroom and pushed her,” causing her to fall and lose consciousness. The defendant denies that the gate agent argued with or pushed the plaintiff.
the restroom occurred during the process of “embarking” on an international flight.\textsuperscript{139}

To determine if the plaintiff was “embarking,” the \textit{Matveychuk} court considered factors similar to those considered by the court in \textit{Fedelich}: “(1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on her movements; (3) the imminence of actual boarding; and (4) the physical proximity of the passenger to the gate.”\textsuperscript{140} The court noted that, in applying these factors, courts generally should pay close attention to whether the injuries were “sustained close in time to the boarding process and in areas that are near departure gates and limited to ticketed passengers.”\textsuperscript{141}

Here, Deutsche Lufthansa contended that, because the plaintiff's plane had stopped boarding before she arrived at the gate, this compelled the conclusion “that she could not have been injured while . . . ‘embarking.’”\textsuperscript{142} The court disagreed, noting it “should not maintain a myopic focus on the discrete act of enplaning when determining whether an injury is encompassed by [the Convention].”\textsuperscript{143} The court stated, “[d]elays and missed connecting flights are usual and predictable occurrences of air travel,” and given this reality, the plaintiff was in the act of “embarking.”\textsuperscript{144} Finally, the court reasoned, “it would not serve the [Convention’s] goal of predictable liability to deny claim coverage to a passenger solely because her alleged injury occurred shortly \textit{after} her connecting flight departed.”\textsuperscript{145} Thus, the court granted partial summary judgment for the plaintiff, holding that the Montreal Convention governed her claims.\textsuperscript{146}

\section*{C. The Meaning of “Accident” Under the Montreal Convention}

In \textit{Ginsberg v. American Airlines}, the court considered the meaning of the term “accident” under Article 17 of the Montreal Convention.\textsuperscript{147} The plaintiff in \textit{Ginsberg} was involved in an

\textsuperscript{139} \textit{Id.} at *2.
\textsuperscript{140} \textit{Id.} (citing \textit{King v. Am. Airlines, Inc.}, 284 F.3d 352, 359 (2d Cir. 2002)).
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} at *3.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} at *4.
\textsuperscript{147} \textit{Ginsberg v. Am. Airlines, No. 09 Civ. 3226(LTS)(KNF), 2010 WL 3958843, at *4 (S.D.N.Y. Sept. 27, 2010).} For the content of Article 17, see \textit{supra} text accompanying note 121.
altercation with a flight attendant after using the aircraft restroom during a flight from New York to Turks and Caicos.\textsuperscript{148} When the plaintiff attempted to return to his seat, the flight attendant told him to wait for her to move the food and beverage cart in the aisle.\textsuperscript{149} When the flight attendant left the cart unattended, the plaintiff began moving the cart himself.\textsuperscript{150} They then had a confrontation.\textsuperscript{151} The plaintiff claimed "that the flight attendant pushed and shoved him at the commencement of the altercation," whereas the flight attendant stated "that she put her left arm around [the plaintiff], on top of the cart, and her left foot at the bottom of the cart."\textsuperscript{152} After the flight arrived in Turks and Caicos, local police questioned the plaintiff.\textsuperscript{153} American Airlines later refused to honor his return ticket.\textsuperscript{154}

In the lawsuit that followed, American Airlines moved for summary judgment, arguing that the Montreal Convention preempted the plaintiff's claims.\textsuperscript{155} The court granted the airline's motion with respect to the assault and battery claims.\textsuperscript{156}

First, the court held that, like the Warsaw Convention, the Montreal Convention completely preempts all claims within its reach.\textsuperscript{157} Therefore, the court examined whether the incident between Ginsberg and the flight attendant was an "accident" within the meaning of the convention.\textsuperscript{158} The court next explained that "the term 'accident,' as used in the analogous provision of the Warsaw Convention, means 'an unexpected or unusual event or happening that is external to the passenger.'"\textsuperscript{159} Applying this definition, the court held that "no 'accident' had occurred."\textsuperscript{160} The altercation was not "unexpected," as the plaintiff had "willfully disregarded [the flight attendant’s] instructions and moved the cart with the knowledge that an altercation could occur."\textsuperscript{161} Nor was the altercation "external" to

\textsuperscript{148} Ginsberg, 2010 WL 3958843, at *1.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at *3.
\textsuperscript{156} Id. at *6.
\textsuperscript{157} Id. at *3.
\textsuperscript{158} Id. at *4.
\textsuperscript{159} Id. (quoting El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 166 (1999)).
\textsuperscript{160} Id.
\textsuperscript{161} Id.
the plaintiff, as it was the result of his "own decision to move the
cart," which he knew could cause a confrontation.\(^{162}\)

The court also held that Ginsberg did not suffer "bodily in-
jury" within the meaning of the convention because he "stipu-
lated that he did not suffer from any physical or bodily injury,
nor did he suffer any resulting psychological injury."\(^{163}\) Thus,
the Montreal Convention barred all claims arising from the
onboard incident.\(^{164}\)

### III. PUBLIC USE AIRCRAFT

*Mercy Flight Central, Inc. v. New York Division of State Police* addressed whether the New York State Police and the Onondaga
County Sheriff's Department violated federal law by providing
helicopter emergency medical services without being properly
certified by the Federal Aviation Administration (FAA).\(^{165}\) The
plaintiffs were competing private providers of commercial emer-
gency medical air transportation services.\(^{166}\) They alleged that
the State Police and Sheriff's Department violated the Federal
Aviation Act by not meeting FAA certification requirements that
the FAA required civilian aircraft operators, like the plaintiffs, to
meet.\(^{167}\)

In a motion to dismiss, the State Police argued it was operating "public aircraft," and thus not required to obtain the same
FAA certification as "civilian aircraft operators."\(^{168}\) The parties
did not dispute that "'civilian aircraft operations' are required
to be certified within the meaning of 49 U.S.C. § 41101(a), and

---

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id. The plaintiff in *Ginsberg* also asserted claims for false arrest based on
questioning and detention by the Turks and Caicos police, conspiracy by Ameri-
can Airlines, and intentional infliction of emotional distress and breach of con-
tract based on the airline's refusal to honor his return ticket. *Id.* at *4–5.* The
court granted American's motion for summary judgment as to all but the breach of
contract claim. *Id.* at *6.* Notably, the court held that Article 19 of the Mon-
treal Convention, which "covers damage claims for 'delay,'" did not apply to the
breach of contract claim because American had cancelled the plaintiff's ticket,
and thus he could not have been in the course of "embarking" when the injury
occurred. *Id.* at *5.*

\(^{165}\) Memorandum—Decision and Order at 2, *Mercy Flight Central, Inc. v. N.Y.*
Div. of State Police, No. 5:08-CV-1041-FJS-GHL (N.D.N.Y. Feb. 26, 2010), ECF 49.

\(^{166}\) Id.

\(^{167}\) Id. at 3.

\(^{168}\) Id. at 9–10.
that 'public aircraft' are not required to obtain the same certification.\textsuperscript{169}

The district court explained that for aircraft to be classified as "public aircraft," the defendants must show that those aircraft "(1) are owned and operated by a government; (2) carry only 'crewmembers' and 'qualified non-crewmembers'; and (3) are not used for 'commercial purposes.'"\textsuperscript{170} The court found that "medi-vac services are a 'government function' and that both patients and medical personnel are 'qualified non-crewmembers' because their presence is required to perform, and is associated with, a 'government function.'"\textsuperscript{171} The court also found that medi-vac services "are in no way 'a major enterprise for profit,'" and thus are not used for a "commercial purpose."\textsuperscript{172} Concluding that the aircraft were "public aircraft" not subject to FAA regulation, the court granted the State Police's motion to dismiss.\textsuperscript{173}

In \textit{Houlihan v. Capital Airways, LLC}, defendant Capital Airways laid off plaintiff Michael Houlihan from his position as Director of Maintenance.\textsuperscript{174} Houlihan claimed this breached his employment agreement with Capital Airways.\textsuperscript{175} Capital Airways filed a motion for summary judgment, claiming it terminated Houlihan within the terms of his employment agreement because he "falsified maintenance records by backdating corrective actions on aircraft logs on at least three occasions," in violation of applicable FAA regulations.\textsuperscript{176} Houlihan submitted an affidavit with his reply to Capital Airways' motion for summary judgment, stating that "the 737 was being operated as a public use aircraft so technically, the Code of Federal Aviation Regulations did not apply," and thus he did not violate his employment agreement.\textsuperscript{177}

Capital Airways then filed a motion to strike the portions of Houlihan's affidavit referring to the aircraft on which he worked

\begin{itemize}
\item \textsuperscript{169} \textit{Id.} (internal citation omitted).
\item \textsuperscript{170} \textit{Id.} at 12 (citing 49 U.S.C. §§ 40102(a)(41)(C), 40125(b) (2006)).
\item \textsuperscript{171} \textit{Id.} at 13.
\item \textsuperscript{172} \textit{Id.} at 16.
\item \textsuperscript{173} \textit{Id.} The court also noted that it had already dismissed the plaintiffs' claims against the Sheriff's Department, but that this was another reason why the plaintiffs' claims against the Sheriff's Department must fail. \textit{Id.} at 16 n.10.
\item \textsuperscript{175} \textit{Id.} at *4.
\item \textsuperscript{176} \textit{Id.} at *5.
\item \textsuperscript{177} \textit{Id.} at *8–9.
\end{itemize}
as "public use aircraft." Capital Airways argued that this called for an expert opinion, which Houlihan was not qualified to provide.

The court ordered that the references to "public use aircraft" be stricken from Houlihan's affidavit, as these were only based on Houlihan's unsupported opinion. The court reasoned that "evidence inadmissible at trial cannot be used to avoid summary judgment," and that "conclusory assertions cannot be used in an affidavit on summary judgment." This conclusion suggests that, to establish an aircraft is a "public aircraft," a party must offer either expert testimony or a lay witness affidavit containing factual detail beyond mere conclusory statements.

The ongoing In re Helicopter Crash Near Weaverville, California 8/5/08 multi-district litigation arises from the crash of a Sikorsky S-61N helicopter in the Shasta Trinity National Forest, California, on August 5, 2008. Carson Helicopters, Inc. owned the helicopter in this case and it operated as a public use flight according to a contract with the U.S. Forest Service to transport firefighters engaged in battling forest fires. The helicopter impacted trees and terrain during the initial climb after takeoff from a helispot in mountainous terrain. "Impact forces and a post-crash fire destroyed the helicopter." The pilot-in-command, a U.S. Forest Service check pilot, a crewmember, and seven firefighters were killed in the crash; the co-pilot and three other firefighters were injured.

178 Id.
179 Id. at *8.
180 Id. at *9–10. The court denied Capital Airways' motion for summary judgment, however, as it found that the parties had raised genuine issues of material fact regarding the terms of the employment agreement. Id. at *11.
181 Id. at *8–9 (internal citations omitted).
182 In re Helicopter Crash Near Weaverville, Cal. 8/5/08, 714 F. Supp. 2d 1098, 1100 (D. Or. 2010).
183 Id.
185 Id.
186 Id.
The NTSB held a final public hearing regarding its investigation into the causes of the accident on December 7, 2010.\textsuperscript{187} The NTSB found that one of the probable causes of the accident was "insufficient oversight by the U.S. [Forest Service] and the Federal Aviation Administration" of public use aircraft such as the helicopter involved in this accident.\textsuperscript{188} In her closing statement at the NTSB public hearing, NTSB Chairman Deborah A.P. Hersman noted, "[o]ver the years public aircraft have been made the orphans of the aviation industry. It’s now time for the FAA and other government agencies to step up and take responsibility."\textsuperscript{189}

Shortly after the NTSB’s final public hearing, the NTSB released its final Aircraft Accident Report. In this report, the NTSB explained that the FAA claims it has no statutory authority to regulate public aircraft operations.\textsuperscript{190} The FAA’s rationale begins with the fact that its primary authority to regulate aviation is found in 49 U.S.C. § 44701, which instructs the FAA Administrator to “promote the safe flight of civil aircraft in air commerce” through minimum standards in the interest of safety.\textsuperscript{191} 49 U.S.C. § 40102(a)(41)(A) defines a “public aircraft” to include “an aircraft used only for the United States government, except as provided in section 40125(b).”\textsuperscript{192} 49 U.S.C. § 40125(b) states that an aircraft does not qualify as a public aircraft “when the aircraft is used for commercial purposes or to carry an individual other than a crewmember or a qualified non-crewmember.”\textsuperscript{193} The FAA requires aircraft in this “public aircraft” category to comply only with “spot inspections of the aircraft and aircraft records.”\textsuperscript{194} The maintenance records of a public aircraft operator are therefore eligible for review, but the

\begin{footnotes}
\item[188] Aircraft Accident Report, supra note 185, at 14.
\item[190] Aircraft Accident Report, supra note 184, at 82.
\item[191] Id. (quoting 49 U.S.C. § 44701 (2006)).
\item[192] § 40102(a)(41)(A).
\item[193] § 40125(b).
\end{footnotes}
operator is not subject to FAA regulations regarding the operation of the aircraft.

As a result of this investigation, the NTSB recommended that the FAA "take appropriate actions to clarify FAA authority over public aircraft, as well as identify and document where such oversight responsibilities reside in the absence of FAA authority." The NTSB also recommended that the FAA "develop and implement a surveillance program specifically for Part 135 operators with aircraft that can operate both as public aircraft and as civil aircraft—to maintain continual oversight ensuring compliance with [14 CFR] Part 135 requirements."

The FAA is currently taking action in direct response to the NTSB's investigation of the Shasta Trinity accident. John Allen, Director of Flight Standards Service for the FAA, spoke on January 20, 2011, at a Public Aircraft Operations Forum sponsored by Helicopter Association International. Mr. Allen's presentation indicated that

"[t]he FAA will consider ALL [government-]contracted aircraft operations as civil aircraft operations, until: [(1)] [t]he contracting government entity provides the operator with a written declaration of public aircraft status for applicable flights; [(2)] the contracting government entity notifies the local FAA Flight Standards District Office; . . . [and (3)] [t]he flights in question are determined to be legitimate public aircraft operations." This declaration must be done "in advance of the proposed public aircraft flight." If such a declaration has not been made, "all operations must be conducted in accordance with all applicable [FAA] regulations." Further, if an operator is offered a contract to perform operations in violation of FAA regulations, it is the operator's responsibility to refuse to accept the contract or notify the FAA. Mr. Allen also noted that even "[w]hen a declaration of public aircraft operation status has been made,

195 AIRCRAFT ACCIDENT REPORT, supra note 184, at 120.
196 Id. at 106.
198 Id.
200 Id. at 8.
201 Id. at 11.
202 Id.
the operator must still comply with certain [FAA] regulations." Further, if a public aircraft is operated outside of an approved "14 CFR Maintenance Program, Type Certificate Data sheet, or is modified in a manner not consistent with the regulations, it must undergo a conformity inspection prior to returning to civil aircraft status." Finally, Mr. Allen explained that the FAA is revising its Public Aircraft Advisory Circular to clarify these issues.205

IV. COMAIR FLIGHT 5191

_In re Air Crash at Lexington, Kentucky, August 27, 2006_206 arises out of the crash of Comair Flight 5191 shortly after takeoff near Blue Grass Airport in Lexington, Kentucky.207 According to NTSB reports, the pilots lined the aircraft up on a runway that was too short to execute a takeoff of a commercial jet of this kind.208 The plane crashed into a nearby field and ignited, leaving 49 people dead.209 The only survivor was the co-pilot, First Officer James Polehinke.210

_In re Air Crash at Lexington, Kentucky_ originally involved claims brought by the survivors of all 47 passenger decedents against various Comair corporate entities.211 All but one claim against Comair settled in 2008.212 The last remaining matter from the crash of Comair Flight 5191 was the case on behalf of passenger Brian Woodward's daughters, Lauren Herbert and Mattie-Kay Herbert, and Mr. Woodward's estate.213 In 2009, on the plaintiffs' motion, the court ruled "as a matter of law that the conduct of the pilots caused the plane crash."214 In December 2009, after trial on the issue of compensatory damages, a jury awarded

203 Id. at 12.
204 Id. at 16.
205 Id. at 17.
208 Id.
209 Id.
210 Id.
211 Id.; _In re Air Crash at Lexington, Ky., 2011 WL 350469, at *1._ Legal matters are still pending between the remaining two decedents (the pilot and a Comair crew member) and Comair. Barrouquere, _supra_ note 207.
212 Barrouquere, _supra_ note 207.
213 _In re Air Crash at Lexington, Ky., 2011 WL 350469, at *1._
214 Id.
the Herbert sisters $7.1 million in compensatory damages from Comair.\footnote{Id.} The Herbert sisters continued to seek punitive damages from the airline under Kentucky’s punitive damages statute, Kentucky Revised Statute (KRS) 411.184, alleging that Comair was grossly negligent.\footnote{Id. at *1–2.}

The following noteworthy orders have shaped the course of this litigation over the past year.

A. MOTIONS IN LIMINE

Comair moved in limine to exclude evidence regarding the hiring and retention of First Officer Polehinke “on the ground that such evidence, at best, shows nothing more than negligent hiring or retention and is not relevant to a claim of gross negligence.”\footnote{Order at 1, In re Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF (E.D. Ky. July 12, 2010), ECF 3811.} The plaintiffs countered that their intention was not to show negligent hiring, but rather to show an “‘unsafe culture and grossly negligent supervision that permeated Comair.’”\footnote{Id.} The plaintiffs further argued that, in light of Comair’s personnel reports, which insisted that Polehinke flew “‘by-the-book,’” they must be able to expose “his repeated training deficiencies and failed check rides.”\footnote{Id. at 2.} The insufficient supervision of Polehinke, according to the plaintiffs, made “‘it more probable that gross negligence by Comair’s management in its supervision of pilots and allowing an unsafe lax culture was a substantial factor in causing the crash of flight 5191.’”\footnote{Id. at 2.}

Denying Comair’s motion, the court reasoned that once the plaintiffs opened this “‘culture-of-safety’” door, Comair would be able to defend against that claim by providing evidence that Polehinke and the rest of the crew were well-trained, good pilots with plenty of experience.\footnote{Id.}

The court also denied Comair’s motion in limine to exclude any “references to the ‘killing’ of passengers” during trial “[s]o long as restraint is exercised.”\footnote{Order at 1, In re Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF (E.D. Ky. July 12, 2010), ECF 3810 [hereinafter Motion in Limine].} The court referenced its April
2010 order denying Comair’s motion for a new trial, in which the court found no ‘‘gross injustice’’ done by the plaintiffs’ counsel’s comment during closing argument that Woodward was “killed” and that it was Comair’s “fault.” The court noted that Comair’s own counsel used the term “killed” in his opening statement, and “[p]laintiffs did not suggest the pilots intentionally crashed the plane.” Finally, because the “first listed definition of ‘kill’ in the Merriam-Webster online dictionary is ‘to deprive of life: cause the death of,’” the court reasoned that there was no need to exclude the word entirely, provided that the plaintiffs use caution in their word choice.

B. Motion for a Simultaneous Trial of Claims Against Comair and the United States

During pretrial proceedings, the plaintiffs moved for a simultaneous trial of their gross negligence/punitive damages claims against Comair and their negligence claims against the United States. The plaintiffs argued that although the United States and Comair reached an agreement regarding how liability would be allocated between the two defendants, the plaintiffs were not parties to that agreement. In response, Comair argued that, because the total amount of the plaintiffs’ compensatory damages had been decided in the 2009 trial, there was no longer any justiciable controversy between the plaintiffs and the United States. The United States also responded that “avoid[ing] the cost and inconvenience of trial” was exactly the reason the settlement arrangement had been made with Comair.

The court denied the motion for a simultaneous trial, agreeing that the settlement between Comair and the United States “renders the issue moot.” In reaching its decision, the court also considered that the “United States cannot be liable for pu-

---

223 Id.
225 Id. at 11.
226 Id. at 11–12.
227 Motion in Limine, supra note 222.
229 Id.
230 Id. at 2.
231 Id.
232 Id. at 5, 7.
nitive damages” and the plaintiffs already had a “judgment against Comair for the entire amount of their compensatory damages.”

C. MOTION TO RECONSIDER AVAILABILITY OF PUNITIVE DAMAGES UNDER KENTUCKY LAW

In late 2010, Comair asked the court to reconsider its previous decisions finding the punitive damages statute, KRS 411.184, unconstitutional as applied to wrongful death actions. The court ruled in 2008, and reaffirmed in 2009, that the statute “did not apply to a wrongful death case because Kentucky Constitution Section 241 prohibited limitations on damages in wrongful death cases. The court ruled earlier that KRS 411.184(2) and (3) would unconstitutionally limit the recovery of punitive damages.” At the time of these earlier rulings, the court was unable to locate a case in which a party raised the issue of the constitutionality of KRS 411.184(2) and (3) as applied to wrongful death cases. Thus, in 2008, the court attempted to anticipate how Kentucky courts would decide the question of whether Section 241 prohibited application of the punitive damages statute to wrongful death cases.

In early 2011, upon reconsideration of its 2008 decision, the court found that recent court decisions applying KRS 411.184 to wrongful death actions did not find these sections of the punitive damages statute unconstitutional under the Kentucky Constitution. The court concluded that its earlier decision did not interpret Kentucky law correctly and accordingly held that “Kentucky courts would apply the punitive damages statute . . . to wrongful death cases, including the present case.” Under the now-applicable Kentucky punitive damages statute, a plaintiff must “(1) establish gross negligence by clear and convincing evidence; and (2) prove the employer ‘authorized or ratified or should have anticipated the conduct in ques-

233 Id. at 5.
235 Id. at *2. For the original order holding that the punitive damages statute did not apply to wrongful death cases, see In re Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF, 2008 WL 2369785 (E.D. Ky. June 6, 2008).
236 Id.
237 Id.
238 Id.
239 Id. at *5.
tion' in order to impose punitive damages on an employer for the gross negligence of its employees." The court found that the "overwhelming evidence is that the Flight 5191 pilots violated Comair training, the procedures in Comair’s manuals, sterile cockpit rules, and the required taxi briefing" before takeoff. The record, however, contained no evidence showing that "Comair should have anticipated the reprehensible conduct" of the flight crew. Further, there was no evidence that either pilot "had previously committed a similar error" such that Comair would reasonably expect the conduct to reoccur.

Because the plaintiffs did not show "by clear and convincing evidence that there were similar incidents from which Comair should have anticipated the pilots’ conduct that caused the crash of Flight 5191," and because there was "no evidence that Comair authorized or ratified the conduct of the pilots," the court found that the plaintiffs did not show gross negligence as required by the punitive damages statute. Thus, the plaintiffs were not entitled to punitive damages. The court, therefore, granted partial summary judgment to Comair on the issue of punitive damages.

V. CONTINENTAL FLIGHT 1404

In re Continental Airlines, Inc. arises out of the December 20, 2008 crash of Continental Flight 1404, which veered off the runway during takeoff and crashed into a ravine at Denver International Airport. The accident caused "no fatalities, but 37 passengers and crew were transported to the hospital" for treatment of various injuries. Representatives of the passengers filed several lawsuits, consolidated in the District Court of Harris County, Texas.

---

241 In re Air Crash at Lexington, Ky., 2011 WL 350469, at *5.
242 Id.
243 Id.
244 Id. at *6.
245 Id. at *8.
246 Id.
247 Id. at *10.
249 Id.
250 Id. at 250 n.1.
In October 2009, the plaintiffs noticed an apex deposition\textsuperscript{251} of Larry Kellner, Continental's chief executive officer and chairman of the board of directors.\textsuperscript{252} "Continental filed a motion to quash the deposition, arguing that Kellner ha[d] no unique or superior knowledge of discoverable information and [that] the plaintiffs ha[d] not attempted to obtain discovery through less intrusive methods."\textsuperscript{253} The plaintiffs then

moved to compel Kellner's deposition, arguing that he ha[d] unique or superior knowledge as . . . shown by the following: (1) Kellner immediately briefed media members on details of the crash; (2) Kellner stated, on numerous occasions, he would learn the cause of the crash to prevent future crashes; (3) Kellner sent personal letters to Flight 1404 passengers after the crash; (4) Kellner interviewed the deadheading pilots aboard Flight 1404 and personally awarded commendation plaques to crew and flight members; and (5) Kellner, who serves on the Board of Directors for Air Transport Association of America ("ATA"), an airline industry organization dedicated to ensuring the safety of airline passengers, has superior knowledge as to Continental's implementation of ATA's policies.\textsuperscript{254}

Continental filed a motion for protective order in response to the motion to compel, attaching an affidavit in which Kellner testified that he had no unique or superior knowledge.\textsuperscript{255}

"The trial court granted the motion to compel Kellner's deposition," but the Texas Court of Appeals reversed.\textsuperscript{256} Basing its decision on \textit{Crown Central Petroleum Corp.}, the standard governing apex depositions,\textsuperscript{257} the court found that Kellner "[did] not have unique or superior knowledge regarding what occurred before and during the accident or the cause of the accident."\textsuperscript{258} The court found

\begin{itemize}
  \item An "apex" deposition is "the deposition of a corporate officer at the apex of the corporate hierarchy." \textit{Crown Cent. Petroleum Corp. v. Garcia}, 904 S.W.2d 125, 126 (Tex. 1995).
  \item \textit{In re Cont'l Airlines}, 305 S.W.3d at 851.
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 851, 859.
  \item The \textit{Crown Central Petroleum Corp.} guidelines apply "[w]hen a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts." \textit{Crown Cent. Petroleum Corp. v. Garcia}, 904 S.W.2d 125, 128 (Tex. 1995).
  \item \textit{In re Cont'l Airlines}, 305 S.W.3d at 858.
\end{itemize}
that the information [Kellner] gave at the press conference was
provided to him by other Continental employees; he provided
the name of the Continental employee who [was] its party repre-
sentative to the NTSB investigation; he did not discuss with the
deadheading pilots what occurred before, during, and after the
accident; he [did] not receive[] information about the cause of
the accident in the executive briefs; and he named the Continen-
tal employee who has direct responsibility for the implementa-
tion of operational and safety practices at Continental and serves
as Continental’s representative on the ATA safety committee.\textsuperscript{259}
The court also found that “plaintiffs [did] not show[ ] that less
intrusive methods [were] inadequate to obtain the information
they [were] seeking.”\textsuperscript{260}

VI. AIR FRANCE FLIGHT 4590

On December 6, 2010, a French court “found Continental
Airlines and one of its mechanics guilty of manslaughter in the
deads of 113 people who perished in the crash of New York-
bound Air France” Flight 4590.\textsuperscript{261} The court found that “Conti-
nental and its mechanic improperly monitored and maintained
aircraft, resulting in a piece of titanium falling from a plane
onto a runway . . . a few minutes before” the Concorde jet took
off on July 25, 2000.\textsuperscript{262} The court “believed the roughly 16-inch
piece of metal known as a wear strip punctured a tire on the Air
France jet as it sped down the runway for takeoff, and that debr-
ris perforated the jet’s low-lying fuel tank, causing a leak and a
fire.”\textsuperscript{263} Continental filed an appeal stating that “the ruling was
‘absurd’ and . . . aimed at deflecting blame from Air France,
operator of the Concorde.”\textsuperscript{264}

CONCLUSION

We expect developments in air carrier litigation in 2011 to
hold particular interest for practitioners following the develop-
ment of Tokyo Convention and Montreal Convention jurispru-

\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Devorah Lauter, \textit{Continental, Mechanic Guilty of Manslaughter in Concorde
world/la-fg-concorde-crash-ruling-20101207.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Continental Appeals Concorde Crash Verdict, \textit{UNITED PRESS INT’L} (Dec. 14,
Continental-appeals-Concorde-crash-verdict/UPI-52411292350852/.
dence and for operators and regulators of public use aircraft as the FAA struggles to begin regulating air operations previously controlled by other government agencies.

**TABLE OF AUTHORITIES**

### Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cerqueira v. Am. Airlines, Inc., 520 F.3d 1 (1st Cir. 2008)</td>
<td></td>
</tr>
<tr>
<td>Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex. 1995)</td>
<td></td>
</tr>
<tr>
<td>Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010)</td>
<td></td>
</tr>
<tr>
<td>Eli Lilly &amp; Co. v. Air Express Int’l USA, Inc., 615 F.3d 1305</td>
<td>(11th Cir. 2010)</td>
</tr>
<tr>
<td>In re Cont’l Airlines, Inc., 305 S.W.3d 849 (Tex. App.—Houston [14th Dist.] 2010, pet. granted)</td>
<td></td>
</tr>
<tr>
<td>In re Helicopter Crash Near Weaverville, Cal. 8/5/08, 714 F. Supp. 2d</td>
<td>1098 (D. Or. 2010)</td>
</tr>
<tr>
<td>King v. Am. Airlines, Inc., 284 F.3d 352 (2d Cir. 2002)</td>
<td></td>
</tr>
<tr>
<td>McCarthy v. Nw. Airlines, Inc., 56 F.3d 313 (1st Cir. 1995)</td>
<td></td>
</tr>
<tr>
<td>Memorandum – Decision and Order, Mercy Flight Central, Inc. v. N.Y.</td>
<td>Div. of State Police, No. 5:08-CV-1041-FJS-GHL</td>
</tr>
</tbody>
</table>
Order, In re Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF (E.D. Ky. July 12, 2010), ECF 3810
Order, In re Air Crash at Lexington, Ky., Aug. 27, 2006, No. 5:06-CV-316-KSF (E.D. Ky. July 12, 2010), ECF 3811
Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776 (7th Cir. 2008)
Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987)

STATUTES

OTHER AUTHORITIES
Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the protocol done at The Hague on 28 September 1955, opened for signature Sept. 25, 1975, reprinted in Sec. Rep. No. 105-20
Brief for the United States as Amicus Curiae, Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010) (No. 06-16457)


