

IN THE SUPREME COURT OF OHIO

EVELYN KELLER,	:	
	:	Case No. 2013-1227
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
MAUREEN DUNDON, CHAUTAUQUA	:	On Appeal from the Court of Appeals
AIRLINES, INC., and REPUBLIC	:	for Licking County, Ohio, 5 th Appellate
AIRLINES, INC.,	:	District Appeal No. 12 CA 73
	:	
Defendants-Appellants.	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION

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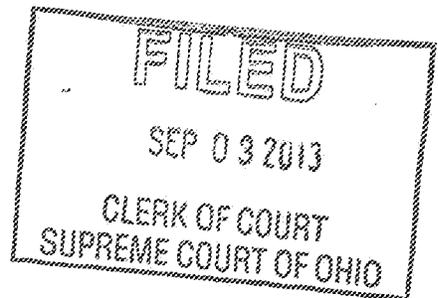


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The actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat which would not accommodate her disability, thus causing injury, for non-operational reasons, affects the airline’s service only in a tenuous, remote or peripheral manner and thus the Airline Deregulation Act does not preempt the injured passenger’s tort claim.

The actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat which would not accommodate her disability, thus causing injury, where the sole justification was the desire of another passenger to sit next to a family member, was not an action which was reasonably necessary to the airline’s service and/or went beyond the normal airline boarding procedures, and thus the Airline Deregulation Act does not preempt the injured passenger’s tort claim. 4

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Appellees' Counter-Proposition of Law:

Where the actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat which would not accommodate her disability, thus causing injury, which actions violated applicable governmental laws, regulations and rules designed to require airlines to accommodate passengers with disabilities, and where the applicable Contract of Carriage expressly provides that such applicable governmental laws, regulations and rules control over conflicting provisions in the Contract of Carriage, a contract provision allowing the airlines to change a passenger's seat does not allow the airlines to change a disabled passenger's seat if by doing so the airlines would violate applicable governmental laws, regulations and rules requiring the airlines to accommodate the needs of passengers with disabilities. 12

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This action involves the effort of a disabled passenger who was injured as a result of a flight attendant's negligence to obtain civil relief under customary tort and contract theories. The Fifth District Court of Appeals unanimously and correctly applied established legal principles and found that the tort claims were not preempted by Federal law and that the terms of the applicable contract did not entitle the airline to deprive a disabled passenger of a confirmed seat which would accommodate her disability and require her to sit in a seat which would not accommodate her disability. This case raises no constitutional question and does not raise any matters of great general or public interest.

With respect to the tort claims, if the Ohio General Assembly enacted laws requiring commercial airlines to provide sufficient overhead storage to allow each passenger to carry on 3 bags, or requiring airlines to refund fares if the flight is delayed, then Appellants would have a legitimate basis to claim that this State has taken improper action affecting the ability of the airlines to provide service. Here, however, this Court is asked to consider a situation where the Court of Appeals, applying established law, found that the claims of a passenger injured by the negligent actions of a flight attendant fall outside of the scope of Federal preemption. The Court of Appeals – applying a three part test recognized both by Appellants and Appellee - correctly recognized that the applicable law requires the Courts to draw a line between claims which directly affect the ability of airlines to conduct their business and are thus preempted, and claims which fall on the other side of that line and are thus allowed. Appellants do not (and cannot) dispute that there is a line which, if crossed, allow tort claims by injured passengers to proceed, they merely dispute that the conclusions of the Court of Appeals as to whether Appellee's claims

fall on one side of the line or the other. The application of a specific set of facts to established law ought not be the obligation of the Supreme Court of Ohio.

With respect to Appellee's contract claim, the Court of Appeals correctly recognized that the airline's standard form contract is expressly subject to applicable laws, rules and regulations and that the standard contract provisions are subordinate to such applicable laws, rules and regulations. The Court of Appeals recognized that applicable laws, rules and regulations require airlines to make reasonable accommodation of passengers with disabilities and that the action of a flight attendant in depriving a disabled passenger of a confirmed seat which would accommodate her disability and requiring her to sit in a seat which would not accommodate her disability, resulting in injury, was not excused by general language in the form contract allowing passengers to be re-seated. Respectfully, such general contract language no more allows an airline to ignore laws and rules designed to protect passengers with disabilities, than such language would allow an airline to move certain passengers to the rear of the aircraft solely because of their race or religion.

Moreover, Appellants fail to disclose to this Court that Federal law provides no procedure or ability of an injured passenger to recover damages from a negligent airline or airline employee, so if the Courts of this State are entirely closed to passengers injured by a negligent airline employee, the citizens of this State will have no remedy for such injuries.

In reaching its decision, the Court of Appeals applied settled principles of law that need no further clarification by this Court. It articulated no new legal test or legal principle; there is no conflict among Ohio courts (and in fact this opinion is consistent with prior Ohio decisions); and no constitutional question has been presented. This appeal raises no legal issues of great general or public interest that warrant the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

A. Relevant Facts.

As found by the Court of Appeals, on November 13, 2010, Appellee flew on Continental Express Flight 5909 from Houston, Texas to Columbus, Ohio. Appellee 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, Appellee booked and received, in advance, confirmation of a seat assignment for an aisle seat on the right side of the aircraft, specifically seat 4B.

Appellee was provided a boarding pass that assigned her seat 4B as her confirmed seat. When Appellee boarded Flight 5909, another passenger was seated in seat 4B. The passenger informed Appellee that the flight attendant gave the passenger seat 4B so that the passenger could sit next to a relative.

Appellee informed Dundon that she had a physical disability that required her to sit in seat 4B. Appellee 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, the flight attendant stated, "Just my luck, I give away one seat and it belongs to a handicapped." The flight attendant directed Appellee to a seat in the front row of the plane, immediately behind the bulkhead. Appellee told the flight attendant she could not sit in the seat behind the bulkhead because Appellee could not fully stretch her leg. The flight attendant nevertheless directed Appellee to sit in the bulkhead seat.

Appellee sat in the bulkhead seat, which prevented her from stretching and flexing her right leg during the flight. The lack of movement caused further injury and pain in her right leg and right hip, together with pain and emotional distress. Airport employees physically assisted Appellee off the plane upon landing. Appellee sought medical attention directly after the flight.

B. Course of Proceedings.

Appellee commenced her complaint on July 5, 2011. Prior to filing an answer to the complaint, Appellants filed a joint motion to dismiss on August 3, 2011, arguing that Appellee'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 Appellants' motion to dismiss in part. The trial court found Appellee's tort claims were preempted by the Airline Deregulation Act and dismissed counts one, two, three, five, and six of the complaint. The trial court denied Appellee's motion to dismiss as to claim for breach of contract.

On February 29, 2012, Appellants filed a motion for summary judgment on the breach of contract claim. The trial court granted the motion for summary judgment on August 28, 2012, disposing of Appellee's sole remaining claim. Appellee timely perfected an appeal and on June 20, 2013 the Fifth District Court of Appeals reversed the trial court on all issues.

ARGUMENT

Appellants' Proposition of Law No. 1:

The Airline Deregulation Act Expressly Preempts Keller's Tort and Punitive Damages Claims Challenging Appellants' Seating and Boarding Services

Appellee's Counter-Propositions of Law:

The actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat which would not accommodate her disability, thus causing injury, for non-operational reasons, affects the airline's service only in a tenuous, remote or peripheral manner and thus the Airline Deregulation Act does not preempt the injured passenger's tort claim.

The actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat

which would not accommodate her disability, thus causing injury, where the sole justification was the desire of another passenger to sit next to a family member, was not an action which was reasonably necessary to the airline's service and/or went beyond the normal airline boarding procedures, and thus the Airline Deregulation Act does not preempt the injured passenger's tort claim.

Appellants claim state court tort claims are preempted by the Federal Airline Deregulation Act ("ADA"), specifically 49 U.S.C. 41713(b)(1) which 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.

Appellants' position is mistaken. Federal and State court precedent is clear that the ADA preemption does not extend to this type of claim. As noted below, as two U.S. Supreme Court justices have held, and as many courts, including courts in the U.S. Sixth Circuit and Ohio Tenth District Court of Appeals, have concluded, the ADA *does not* preempt personal injury claims of the type asserted in this case.

In order to understand the scope of the ADA's preemption clause, one must determine and understand what Congress intended to achieve through the ADA. In *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700, the Supreme Court advised that preemption provisions ought to be narrowly construed for two reasons:

First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment ... that the purpose of Congress is the ultimate touchstone in every pre-emption case.

518 U.S. at 485 (internal quotation marks omitted). Indeed, preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist

system.” *Alessi v. Raybestos-Manhattan, Inc.* (1981), 451 U.S. 504, 522, 101 S. Ct. 1895, 68 L. Ed. 2d 402. When the question of preemption implicates “a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic*, 518 U.S. at 485 (internal citation and quotations omitted).

To determine what Congress’s “manifest purpose” in enacting the ADA’s preemption clause was, then, this Court must consider the ADA’s unique history. Under the Federal Aviation Act of 1958, the Civil Aeronautics Board had regulatory authority over interstate air transportation. Pub. L. No. 85-726. But the Board’s power in that field was not exclusive, as the statute also contained a “savings clause,” clarifying that “[n]othing ... in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” (emphasis added) 49 U.S.C. §1506 (1964), amended and renumbered as 49 U.S.C. §40120(c) by Pub. L. 103-272, 108 Stat. 745, 1118 (1994).

In 1978 Congress enacted the preemption clause cited by Appellants. When it did so, however, Congress retained the ADA’s “savings clause,” cited above, thereby preserving state common law and statutory remedies. The “savings clause” expressly allows the States to enforce common law remedies, such as negligence and breach of contract. That provision of the law cannot be ignored.

1. U.S. Supreme Court Precedent.

The United States Supreme Court has encountered and interpreted the ADA’s preemption clause at least three times since 1990. In *Morales v. Trans World Airlines Inc.* (1992), 504 U.S. 374, the Court considered whether the clause preempted the states “from prohibiting allegedly

deceptive airline fare advertisements through enforcement of their general consumer protection statutes.” 504 U.S. at 378. The Court concluded that because advertising has such a direct link to pricing and rates, the ADA preempted state restrictions against deceptive advertising. *Id.* at 388-89. The Court reasoned that the advertising restrictions at issue had a “forbidden significant effect” on rates, routes, or services. *Id.* at 388. But, the Court made sure to limit its holding to those state laws that actually have a *direct effect* on rates, routes, or services.

The Court went to great lengths to make clear that its holding was narrow, and that the ADA only preempts laws that have a direct effect on pricing:

In concluding that the ... advertising guidelines are pre-empted, we do not ... set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly “relate to” rates; the connection would obviously be far more tenuous. . . . *[S]ome state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have a preemptive effect.*

504 U.S. at 390 (internal citations omitted) (emphasis added).

The Court considered the ADA’s preemption clause for a second time in *American Airlines, Inc., v. Wolens* (1995), 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715. In that case, the plaintiffs were members of a frequent flyer program and brought suit against an airline. *Id.* at 224-25. The plaintiffs challenged certain program modifications that devalued credits the members had already earned, and claimed that the devaluation constituted a breach of contract and a violation of Illinois’s Consumer Fraud and Deceptive Business Practices Act. *Id.* The Court concluded that §1305(a)(1) clearly preempted the consumer fraud claim because it was a state-imposed regulation that related to the price, routes, or services of air carriers. *Id.* at 222. But the Court allowed the breach of contract claim to go forward, making clear that the ADA “allows room for court enforcement of contract terms set by the parties themselves.” *Id.* “In so

doing, the Court held that Congress did not intend to preempt common law contract claims.”

Charas v. Trans World Airlines, Inc. (9th Cir. 1998), 160 F.3d 1259, 1264 (en banc) (discussing the scope of §1305(a)(1) after the *Wolens* decision).

The Court in *Wolens* drew a clear distinction between the consumer fraud claim, which was based on a proscriptive law targeting primary conduct, and actions that “simply give effect to bargains offered by the airlines and accepted by airline customers.” *Wolens*, 513 U.S. at 228.

Indeed, the Court stated as follows:

We do not read the ADA’s preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings. As persuasively argued by the United States, terms and conditions airlines offer and passengers accept are *privately ordered obligations* “and thus do not amount to a State’s ‘enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law’ within the meaning of [§] 1305(a)(1).” Brief for United States as *Amicus Curiae* 9. Cf. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526, 112 S. Ct. 2608, 2612, 120 L. Ed. 2d 407 (1992) (plurality opinion) (“[A] common-law remedy for a contractual commitment voluntarily undertaken [*12] should not be regarded as a ‘requirement . . . imposed under State law’ within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b).”).

The ADA, as we recognized in *Morales* . . . was designed to promote “maximum reliance on competitive market forces.” . . . Market efficiency requires effective means to enforce private agreements. See Farber, *Contract Law and Modern Economic Theory*, 78 Nw.U.L.Rev. 303, 315 (1983) (remedy for breach of contract “is necessary in order to ensure economic efficiency”) As stated by the United States: “The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on the needs perceived by the contracting parties at the time.” Brief for United States as *Amicus Curiae* 23. That reality is key to sensible construction of the ADA.

Wolens, 513 U.S. at 228-30 (internal footnote omitted) (alterations in original) (emphasis added).

In sum, the Court concluded that a state does not “enact or enforce any law” when it uses its contract laws to enforce private agreements.¹

After drawing this distinction, the Court pointed out institutional limitations that demonstrate that the ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing. In particular, the Court noted that the Department of Transportation is not equipped to adjudicate these types of claims. First, it concluded, the DOT’s own regulations “contemplate that ... contracts ordinarily would be enforceable under ‘the contract law of the States.’” *Wolens*, 513 U.S. at 230 (citing 47 Fed. Reg. 52129 (1982)). And second, the Court noted that the DOT is not equipped with either “the authority [or] the apparatus required to superintend a contract dispute resolution regime.” *Id.* at 232. Although before 1978 the [Civil Aeronautics Board] adjudicated contract disputes, when Congress deregulated the airline industry it dismantled this apparatus and never replaced it. Therefore, if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit -- a result that Congress never intended. The same logic applies to tort claims.

The Supreme Court considered §1305(a)(1) for a third time in *Rowe v. New Hampshire Motor Transport Ass’n* (2008), 552 U.S. 364, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008). In that

¹ Two concurrences in *Wolens*, which provide insight into the Court’s reasoning, are particularly significant to the issues in this case. Justice O’Connor wrote that “[m]any cases decided since *Morales* have allowed personal injury claims to proceed, even though none has said that a State is not ‘enforcing’ its ‘law’ when it imposes tort liability on an airline.” 513 U.S. at 242 (O’Connor, J., concurring in the judgment in part, dissenting in part). And Justice Stevens emphasized that the ADA’s preemption clause would not bar common law claims such as negligence or fraud. 513 U.S. at 235-36 (Stevens, J., concurring in part, dissenting in part).

case, a group of transport carrier associations challenged a Maine statute that regulated the shipment of tobacco into the state. *Id.* at 369. The Court concluded that the ADA preempted Maine's statute because the latter "produces the very effect that the federal law sought to avoid; namely, a State's direct substitution of its own governmental commands for 'competitive market forces.'" *Id.* at 372. Clearly, compared to either *Wolens* or *Morales*, the state law in *Rowe* was more directly related to "routes, rates, or services" because it regulated primary activity that fell under the ADA, and thereby they were preempted.

2. Lower Court Decisions.

It is well established that claims that are only tenuously, remotely or peripherally related to the price, routes or services of air carriers *are not preempted by the ADA*. *Morales*, 504 U.S. at 390. Courts within the U.S. Sixth Circuit have routinely held that state common law claims are not preempted by the ADA. *See, e.g., Margolis v. United Airlines* (E.D. Mich. 1993), 811 F. Supp. 318 (personal injury/negligence claim not preempted since the savings clause indicates no intent to preempt traditional state law claims); *Seals v. Delta Airlines, Inc.* (E.D. Tenn. 1996), 924 F. Supp. 854 (ADA did not preempt negligence claims under state law because personal injury suits do not relate to services provided by air carriers); *Wright v. Bond-Air, Ltd.* (E.D. Mich. 1996), 930 F. Supp. 300 (relying on *Margolis* to remand negligence claim to state court); *Musson Theatrical Inc. v. Federal Exp. Corp.* (6th Cir. 1996), 89 F.3d 1244 (common law claims for fraud and misrepresentation not preempted because ADA expresses no Congressional intent to make federal court the exclusive forum); *Wellons v. Northwest Airlines* (6th Cir. 1999), 165 F.3d 493 (state law claims of discrimination, intentional infliction of emotional distress, fraud, and misrepresentation not preempted by the ADA because only "tenuously related" to services since they did not impact air safety or market efficiency).

The courts within the Sixth Circuit are not alone in their treatment of state court claims relative to the ADA's preemption clause. In *Hodges v. Delta Airlines, Inc.* (5th Cir. 1995), 44 F.3d 334 (en banc), for instance, the plaintiff brought state tort claims against Delta Airlines based on injuries sustained when a case of rum fell out of an overhead compartment.

Adopting definitions of "services" similar to the one employed in *Hodges*, other courts have held that state law personal injury actions are *never* preempted under §1305. See, e.g., *Stagl v. Delta Air Lines, Inc.*, (E.D.N.Y. 1994), 849 F. Supp. 179, 182 (§1305 "necessarily exclude[s] an air carrier's common law duty to exercise ordinary care from preemption.") (quoting *Butcher v. City of Houston* (S.D. Tex. 1993), 813 F. Supp. 515, 517-18; *Dudley v. Business Express* (D.N.H. 1994), 882 F. Supp. 199 (personal injury actions fall outside the sweep of §1305) (citing *O'Hern v. Delta Airlines* (N.D. Ill. 1993), 838 F. Supp. 1264, 1267; *Jamerson v. Atlantic Southeast Airlines, Inc.* (M.D. Ala. 1994), 860 F. Supp. 821, 826 (same); *Union Iberoamericana v. American Airlines, Inc.* (S.D. Fl. July 2, 1994), 1994 U.S. Dist. LEXIS 10483 at *3 ("run-of-the-mill negligence and breach of contract claims" are not specifically aimed at regulating rates, routes, or services, and are therefore not preempted). And the Ninth and Third Circuits, defining "services" under §1305 to mean only air transportation, have similarly held that state law personal injury actions are *not* preempted under §1305. *Charas v. Trans World Airlines, Inc.* (9th Cir. 1998), 160 F.3d 1259, 1266 (en banc) (interpreting "service" to refer only to "the provision of air transportation to and from various markets at various times"); *Taj Majal Travel, Inc. V. Delta Airlines, Inc.* (3rd Cir. 1998), 164 F.3d 186, 193-94 (similar).

Not surprisingly, the only Ohio state court that has addressed the issue at hand – that is, whether §1305 preempts state law personal injury actions -- is in accord with the above. In *White*

v. America West Airlines, Inc. (Ohio App. 10th Dist. 2003), 152 Ohio App. 3d 14, 19, the Tenth District Court of Appeals concluded, very clearly, that §1305 does not preempt state law claims based on the tortious conduct of an airline carrier since tortious conduct is not a “service” as that term is used in the ADA. In doing so, the court “readily disagree[d] with defendant’s assertion that [an airline’s] commission of torts against its patrons is part and parcel of customer service.”

Id.

Appellants' Proposition of Law 2:

The Court of Appeal’s Enlargement of the Unambiguous Terms of the Contract of Carriage is Prohibited by the ADA, the ACCAA, and the United States Supreme Court Precedent.

Appellee's Counter-Proposition of Law:

Where the actions of an airline flight attendant in depriving a known disabled passenger of her confirmed seat which would accommodate her disability and requiring her to sit in another seat which would not accommodate her disability, thus causing injury, which actions violated applicable governmental laws, regulations and rules designed to require airlines to accommodate passengers with disabilities, and where the applicable Contract of Carriage expressly provides that such applicable governmental laws, regulations and rules control over conflicting provisions in the Contract of Carriage, a contract provision allowing the airlines to change a passenger’s seat does not allow the airlines to change a disabled passenger’s seat if by doing so the airlines would violate applicable governmental laws, regulations and rules requiring the airlines to accommodate the needs of passengers with disabilities.

The applicable contract is the Continental Airlines Contract of Carriage, which essentially is the tariff under which the airline operates. Appellants’ argument is that the only term in the contract which applies is Section 4(I) of the Continental Contract of Carriage, which states “Seat assignments are not guaranteed and are subject to change without notice. [Airline] reserves the right to reseat a Passenger for any reason....” However, the Court of Appeals

correctly recognized that this one provision does not stand alone or operate in a vacuum. Rule 3(B) of the contract expressly 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 governmental laws, regulations, rules, security directives and their corresponding effects on [airline's] operation, the latter shall prevail.

This provision is necessary and entirely logical because airlines are regulated entities. Section 4(I) does not and cannot give Appellants the unbridled discretion they claim. If a flight attendant directed all passengers of a certain race or religion to sit at the back of the aircraft, would that be allowed simply because of Section 4(I)? Certainly not and no one would seriously advance such a position. The reason is because there are Federal laws, regulations and rules proscribing such treatment.

Hence, if an applicable law, regulation or rule would proscribe Appellants from taking the action which occurred – knowingly removing a disabled passenger from a confirmed seat for a non-operational reason and requiring her to sit in a seat which did not reasonably accommodate her disabilities -- then such applicable laws, regulations or rules would supersede the provision 4(I) of the Contract of Carriage and would control.

The Court of Appeals was presented with and recognized the existence of Federal law which does in fact require a commercial airline to reasonably accommodate passengers with disabilities. For example, in 1986 Congress enacted the Air Carrier Access Act, 49 U.S.C. Sec. 41705. The Federal Regulations enacted pursuant to the Act are found at 14 C.F.R. Part 382. Subpart 382.1 states:

What is the purpose of this part?

The purpose of this part is to carry out the Air Carrier Access Act of 1986, as amended. This rule prohibits both U.S. and foreign carriers from discriminating against passengers on the basis of disability, requires carriers to make aircraft, other facilities and services accessible, **and requires carriers to take steps to accommodate passengers with a disability.** (emphasis added)

The U.S. Department of Transportation, which regulates air carriers, published a brochure entitled "Information for the Air Traveler with a Disability" (copy attached Exhibit 2).

This brochure states:

Seat Assignments

An individual with a disability cannot be required to sit in a particular seat or be excluded from any seat, except as provided by government safety rules (for example, exit rows)." (p.10)

14 C.F.R. Subpart 382.85 states:

As a carrier, you must provide the following seating accommodations to a passenger who self-identifies as having a disability ... as needing a seat assignment accommodation in order to readily access and use the carrier's air transportation services:

- (a) as a carrier that assigns seats in advance, you must provide accommodations in the following ways:
 - ...
 - (i) When a passenger with a disability not described in Sec 382.81(a) through 9d) of this part makes a reservation more than 24 hours before the scheduled departure time of the flight, you are not required to offer the passenger one of the seats blocked for the use of passengers with a disability listed under Sec 382.81.
 - (ii) However, you must assign to the passenger any seat, not already assigned to another passenger that accommodates the passenger's needs, even if that seat is not available for assignment to the general passenger population at the time of the request."

Thus, applicable Federal law and regulations required Appellants to do precisely what they failed to do (accommodate Appellee as a passenger with a known disability), and prohibited

Appellants from doing what they did (requiring Appellee to sit in the bulkhead seat which would not accommodate her disability). Inasmuch as Federal law and regulations specifically address the requirement to assign a passenger with a disability to a seat which will accommodate the disability, it would certainly violate and thwart that law if the airlines could then deny the passenger with a disability her access to that assigned seat. Federal authority supersedes Rule 4(I). The Court of Appeals correctly held that Appellants were not entitled to summary judgment as to the breach of contract claim.

CONCLUSION

This appeal raises no issues of great general or public interest and presents no constitutional questions. The Court of Appeals correctly found that Appellee's tort claims were sufficient to survive a motion to dismiss and that Appellee's contract claims should not have been dismissed by the grant of summary judgment. This cause ought to be remanded to the trial court. Appellee urges the Court to decline jurisdiction in this matter.

Respectfully submitted,



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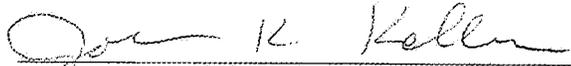
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following persons, by regular U.S. Mail on this 3rd day of September, 2013:

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