

ORIGINAL

IN THE SUPREME COURT OF OHIO

EVELYN KELLER,

Plaintiff-Appellee,

v.

MAUREEN DUNDON, CHAUTUAQUA  
AIRLINES, INC., and REPUBLIC  
AIRLINES INC.,

Defendants-Appellants.

Case No.

13-1227

On Appeal from the Court of Appeals for  
Licking County, Ohio, 5th Appellate District  
Appeal No. 12 CA 73

Trial No. 11-CV-0891TMM

Judge Thomas M. Marcelain, Presiding

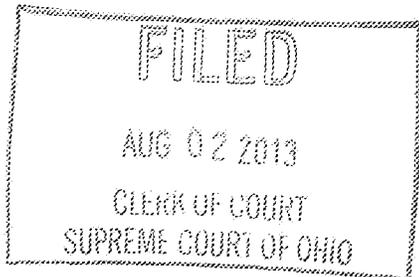
MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL  
QUESTIONS AND MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

This case presents two issues of substantial constitutional significance and profound statewide importance, as it impacts one of the nation's most heavily regulated and vital industries—the airline industry.

The first question, which is one of first impression for this Court, is whether Plaintiff-Appellee Evelyn Keller (“Keller”) can proceed with her common law tort claims in the face of the Airline Deregulation Act (“ADA”), which states, in relevant part, that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation.” 49 U.S.C. § 41713(b)(1). The trial court correctly found that Keller’s tort claims which challenged the airline’s ability to reseat her were preempted by federal law.

Based on the Fifth District Court of Appeal’s sweeping opinion below, however, an Ohio jury will now be permitted to decide whether the airline’s boarding and seating procedures were proper under Ohio state law, potentially exposing the airline to a patchwork of inconsistent and non-uniform state law standards. This is a result prohibited by federal law and undermines the strong federal interest in deregulated air transportation. *See, e.g., Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 756 (Tex. 2003) (“If passengers were permitted to challenge airlines’ boarding procedures under state common law, the airline industry would potentially be subject to regulation by fifty different states. The fact that federal regulations expressly address airline boarding procedures strengthens our conclusion that [plaintiff’s] breach of contract claims resulting from Delta’s boarding and seating procedures are preempted by the ADA. To hold otherwise could create extensive multi-state litigation, launching inconsistent assaults on federal deregulation in the airline industry, every time an airline reassigned a passenger’s seat.”).

The second question presented is equally important and has significant ramifications in this state and nationally: whether the contract of carriage should be enforced as written or whether the Air Carrier Access Act (ACAA) regulations—which are not even mentioned in the contract—should be read into it. The Fifth District Court of Appeal modified the parties’ contract of carriage by adding ACAA regulations, 14 C.F.R., Part 382, as contract terms; a result which is contrary to United States Supreme Court precedent and Congressional intent.

The United States Supreme Court has held that the contract of carriage governs the rights between an airline and its passengers and that it cannot be “enlarge[d] or enhance[d] based on state laws or policies external to the agreement” without violating the ADA. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 230-33 (1995) (“The ADA’s preemption clause, read together with the FAA’s saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.”); accord *Smith v. Comair, Inc.*, 134 F.3d 254, 258-59 (4th Cir. 1998). But here, the Fifth District did just what *Wolens* forbids: it enlarged the parties’ contract of carriage by adding policies external to the agreement. And even more, the Fifth District’s opinion has the effect of allowing an implied private right of action under the ACAA by treating it as an implicit contract term, which conflicts with numerous federal decisions. *See Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002); *Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596 (5th Cir. 2010).

In this case, Keller was allegedly directed by the flight attendant to sit in a seat other than the one appearing on her ticket because another passenger requested to sit next to her child prior to Keller boarding the flight. And the contract of carriage clearly permitted this. Rule 4(I) of the Contract of Carriage states, “**Seat assignments are not guaranteed and are subject to change without notice. [The airline] reserves the right to reseat a Passenger for any reason, including from an extra legroom seat for which the applicable fee has been paid.**” (emphasis added.)

According to Keller, however, the seat she was directed to sit in did not accommodate her alleged disability, causing injury to her right leg. Three weeks later, Keller filed a lawsuit in Ohio, seeking compensatory and punitive damages based on breach of contract, tort, and for alleged violations of the ACAA. The trial court properly dismissed Keller’s tort claims as preempted by the ADA, dismissed her ACAA claim because there is no private cause of action under the ACAA, and later granted summary judgment in favor of Appellants on her contract claim based on Rule 4(I) of the Contract of Carriage. The trial court’s well-reasoned orders were correct and should be reinstated.

The Fifth District Appellate Court’s opinion reversing the trial court’s orders is inconsistent with federal law and has far reaching implications. The Court’s decision to allow Keller’s tort claims to proceed though they openly attack an airline’s boarding and seating procedures would result in significant *de facto* regulation of airline seating policies under state law, which is contrary to the ADA. *See, e.g., Lavine v. Am. Airlines, Inc.*, 2011 Md. App. LEXIS 158, at \*31 (Md. App. Ct. Dec. 1, 2011) (“[B]oarding procedures are a ‘service,’ and, it follows that allowing state tort claims that are closely related to such a service to proceed ‘would result in significant *de facto* regulation of the airlines’ boarding practices.”). The Appellate Court’s

conclusion that the ACAA should be added to the airline's contract of carriage violates the U.S. Supreme Court's pronouncement in *Wolens* that courts are confined in breach of contract actions, "to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." See *Wolens*, 513 U.S. at 230-33; accord *Smith*, 134 F.3d at 258-59 ("[Plaintiff's] contract claim must be held to be preempted under the ADA because of its practical effect on federal law in this area. If passengers could challenge airlines' boarding procedures under general contract claims alleging failure to transport, we would allow the fifty states to regulate an area of unique federal concern—airlines' boarding practices.")

In addition, the Appellate Court's order has the deleterious effect of allowing litigants like Keller to avoid the implied right of action doctrine, a result which is particularly inequitable here since she agreed that her ACAA claim should be dismissed and did not appeal from the dismissal of that claim. *Buck v. American Airlines, Inc.*, 476 F.3d 29, 37 (1st Cir. 2007) ("[C]onstruing all federal regulations touching upon air travel as automatically incorporated into every airline's contracts of carriage would allow litigants freely to skirt the implied right of action doctrine").

Review by this Court is necessary to ensure that federal law and United States Supreme Court precedent are adhered to by Ohio courts and to provide guidance to lower courts on these significant issues of first impression. The resolution of these two substantial issues is of great public and nationwide interest and is vital to the services of airlines operating in not only Ohio, but in the United States generally.

## STATEMENT OF THE CASE AND FACTS

### A. The Alleged Incident

On November 13, 2010, Plaintiff-Appellee Evelyn Keller (“Keller”) was a passenger onboard Continental Express Flight 5909, operated by Appellant Chautauqua Airlines, Inc. (“Chautauqua”), traveling from Houston, Texas to Columbus, Ohio. (Op., ¶13.) Keller alleges that the seat identified on her ticket was seat 4B, which she reserved in advance to accommodate a disability she alleges to suffer in her right leg. (Op., ¶13.)

Prior to Keller boarding the flight, another passenger requested to sit in seat 4B in order to sit next to her child. (Op., ¶4.) Keller alleges that the flight attendant, Appellant Maureen Dundon (“Dundon”), changed Keller’s assigned seat from seat 4B to a bulkhead seat in order to accommodate the other passenger and her relative. (Op., ¶4.) Upon boarding the aircraft, Keller alleges she informed Dundon of having a disability and objected to sitting in any seat besides 4B (Op., ¶5.) Dundon is alleged to have rudely responded to Keller and made insensitive remarks regarding her being handicapped. (Op., ¶5.) Despite Keller’s protest to sitting in any other seat but 4B, she ultimately sat in the bulkhead seat assigned to her. (Op., ¶6.) As a result of her seating assignment, Keller alleges injury to her right leg. (Op., ¶6.)

### B. The Complaint

Keller filed a multi-count complaint against Dundon; her employer, Chautauqua; and Chautauqua’s sister-corporation, Appellant Republic Airlines, Inc. (“Republic”) (collectively referred to herein as “Appellants”), to recover for injuries she allegedly sustained as a result of her seat reassignment on the subject flight. (Op., ¶2.)

Count I generally alleges that Dundon negligently failed to provide Keller with seat 4B, resulting in injuries to her right leg. (Op., ¶¶2-5.) Counts II, III, and IV of Keller’s complaint are

directed against Chautauqua and Republic for: (1) *respondeat superior* liability; (2) negligent training, supervision and review; and (3) breach of contract, respectively. (Op., ¶2.) Count V of the complaint was based on alleged violations of the Air Carrier Access Act (ACAA) and directed against all Appellants. (Op., ¶2.) Finally, Count VI seeks punitive damages against all Appellants. (Op., ¶2.)

C. The Litigation and Appeal

Appellants filed a motion to dismiss all of Keller's claims, asserting that federal law—namely, the Airline Deregulation Act (ADA)—preempted Keller's tort, punitive damages, and contract claims, and that the ACAA provided no private right of action. (Tr. Op., Oct. 3, 2011 Order, p.5; Op. ¶7.) Keller generally opposed Appellants' motion to dismiss but conceded that her Air Carrier Access Act claim (Count V) should be dismissed. (Tr. Op., Oct. 3, 2011 Order, p.5; Op. ¶7.) On October 3, 2011, the trial court granted Appellants' motion to dismiss, in part, and dismissed Counts I, II, III, V, and VI, leaving only Keller's contract claim (Count IV). (Tr. Op., Oct. 3, 2011 Order; Op. ¶7.)

In her contract claim, Keller alleges that Republic and Chautauqua breached the contract by reassigning her from seat 4B to a bulkhead seat in order to accommodate another passenger and her relative. (Op. ¶3.) The contract of carriage states that seat assignments are not guaranteed and are subject to change without notice. (Op. ¶36.) Accordingly, on February 29, 2012, Republic and Chautauqua moved for summary judgment based on the governing contract of carriage. (Op. ¶7.) After further discovery, the motion was fully briefed and the trial court granted summary judgment in their favor on August 28, 2012. (Op. ¶7.) Keller appealed both orders to the Fifth District Court of Appeals on September 27, 2012. (Op. ¶8.)

The Fifth District reversed the trial court's orders and remanded the case. With respect to Keller's tort and punitive damage claims, the court held that her claims were not preempted by the ADA. (Op., ¶30.) The Fifth District agreed that a flight attendant's management of seating assignments constitutes an airline "service," but held that Keller's tort claims did not have a direct or indirect effect on airline competition or frustrate Congress's purpose in deregulation and, therefore, were not preempted by the ADA. (Op., ¶¶28-30.)

The Fifth District also reversed the trial court's summary judgment order in favor of Republic and Chautauqua on Keller's breach of contract claim. Although Rule 4(I) of the applicable contract of carriage expressly provides that "[s]eat assignments are not guaranteed and are subject to change without notice," the court stated that a genuine issue of material fact exists as to whether the contract was breached based upon the ACAA and Rule 3(B) of the Contract of Carriage, which states: "In the event of a conflict between the Rules contained herein and such governmental laws, regulations, rules, security directives and their corresponding effects on CO's operation, the latter shall prevail." (Op., ¶¶36-39.)

Appellants timely filed their Notice of Appeal and this Memorandum In Support of Jurisdiction to this Court on August 2, 2013.

#### ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

##### **Proposition of Law No. 1: The Airline Deregulation Act Expressly Preempts Keller's Tort and Punitive Damages Claims Challenging Appellants' Seating and Boarding Services**

Preemption is grounded upon the Supremacy Clause in Article VI of the United States Constitution. U.S. CONST. art. VI, cl. 2. Preemption "may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990).

Regulations promulgated under the Federal Aviation Act (FAA) provide the central source of federal statutory control over airlines and general aviation activity. See 49 U.S.C. § 40101(a)(1)-(3); 49 U.S.C. § 40113; accord *Kagy v. Toledo-Lucas County Port Auth.*, 126 Ohio App. 3d 675, 682 (6th Dist. 1998). In 1978, Congress amended the FAA with the Airline Deregulation Act (ADA), 49 U.S.C. § 41713, which explicitly prohibits States from regulating air carriers' prices, routes, or services:

A state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier.

49 U.S.C. § 41713(b)(1). In other words, claims, including common law tort claims, "having a connection with, or reference to, airline 'rates, routes or services' are preempted." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

As recognized by Ohio courts, "Congress expressly gave the Federal Aviation Administration exclusive responsibility for regulating aircraft commerce." *Kagy*, 126 Ohio App. 3d at 682. "The purpose of the ADA is '[t]o ensure that the States would not undo federal deregulation with regulations of their own.'" *Restivo v. Continental Airlines, Inc.*, 192 Ohio App. 3d 64, 67 (8th Dist. 2011) (quoting *Morales*, 504 U.S. at 386-87). The policy behind doing so has been explained as follows:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal command. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

*Kagy*, 126 Ohio App. 3d at 682 (quoting *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34 (1973)).

The term “service,” as it relates to the ADA, is consistently defined broadly so as to include an airline’s boarding and seating procedures:

“Services” generally represent a bargained-for or anticipated provision of labor from one party to another . . . . [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

*Hodges v. Delta Airlines, Inc.*, 44 F. 3d 334, 336 (5th Cir. 1995); *see also Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 753 (Tex. 2003) (“Although several courts have fashioned different tests to determine whether a state law action relates to an airline’s services, most courts generally agree that state law claims involving seating and boarding procedures relate to services.”); *Air Transport Ass’n of America, Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (“[A] majority of the circuits have held that the term [‘service’] refers to the provision or anticipated provision of labor from the airline to its passengers and encompasses matters such as boarding procedures . . . [as well as other] matters incidental to and distinct from the actual transportation of passengers.”). Likewise, the “relating to” language of the ADA is interpreted broadly, and “[p]reemption may occur even if a state law’s effect on rates, routes, or services ‘is only indirect.’” *Restivo*, 192 Ohio App. 3d at 67 (quoting *Morales*, 504 U.S. at 378).

Both the trial court and Fifth District utilized the three-part test announced by *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221 (S.D.N.Y. 1994), to determine whether Keller’s tort claims challenging her seat assignment onboard the flight constituted a “service” under the ADA. (Op., ¶27; Dkt. 32, Oct. 3, 2011 Order, p.3.) This test involves the following elements: (1) whether the activity at issue is an airline service; (2) whether plaintiff’s claims affect the airline service directly as opposed to “tenuously, remotely, or peripherally”; and (3) whether the

underlying conduct was reasonably necessary to the provision of the service and not “outrageous conduct” beyond the scope of normal airline operations. *Rombom*, 867 F. Supp. at 222.

The trial court and the Fifth District both agreed that “[t]he activity at issue, the flight attendant managing the seating assignments during the boarding of the flight, *would constitute an airline service based on the underlying facts of this case.*” (Op., ¶27) (emphasis added); accord *Peterson v. Continental Airlines, Inc.*, 970 F. Supp. 246, 250 (S.D.N.Y. 1997) (“A flight crew’s conduct during the boarding stage of a flight, specifically, flight attendants’ efforts to locate appropriate seat assignments and resolve seat conflicts, constitutes an airline service.”); *Pearson v. Lake Forest Country Day Sch.*, 633 N.E.2d 1315, 1320 (Ill. App. Ct. 1994) (“An airline’s boarding and seating policies come within the ambit of the ‘services’ it provides to its customers.”).

Although Keller’s claims indisputably challenge an airline “service” directly, the Fifth District nevertheless found that “Keller’s claims against the airline have a tenuous, remote, or peripheral impact on the delivery of services of an airline; therefore, preemption is not warranted.” (Op., ¶28.) Without any analysis, the Fifth District concluded that “such a negligence suit would not impede free market competition of air carriers or frustrate deregulation by interfering with matters about which airlines compete.” (Op., ¶28.) This conclusion ignores well-established case law in this area and the very purpose of the ADA. For example, the Supreme Court of Texas in *Delta Air Lines v. Black*, 116 S.W.3d 745, 753 (Tex. 2003), found that seating and boarding procedures are not peripheral to the operation of an airline, but rather are “inextricably linked” to the contract of carriage between a passenger and the airline and have a definite connection with airline services.

Accordingly, common law negligence suits attacking airline ticketing, boarding procedures, and seating assignments do directly impact airline competition and go to the very heart of what the express preemption provision of the ADA forbids. “If passengers were permitted to challenge airlines’ boarding procedures under state common law, the airline industry would potentially be subject to regulation by fifty different states.” *Black*, 116 S.W.3d at 756; *see also Farash v. Continental Airlines, Inc.*, 574 F. Supp. 2d 356, 366 (S.D.N.Y. 2008) (“[C]laims based on the quality of in-flight services and the conduct of the flight attendant are preempted under the ADA.”).

Contrary to the Fifth District’s narrow view of ADA preemption, the fact that Keller’s method of challenging Appellants’ seating arrangements and procedures is through a negligence claim where she seeks to recover for her personal injuries does not categorically result in “a tenuous, remote, or peripheral impact on the delivery of services by the airlines.” (Op., ¶28.). *Cf. Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831, 833 (W.D. Tenn. 1993) (“There is no foundation . . . for giving personal injury claims a blanket exemption from [ADA] pre-emption. The proper test to avoid pre-emption is whether the claim’s effect is ‘too tenuous, remote or peripheral.’”); *Sawyer v. Southwest Airlines, Co.*, 145 Fed. Appx. 238, 242 (10th Cir. 2005) (“[T]he relevant issue is preemption—not whether plaintiff [ ] suffered physical injury.”).

This is because “[a] flight crew’s conduct during the boarding stage of a flight, specifically, flight attendants’ efforts to locate appropriate seat assignments and resolve seat conflicts, constitutes an airline service,” *Peterson*, 970 F. Supp. at 250, “and, it follows that allowing state tort claims that are closely related to such a service to proceed ‘would result in significant *de facto* regulation of the airlines’ boarding practices.” *Lavine v. Am. Airlines, Inc.*, 2011 Md. App. LEXIS 158, at \*31 (Md. App. Ct. Dec. 1, 2011); *see also Black*, 116 S.W.3d at

756; *Farash*, 574 F. Supp. 2d at 364 (“Because plaintiff’s allegations openly attack the manner in which the flight crew provided a service, his claims directly arise from the inadequate provision of a service—namely, boarding and seating.”).

Put simply, if a flight attendant’s decision to resolve a seat conflict onboard a flight so that a mother can sit next to her child is sufficient to overcome federal preemption in Ohio, the express purpose of the ADA would be lost. This is the very result that the ADA is meant to avoid. *See Farash*, 574 F. Supp. 2d at 365 (“The underlying conduct—here, requesting that a passenger voluntarily change seats within his paid-for cabin of service in order to accommodate a family traveling together, and the reseating of the passenger in a seat that he finds to be inferior—is reasonably necessary to the provision of the airline service of seating and reseating passengers.”); *El-Menshawy v. Egypt Air*, 647 A.2d 491, 492 (N.J. Super. Ct. Law Div. 1994) (finding that the plaintiff’s claim against the airline—“that it failed to honor an allegedly confirmed reservation—beyond a shadow of a doubt ‘relates to’ airline services”).

The Fifth District’s reinstatement of Keller’s tort and punitive damage claims has far reaching implications. It creates a de facto regulation of airline seating assignments in Ohio under state tort law, a result which is forbidden by the ADA. Review by this Court is necessary.

**Proposition of Law No. 2: The Court of Appeal’s Enlargement of the Unambiguous Terms of the Contract of Carriage Is Prohibited by the ADA, the ACAA, and United States Supreme Court Precedent**

The United States Supreme Court has declared that the ADA’s preemption clause “confines courts, in breach of contract actions” to the contract of carriage with “no enlargement or enhancement” based on state laws or external policies. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 230-33 (1995). In other words, “[t]he Supreme Court has specifically held that the Airline Deregulation Act forbids the invocation of state law to enlarge or enhance remedies for

breach beyond those provided in the contract.” *Norman v. TWA*, 2000 U.S. Dist. LEXIS 14618, at \*18 (S.D.N.Y. Oct. 6, 2000) (citing *Wolens*, 513 U.S. at 233).

But here, contrary to *Wolens*, the Fifth District enlarged the contract of carriage by adding the ACAA regulations to the contract and used that rationale as a basis for finding Rule 4(I) of the contract, which states that “[s]eat assignments are not guaranteed and are subject to change without notice,” to be ambiguous.

The court based its reasoning on Rule 3(B), which states that the contract of carriage, like any other contract, is subject to applicable law, rules, and regulations. (Op., ¶¶36-37.) But Rule 3(B) makes no explicit reference to the ACAA, by name or otherwise, and does not incorporate those regulations as contract terms. Thus, the Fifth District’s finding that a question of fact exists over the clear language that “[s]eat assignments are not guaranteed and are subject to change without notice” is inconsistent with the United States Supreme Court’s holding in *Wolens* and several other decisions addressing the preemptive scope of the ADA in breach of contract cases. *Buck v. American Airlines, Inc.* (1st Cir. 2007), 476 F.3d 29, 36 n.10, 38 (“The plaintiffs list a dizzying assortment of other federal regulations and describe them as relevant. These regulations, which dictate how airlines are supposed to collect and hold the fees, are too far removed from the contracts of carriage to give rise to a colorable claim that they are incorporated as contract terms. . . . A finding for the defendants merely retains the configuration of the *Wolens* exception crafted by the Supreme Court, which limited that exception to ‘self-imposed undertakings.’ . . . Refusing to treat federal regulations as implied contract terms does not in any way diminish the efficacy of the regulatory scheme itself.” (citing *Wolens*, 513 U.S. 219)); *Smith v. Comair, Inc.*, 134 F.3d 254, 258-59 (4th Cir. 1998); *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. 1998) (“Plaintiff’s suit clearly falls on the prohibited side of the

line drawn in *Wolens*. The essence of her claim is an ‘enlargement or enhancement [of her rights] based on state laws or policies external to the agreement,’ which, she says, should invalidate a portion of the contract between her and the airline. The complaint violates the essence of the preemption provision of [the ADA] and thus it cannot stand.”).

Indeed, courts have uniformly held that similar contract of carriage provisions containing boilerplate acknowledgments about “applicable law” do not incorporate regulations into the contract of carriage as contract terms unless they are specifically referenced by name and expressly incorporated. *See, e.g., Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596 (5th Cir. 2010) (granting summary judgment in favor of Northwest on plaintiff’s breach of contract claim based on the ADA and holding that plaintiff’s attempt to add international regulations to the contract of carriage was forbidden under *Wolens*); *Volodarskiy v. Delta Air Lines, Inc.*, 2012 U.S. Dist. LEXIS 154831, at \*10-11 (N.D. Ill. Oct. 29, 2012) (“It is one thing for a law to trump a contract’s contrary terms; it is quite another to consider the law as incorporated into the contract as if the law were itself one of the contract’s terms (instead of merely prevailing over a conflicting term). To hold otherwise would equate a violation of a statute or regulation into a breach of contract, in addition to a violation of the law itself.”).

In addition to running afoul of the U.S. Supreme Court’s decision in *Wolens*, the Fifth District’s holding circumvents Congress’s decision not to create a private cause of action under the ACAA by allowing enforcement through a state law breach of contract claim. *See, e.g., Love v. Delta Air Lines* 310 F.3d 1347, 1357 (11th Cir. 2002) (“The fact that Congress has expressly provided private litigants with one right of action [under the ACAA]—the right to review of administrative action in the courts of appeals—powerfully suggests that Congress did not intend to provide other rights of action.”). Even more, Keller conceded below that her ACAA claim

(Count V) *should be dismissed* and she never appealed the trial court's order granting dismissal of her ACAA claim. (Tr. Op., Oct. 3, 2011 Order, p.5.) The Fifth District's revival of Keller's abandoned ACAA claim under the guise of a breach of contract claim is contrary to *Wolens* and wholly inconsistent with cases holding that no private cause of action exists under the ACAA. For this additional reason, the Court should hear this appeal and reverse the Fifth District's opinion below.

### CONCLUSION

For the reasons stated, Defendants-Appellees Maureen Dundon, Chautauqua Airlines, Inc., and Republic Airlines, Inc. respectfully request that this Court grant them leave to a merit brief, reverse the Fifth District's opinion below, and reinstate the trial court orders dated October 3, 2011 and August 28, 2012 in favor of Defendants-Appellees and against Plaintiff-Appellant Evelyn Keller, and for any further relief the Court may deem just and proper.

Respectfully submitted,

DEFENDANTS-APPELLANTS MAUREEN  
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INC. AND REPUBLIC AIRLINES, INC.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served to the following by e-mail and regular U.S. mail, postage prepaid, this 2nd day of August, 2013:

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IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

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LICKING CO. OHIO

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Evelyn Keller,

Plaintiff,

v.

Maureen Dundon, et al.,

Defendants.

CASE NO. 11 CV 0089  
CARY R. WALTERS  
CLERK

JUDGMENT ENTRY

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on defendants' motion to dismiss, plaintiff's memorandum in opposition, and defendants' reply. Defendants also filed a motion for a more definite statement. For the reasons set forth below, defendants' motion to dismiss is granted in part, and the motion for more definite statement is denied.

II. STANDARD OF REVIEW

To dismiss a claim under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *LeRoy v. Allen, Yurasek & Merklin* (2007), 114 Ohio St.3d 323, 326. "A court must construe all material allegations in the complaint and all inferences that may be reasonably drawn therefrom in favor of the nonmoving party. Thus, a court must presume all factual allegations in the complaint are true for purposes of the motion." *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 667 (citations omitted).

III. CONCLUSIONS OF LAW

Plaintiff asserts claims for negligence and breach of contract. Plaintiff states she has a physical disability which requires her to be able to straighten and flex her right leg when

Judge  
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Judge  
W. David Bransteel  
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seated for an extended period of time. She alleges she was wrongfully required to sit in a different seat than the one she had reserved on a flight from Houston, Texas to Columbus, Ohio by defendant Dundon. She states this caused her much discomfort and injury to her right leg and hip. Plaintiff also alleges that Ms. Dundon failed to provide her proper assistance by stowing her carry-on items where she could not access them, failing to have a wheelchair provided after deplaning, and failing to contact her husband to assist her after deplaning. Plaintiff asserts that the defendant airlines failed to properly train Ms. Dundon to assist disabled passengers, and that the airlines breached her contract by failing to provide the seat she had reserved.

Defendants assert plaintiff's claims are preempted by the Airline Deregulation Act. 49 U.S.C. 41713(b)(1) states:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Defendant airlines are air carriers as defined in 49 U.S.C. 40102(a)(2). "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted under 49 U.S.C.App. § 1305(a)(1)." *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. 374, 384. 49 U.S.C. 1305(a)(1) is the former version of 49 U.S.C. 41713(b)(1).

"[N]either the ADA nor its legislative history indicates that Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations, or that Congress even considered such preemption." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 338 (5th Cir. 1995). "But this general vindication of state tort claims

arising from the maintenance or operation of aircraft *does not* extend to all conceivable state tort claims." *Id.* at 339. Tort claims related to services are preempted. *Id.*

The Court in *Hodges* stated:

"Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation.

*Id.* at 336. "A flight crew's conduct during the boarding stage of a flight, specifically, flight attendants' efforts to locate appropriate seat assignments and resolve seat conflicts, constitutes an airline service within the meaning of Section 41713." *Peterson v. Continental Airlines, Inc.*, 970 F.Supp. 246, 250 (S.D.N.Y.,1997). "Undoubtedly, boarding procedures are a service rendered by an airline." *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir.1998).

Some federal courts, including one in the Sixth Circuit, have used a three-part test described in *Rombom v. United Air Lines*, 867 F.Supp. 214 (S.D.N.Y. 1994), to determine whether a tort claim is preempted. See *Hammond v. Northwest Airlines*, 2009 WL 4166361, (E.D.Mich. 2009) and *Peterson*, *supra*.

The threshold inquiry in deciding whether state claims against an airline are preempted by section 1305 is whether the activity at issue is an airline service... a court must then address the second prong: whether plaintiff's claims affect the airline service directly as opposed to 'tenuously, remotely, or peripherally.'... The third prong of the preemption inquiry focuses on whether the underlying tortious conduct was reasonably necessary to the provision of the service. In other words, section 1305 'cannot be construed in a way that insulates air carriers from liability for injuries caused by outrageous conduct that goes beyond the scope of normal aircraft operations.'

*Hammond* (citing *Rombom*).

Assigning seats and resolving seat conflicts is an airline service. Plaintiff's alleged injuries, according to the complaint, arose from being seated in an inappropriate seat for her disability. While she complains of other failures by Ms. Dundon, it is clear from the complaint that her alleged injuries arose from being seated in a seat to which she objected. A determination by this court about the seating defendants should have provided to plaintiff or must provide to disabled passengers would directly affect an airline service. Finally, as to the third prong, plaintiff has not alleged any outrageous conduct or tortious conduct of the type alleged in *Hammond* or *Peterson*, merely that Ms. Dundon seated her in the wrong seat and did not give her the requisite attention her disability required. Ms. Dundon had to seat the passengers albeit over plaintiff's objection.

Further, air travel and service are extensively regulated by Title 14 of the Code of Federal Regulations including the accommodations that must be provided for disabled passengers. See 14 C.F.R. Part 382. Establishing what duties defendants owed plaintiff—essentially what accommodations defendants should have provided plaintiff—in this instance would work as a *de facto* regulation of airline services. Accordingly, plaintiff's first claim for negligence and claims two and three which are based upon claim one are preempted by 49 U.S.C. 41713(b)(1).

Count four of plaintiff's complaint alleges breach of contract. 49 U.S.C. 41713(b)(1) "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the

parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *American Airlines, Inc. v. Wolens* (1995), 513 U.S. 219, 233.

Accordingly, plaintiff's contract claim is not preempted, as it does not require reference to laws or policies external to the agreement itself. Either plaintiff's choice of seat was provided for in the agreement or it was not.

Count five of plaintiff's complaint asserts a cause of action for violation of the Air Carrier Access Act. Defendants argue, and plaintiff admits, that count five should be dismissed. The Air Carriers Access Act does not provide a private cause of action. See *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004), and *Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002).

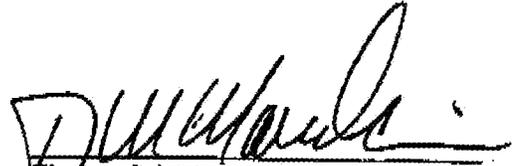
Finally, count six of plaintiff's complaint asserts a claim for punitive damages. Since plaintiff's negligence claims are preempted, plaintiff's claim for punitive damages based upon those claims is also preempted. Further, plaintiff is not entitled to punitive damages based upon her contract claim. "Rather than merely holding parties to the terms of a bargain, punitive damages represent an 'enlargement or enhancement [of the bargain] based on state laws or policies external to the agreement.'" *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, fn. 8 (7th Cir. 1996)(citing *Wolens* at 826). Accordingly, plaintiff's claim for punitive damages is also preempted.

#### IV. CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is GRANTED in part. Counts one, two, three, five, and six of plaintiff's complaint are DISMISSED. Defendant's motion for a more definite statement is DENIED. Defendants shall have fourteen days from the date of this entry to file an answer to plaintiff's remaining claim.

It is so ORDERED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



Thomas M. Marcelain, Judge

Copies to:

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43216-1008

**IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO**

Evelyn Keller,

Plaintiff,

v.

Maureen Dundon, et al.,

Defendants.

LEICKING COUNTY  
COMMON PLEAS COURT

2017 AUG 28 A 10 48 CASE NO. 11 CV 00891

FILED  
GARY B. WALTERS  
CLERK

JUDGMENT ENTRY

**I. NATURE OF THE PROCEEDINGS**

This matter is before the Court on defendants' motion for summary judgment, plaintiff's memorandum in opposition, and defendants' reply. For the reasons set forth below, the motion is granted.

**II. STANDARD OF REVIEW**

Rule 56(C) of the Ohio Rules of Civil Procedure sets forth the standard this Court applies when construing a motion of summary judgment:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is proper if, after construing the evidence most strongly in favor of the nonmoving party, reasonable minds could come to but one conclusion in favor of the moving party. Civ.R. 56; *Horton v. Hardwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687 (1995). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

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Once the moving party satisfies its initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

### III. CONCLUSIONS OF LAW

On October 3, 2011, the Court dismissed all but one of plaintiff's claims. The Court did not dismiss count four of the complaint for breach of contract. Defendants have moved for summary judgment on the remaining claim.

Plaintiff states she has a physical disability which requires her to be able to straighten and flex her right leg when seated for an extended period of time. She alleges she was wrongfully required to sit in a different seat than the one she had reserved on Continental Express Flight 5909 from Houston, Texas to Columbus, Ohio. Defendant Chautauqua Airlines was operating the Continental flight. Plaintiff asserts that the defendant airlines breached her contract by failing to provide the seat she had reserved causing her much discomfort and injury to her right leg and hip.

Continental's Contract of Carriage states:

Transportation of Passengers and Baggage provided by Continental Airlines, Inc., Continental Micronesia, Inc. and Carriers doing business as Continental Express or Continental Connection, are subject to the following terms and conditions, in addition to any terms and conditions printed on or in any ticket, ticket jacket or ticket receipt, or specified on any internet site, or published schedules. By purchasing a ticket or accepting transportation, the passenger agrees to be bound thereby.

(Defendant's Motion for Summary Judgment, Ex. C-2, pg. 1). The contract further states, "Continental Express carriers are Carriers not wholly owned or operated by Continental Airlines, Inc. or Continental Micronesia, Inc. but operating with the CO designator code under the trade name "Continental Express". *Id.* at 3. "Carrier means the carrier (air or ground) issuing the ticket and all carriers that carry or undertake to carry the Passenger and/or his baggage thereunder." *Id.* at 3. Defendant Chautauqua was the carrier for plaintiff's Continental Express flight pursuant to Continental's Contract of Carriage.

Rule 4(I) of the contract states, "Seat assignments are not guaranteed and are subject to change without notice. CO reserves the right to reseat a Passenger for any reason, including from an extra legroom seat for which the applicable fee has been paid." *Id.* at 10.

The Contract of Carriage was properly authenticated by affidavit. (Ex. C-1). It states that plaintiff's seat was not guaranteed. Accordingly, defendants did not breach the contract by failing to provide plaintiff the seat she had reserved.

#### IV. CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is GRANTED. Costs to plaintiff.

It is so ORDERED. There is no just cause for delay. This is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.

  
Thomas M. Marcelain, Judge

**Copies to:**

**Steven L. Boldt, Esq., Kerry A. Bute, Esq., Attorneys for Defendants Marueen Dundon,  
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43216-1008**

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

**FILED**

FIFTH APPELLATE DISTRICT

2013 JUN 20 P 1:22

EVELYN KELLER

Plaintiff-Appellant

-vs-

MAUREEN DUNDON, ET AL

Defendants-Appellees

CLERK OF COURTS  
OF APPEALS  
LICKING COUNTY OH  
GARY R. WALTERS

JUDGMENT ENTRY

CASE NO. 12-CA-73

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is reversed and remanded for further proceedings. Costs assessed to Appellees.

*Leticia A. Delaney*

*William B. Hoffman*

*John G. ...*

JUDGES

40 / 778

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED

2013 JUN 20 P 1:19

CLERK OF COURTS  
OF APPEALS  
LICKING COUNTY OH  
GARY R. WALTERS

EVELYN KELLER

Plaintiff - Appellant

-vs-

MAUREEN DUNDON, ET AL

Defendant - Appellees

JUDGES:

Hon. William B. Hoffman, P.J.  
Hon. John W. Wise, J.  
Hon. Patricia A. Delaney, J.

Case No. 12-CA-73

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County  
Court of Common Pleas, Case No.  
11-CV-0891TMM

JUDGMENT:

REVERSED & REMANDED

DATE OF JUDGMENT:

APPEARANCES:

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*Delaney, J.*

(¶1) Plaintiff-Appellant Evelyn Keller appeals the October 3, 2011 and August 28, 2012 judgment entries of the Licking County Court of Common Pleas dismissing her complaint.

#### **FACTS AND PROCEDURAL HISTORY**

(¶2) On July 5, 2011, Keller filed a complaint against Defendants-Appellees Maureen Dundon, Chautauqua Airlines, Inc, and Republic Airlines, Inc. in the Licking County Court of Common Pleas. In her complaint, Keller brought the following claims: (1) negligence against Dundon; (2) respondeat superior liability against Chautauqua Airlines and Republic Airlines; (3) negligent training, supervision, and review against Chautauqua Airlines and Republic Airlines; (4) breach of contract against Chautauqua Airlines and Republic Airlines; (5) violation of the Air Carrier Access Act against Dundon, Chautauqua Airlines, and Republic Airlines; and (6) punitive damages against Dundon, Chautauqua Airlines, and Republic Airlines. The complaint alleges the following facts.

(¶3) On November 13, 2010, Keller flew on Continental Express Flight 5909 from Houston, Texas to Columbus, Ohio. Keller suffers from a physical disability that requires her right leg to be able to be both flexed and extended when she is in a continual seated position. To accommodate her physical disability on the flight from Texas to Ohio, Keller booked and received, in advance, confirmation of a seat assignment for an aisle seat on the right side of the aircraft, specifically seat 4B.

(¶4) Keller was provided a boarding pass that assigned her seat 4B as her confirmed seat. When Keller boarded Flight 5909, another passenger was seated in

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seat 4B. The passenger informed Keller that the flight attendant, Defendant-Appellee Maureen Dundon, gave the passenger seat 4B so that the passenger could sit next to her relative.

(¶5) Keller informed Dundon that she had a physical disability that required her to sit in seat 4B. Keller stated she needed to sit in an aisle seat on the right side of the aircraft so she could flex and straighten her right leg. In response, Dundon stated, "Just my luck, I give away one seat and it belongs to a handicapped." Dundon directed Keller to a seat in the front row of the plane, immediately behind the bulkhead. Keller told Dundon she could not sit in the seat behind the bulkhead because Keller could not fully stretch her leg. Dundon directed Keller to sit in the bulkhead seat.

(¶6) Keller sat in the bulkhead seat, which prevented Keller from stretching and flexing her right leg during the flight. The lack of movement caused injury and pain in her right leg and right hip, also causing Keller to suffer emotional distress. Airport employees physically assisted Keller off the plane upon landing. Keller sought medical attention directly after the flight.

(¶7) Prior to filing an answer to the complaint, Dundon, Chautauqua Airlines, and Republic Airlines filed a joint motion to dismiss on August 3, 2011. Keller filed a response and Appellees filed a reply. In their motion to dismiss, Appellees argued Keller's claims were preempted by federal law pursuant to the Airline Deregulation Act of 1978. On October 3, 2011, the trial court issued its judgment entry that granted Appellees' motion to dismiss in part. The trial court found Keller's claims for negligence were preempted by the Airline Deregulation Act. The trial court dismissed counts one,

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two, three, five, and six of Keller's complaint. The trial court denied Appellees' motion to dismiss as to Keller's claim for breach of contract.

{¶8} On February 29, 2012, Chautauqua Airlines and Republic Airlines filed a motion for summary judgment on the breach of contract claim. Keller filed a response and Appellees filed a reply. The trial court granted the motion for summary judgment on August 28, 2012, disposing of Keller's sole remaining claim.

{¶9} It is from these judgments Keller now appeals.

#### **ASSIGNMENTS OF ERROR**

{¶10} Keller raises five Assignments of Error:

{¶11} "I. THE COURT ERRED BY DISMISSING PLAINTIFF-APPELLANT'S TORT CLAIMS AGAINST THE AIRLINES, ON THE BASIS THAT FEDERAL LAW WHICH PREEMPTS STATE CONTROL OVER AIRLINES "OPERATION" APPLIES TO A SITUATION WHERE A FLIGHT ATTENDANT KNOWINGLY RESEATED A DISABLED PASSENGER INTO A SEAT WHICH DID NOT ACCOMMODATE HER DISABILITIES FOR NON-OPERATIONS REASONS.

{¶12} "II. THE COURT ERRED BY DISMISSING PLAINTIFF-APPELLANT'S TORT CLAIMS AGAINST THE FLIGHT ATTENDANT WITHOUT CONSIDERATION OF WHETHER THE FLIGHT ATTENDANT'S ACTIONS IN KNOWINGLY SEATING A DISABLED PASSENGER INTO A SEAT WHICH DID NOT ACCOMMODATE HER DISABILITIES WERE, OR WERE NOT, IN COMPLIANCE WITH THE FLIGHT ATTENDANT'S EMPLOYER'S WORK RULES AND POLICIES AND THUS WHETHER THE FLIGHT ATTENDANT WAS ACTING WITHIN THE SCOPE OF HER EMPLOYMENT.

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{¶13} "III. THE COURT ERRED BY DETERMINING THAT AS A MATTER OF LAW THE ACTIONS OF DEFENDANTS-APPELLEES COULD NOT BE CONSIDERED OUTRAGEOUS.

{¶14} "IV. THE COURT ERRED BY DETERMINING THAT THE ISSUE OF WHETHER THE ACTIONS OF DEFENDANTS-APPELLEES WERE OUTRAGEOUS WAS NOT AN ISSUE OF FACT FOR DETERMINATION BY A JURY.

{¶15} "V. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES ON THE CONTRACT ISSUE, NOTWITHSTANDING THAT THE APPLICABLE CONTRACT WAS EXPRESSLY SUBJECT TO FEDERAL LAWS AND RULES, AND THOSE LAWS AND RULES REQUIRE AN AIRLINE TO REASONABLY ACCOMMODATE THE SEATING NEEDS OF A PASSENGER WITH DISABILITIES."

#### ANALYSIS

##### I., II., III., and IV.

{¶16} We consider Keller's first, second, third, and fourth Assignments of Error together because they raise a similar question as to whether the trial court erred in granting Appellees' motion to dismiss because the Airline Deregulation Act preempted Keller's negligence claims.

{¶17} The standard of review on a Civil Rule 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). In a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*, 57 Ohio St.3d 58, 585 N.E.2d 584 (1991).

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(¶18) The basis of Keller's claims against Dundon, Chautauqua Airlines, and Republic Airlines arise from Dundon's alleged negligent actions towards Keller. Keller's complaint states as to Dundon's negligence:

39. Dundon negligently required Plaintiff to sit in a seat unfit for her medical needs and physical disability, causing physical injury to Plaintiff's knee and hip.

40. Dundon failed to provide Plaintiff with seat 4B, which Plaintiff scheduled in advance of Flight 3909 [sic], and paid for, to accommodate her physical disability.

41. Dundon was told of Plaintiff's physical disability and, as an employee of a common carrier, owed Plaintiff a heightened degree of care.

42. As a direct and proximate result of Dundon's negligence, Plaintiff sustained significant damages and personal injuries, \* \* \*.

(¶19) In Appellees' joint motion to dismiss, Appellees argued Keller's claims were preempted under the Airline Deregulation Act of 1978 ("ADA"), now known as the Federal Aviation Authority Authorization Act (1994). From 1958 to 1978, the Federal Aviation Act permitted passengers to pursue common law or state statutory remedies against airlines. In 1978, the Federal Aviation Act was amended by the ADA. The relevant version of the ADA provides in relevant part:

(b) Preemption

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law

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related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. 41713(b)(1).

(¶20) Congress, however, left in place the "savings clause" that provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. 40120(c).

(¶21) We note that tort law traditionally has been regulated by the states, particularly claims for personal injuries.

(¶22) The first issue is whether Keller's negligence claims relate to a "price, route, or service of an air carrier." Appellees argue Keller's claims involve the provision of a service because they are directly related to Appellees' boarding/seating policies and procedures, specifically seating assignments on Flight 5909.

(¶23) There is no definition within the federal statute as to the meaning of "relating to \* \* \* service." "The United States Supreme Court has acknowledged that the statute was meant to bar state actions 'having a connection with or reference to airline \* \* \* services.'" *Peterson v. Continental Airlines, Inc.*, 970 F.Supp. 248 (S.D.N.Y.1997) quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). "However, the Court has cautioned against finding preemption in cases where the state law's impact on an air carrier's services is 'tenuous, remote, or peripheral.'" *Id.* Although the Supreme Court has interpreted the reach of the ADA's preemption provision in three cases, it has not expressly ruled on whether state tort actions are within the provision's preemptive scope. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (states prohibited from

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enforcing airline fare advertising guidelines adopted by the National Association of Attorneys General (NAAG) through their existing general consumer protection laws); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) (state consumer fraud claims involving frequent flyer program preempted because they serve to guide and police marketing practices of airlines and thus impose state substantive standards with respect to rates, routes or services. Common law contract claims were not preempted because they merely involve an airline's own agreements); and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 384, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008) (state tobacco law regulating the delivery of tobacco within the state preempted by the ADA because it directly regulated airline and trucking services).

(¶24) Keller asks this Court to consider a three-part test utilized by the United States District Court in *Rombom v. United Air Lines, Inc.*, 867 F.Supp. 214, 221, (S.D.N.Y.1994) to determine whether preemption is warranted under the ADA. The threshold inquiry in deciding whether state claims against an airline are preempted by Section 41713 is whether the activity at issue is an airline service. *Id.* If the court determines the activity is not an airline service for Section 41713 purposes, then the preemption inquiry ceases and the state law claims are actionable. *Id.* at 222. If, however, the activity at issue implicates an airline service, then the court must address the second prong: Whether plaintiff's claims affect the airline service directly as opposed to "tenuously, remotely, or peripherally." *Id.* If the state claims have only an incidental effect on the airline service, there is no preemption. The third prong of the preemption inquiry focuses on whether the underlying tortious conduct was reasonably necessary to the provision of the service. *Id.* In other words, Section 41713 "cannot be

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construed in a way that insulates air carriers from liability for injuries caused by outrageous conduct that goes beyond the scope of normal aircraft operations." *Id.* at 222. If, in contrast, the service was provided in a reasonable manner, then preemption is appropriate.

{¶25} The three-part *Rombom* test has been adopted by the United States District Court for the Eastern District of Michigan in *Hammond v. Northwest Airlines*, No. 09-12331, 2009 WL 4166361 (Nov. 25, 2009). The Ohio Tenth District Court of Appeals also engaged in a similar analysis in *White v. America West Airlines, Inc.*, 152 Ohio App.3d 14, 2003-Ohio-1182. See also, *Restivo v. Continental Airlines, Inc.*, 192 Ohio App.3d 64, 2011-Ohio-219, 947 N.E.2d 1267 (8th Dist.) (claims alleging violation of Ohio's Gift Card Statute and Ohio Consumer Sales Practices Act were preempted by the ADA).

{¶26} In *White v. America West Airlines, Inc.*, the plaintiffs brought a cause of action for defamation against the pilot and crew of a flight from which the plaintiffs were removed. After the plaintiffs' removal from the flight, the captain addressed the passengers and apologized for the disturbance. Plaintiffs argued the announcement was defamatory, entitling them to damages. *White*, 2003-Ohio-1182, ¶ 10. The Tenth District Court of Appeals analyzed the issue of service and the tort claim and concluded, "[d]espite our best efforts to do so, we have been unable to conceive of any situation where a defamatory statement is a 'service' of an airline." *Id.* at ¶ 18.

{¶27} We will engage in the *Rombom* analysis to determine whether Keller's claim is preempted by Section 41713. The activity at issue, the flight attendant managing the seating assignments during the boarding of the flight, would constitute an

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airline service based on the underlying facts of this case. "A flight crew's conduct during the boarding stage of a flight, specifically, flight attendants' efforts to locate appropriate seat assignments and resolve seat conflicts, constitutes an airline service within the meaning of Section 41713." *Peterson v. Continental Airlines, Inc.*, 970 F. Supp. 246, 250 (S.D.N.Y. 1997).

{¶28} The next prong asks whether Keller's personal injury claims affect the airline service directly, as opposed to "tenuously, remotely, or peripherally." See *Rowe, supra*, at 375. Keller claims that Dundon sat a passenger traveling with a relative in Keller's confirmed seat. Keller states that by not honoring her confirmed aisle seat and placing her in a bulkhead seat, she suffered a physical injury and emotional distress. We conclude under the second *Romborn* prong, Keller's claims against the airline have a tenuous, remote, or peripheral impact on the delivery of services by the airlines; therefore, preemption is not warranted. We find such a negligence suit would not impede free market competition of air carriers or frustrate deregulation by interfering with matters about which airlines compete. Here, a disabled passenger was allegedly injured by the negligent acts of Dundon. Allowing Keller's claims to proceed would not, in this Court's opinion, have a direct or indirect effect on airline competition or frustrate Congress's purpose in deregulation. To preempt such personal injury claims would also have the effect of immunizing Appellees from the consequences of their own negligence.

{¶29} The third prong analyzes whether Appellees provided the airline service in a reasonable manner; i.e., whether the underlying tortious conduct was reasonably necessary to the provision of the service. Even assuming that Keller's claims directly

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implicate an airline service, Appellees' preemption argument also falls under the third prong because Keller's version of the facts raises the issue of whether Appellees acted reasonably and/or went beyond the scope of normal aircraft boarding procedures.

(¶30) Based on our de novo review, the trial court erred in granting Appellees' joint motion to dismiss Keller's common law tort claims based on preemption under 49 U.S.C. 41713(b)(1). Further, because the Keller's common law tort claims are viable, it was incorrect for the trial court to dismiss Keller's punitive damages claims.

(¶31) Keller's first, second, third, and fourth Assignments of Error are sustained.

V.

(¶32) In Keller's fifth Assignment of Error, she argues the trial court erred in granting summary judgment on her breach of contract claim against Appellees Chautauqua Airlines and Republic Airlines. We agree.

(¶33) The standard for granting summary judgment is delineated in *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996): " \* \* \* a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. \* \* \*"

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{¶34} Appellees' joint motion for summary judgment was based on Continental's Contract of Carriage. It states:

Transportation of Passengers and Baggage provided by Continental Airlines, Inc., Continental Micronesia, Inc. and Carriers doing business as Continental Express or Continental Connection, are subject to the following terms and conditions, in addition to any terms and conditions printed on or in any ticket, ticket jacket or eticket receipt, or specified on any internet site, or published schedules. By purchasing a ticket or accepting transportation, the passenger agrees to be bound thereby.

{¶35} Chautauqua was the carrier for Keller's Continental Express flight pursuant to Continental's Contract of Carriage.

{¶36} Rule 4(I) of the contract states, "[s]eat assignments are not guaranteed and are subject to change without notice. CO reserves the right to reseat a Passenger for any reason, including from an extra legroom seat for which the applicable fee has been paid." The trial court found this provision to state that Keller's confirmed seat was not guaranteed and therefore Appellees did not breach the contract.

{¶37} Keller, however, argued in her response to the motion for summary judgment that Rule 3(B) of the Continental Contract of Carriage created an ambiguity for the applicability of Rule 4(I) to the facts of this case. Rule 3(B) states:

This Contract of Carriage is subject to applicable laws, regulations, rules, and security directives imposed by governmental agencies \* \* \* In the event of a conflict between the Rules contained herein and such

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governmental laws, regulations, rules, security directives and their corresponding effects on CO's operation, the latter shall prevail.

{¶38} In 1988, the Air Carrier Access Act, 49 U.S.C. 41705, was enacted to require air carriers to take steps to accommodate passengers with a disability. The federal regulations enacted pursuant to the Air Carrier Access Act regulate seat assignments for a disabled individual.

{¶39} Upon our de novo review, we find there is a genuine issue of material fact as to whether Appellees Chautauque Airlines and Republic Airlines breached its contract with Keller based on the language of the Contract of Carriage and the regulations promulgated by the Air Carrier Access Act.

{¶40} Keller's fifth Assignment of Error is sustained.

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**CONCLUSION**

{¶41} The first, second, third, and fourth Assignments of Error of Plaintiff-Appellant Evelyn Keller are sustained.

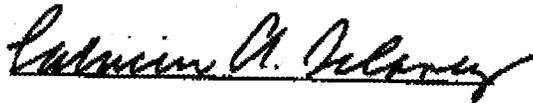
{¶42} The fifth Assignment of Error of Plaintiff-Appellant Evelyn Keller is sustained.

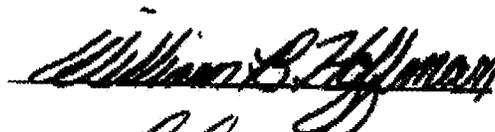
{¶43} The judgment of the Licking County Court of Common Pleas is reversed and this case is remanded for further proceedings consistent with this opinion and law.

By Delaney, J.

Hoffman, P.J. and

Wise, J. concur.







JUDGES

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