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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 73,395

EASTERN AIRLINES, INC.

Petitioner,

vs.

CHARLES KING,

Respondent.

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT
OF APPEAL, OF FLORIDA, THIRD DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

(With Separate Appendix)
Florida Bar No. 480770

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RESTATEMENT AND OTHER AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

This case involves a claim for emotional distress brought by Charles King against Eastern Airlines, Inc. King was a passenger on Eastern's Flight 855, from Miami, Florida to Nassau, Bahamas, on May 5, 1983. (R. 40-41).[1] Shortly after takeoff from Miami International Airport, one of the aircraft's three engines failed. (R. 41). The plane was turned around for a landing in Miami, and on the return, the aircraft's other two engines failed. (R. 41).

As the aircraft lost altitude because of the loss of power, the passengers and crew were prepared for ditching. The Flight crew subsequently were able to restart one of the engines, and the aircraft landed at Miami International Airport. R. 40-41).

King, and other passengers not parties to this proceeding, sued Eastern for damages allegedly incurred as a result of Eastern's intentional or reckless infliction of emotional distress and for damages arising under the Warsaw Convention. (R. 7-39). King's action was removed to the United States District Court for the Southern District of Florida, but was remanded to the Circuit Court for Dade County. (R. 48-49). Shortly thereafter, King filed an amended complaint against Eastern. In his amended complaint, King alleged claims under state law for breach of contract (Count I), negligence (Count 11), and entire want of care (Count 111). King also brought a claim under federal law pursuant to the Warsaw Convention (Count IV). (R. 40-44). King's claims were based on allegations that

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[1] In this brief the Record on Appeal will be referred to by the symbol "R," and Petitioner's Appendix will be referred to as "A."

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Eastern failed to properly train and supervise its employees and on allegations that the incident on Flight 855 was caused by the failure to install oil seals, or "O-rings" in the engines in question. (R. 41). King also alleged that Eastern acted with an entire want of care in failing to properly inspect, maintain and operate the aircraft in question. Specifically, King alleged that Eastern's record revealed "at least one dozen prior instances of engine failure due to missing O-rings, and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." (R. 43). King alleged that he sustained mental pain and anguish, fright, distress and inability to lead a normal life. (R. 42).

Subsequently, the trial court stayed King's action, pending consolidated discovery and other proceedings in the federal court litigation arising out of Flight 855. (R. 48-50). The twenty-eight actions in federal court had been consolidated as Multidistrict Litigation (MDL) before the Honorable Edward B. Davis of the United States District for the Southern District of Florida. (R. 48-49).

On February 3, 1986, Judge Davis dismissed with prejudice all claims for emotional distress in which the plaintiffs failed to allege any physical impact or injury as a result of the incident on Flight 855. In dismissing the plaintiffs' claims for intentional infliction of emotional distress, the United States District Court applied section 46 of the Restatement (Second) of Torts (1965), which had been adopted by the Florida Supreme Court in Metropolitan Life Insurance Company V. McCarson, 467 So.2d 277 (Fla. 1985), as the appropriate definition for the tort of intentional infliction of emotional

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distress. Citing McCarson and section 46 of the Second Restatement, the court concluded that plaintiffs had failed to state a cause of action for intentional infliction of emotional distress because the allegations of plaintiffs' claims did not support the contention that Eastern acted "intentionally or recklessly" and did not support the claim that Eastern was guilty of "outrageous and willful misconduct." In re Eastern Airlines. Inc., Engine Failure, Miami International Airport on Mav 5, 1983, 629 F.Supp. 307, 311 (S.D. Fla. 1986). (A. 16, 10). The court also dismissed plaintiffs' claims for damages for emotional distress under federal law pursuant to the Warsaw Convention, concluding that "mental anguish alone is not compensable under the Warsaw Convention." In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. at 314. (A. 23).

Based on Judge Davis' ruling Eastern moved for a judgment on the pleadings in King's action in state court. (R. 51-73). The trial court judge, the Honorable Richard S. Fuller, "persuaded by Judge Davis' opinion in the MDL proceedings," entered a final judgment in favor of Eastern.[2] (R. 107).

King appealed the adverse judgment to the District Court of Appeal of Florida, Third District. The Third District, in a 2 to 1 decision, held that King had stated a cause of action under Florida law for intentional infliction of mental distress. King v. Eastern Airlines. Inc., 536 So.2d 1023, 1025-1026 (Fla. 3d DCA 1988). (A. 1,

[2] The complaints filed in the federal actions were identical or similar to the one filed by King. (R. 51-73).

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3-4). Judge Barkdull, writing in dissent, found that King had failed to state a cause of action for intentional or reckless infliction of emotional distress. Judge Barkdull based his decision upon the reasoning enunciated by Judge Davis in the federal action, quoting Judge Davis' opinion on plaintiffs' intentional tort claims, in its entirety. 536 So.2d at 1028-1030. (A. 6-8). The Third District Court of Appeal also unanimously ruled that King had failed to state a cause of action under the Warsaw Convention, finding that "emotional distress alone" is not compensable under Warsaw. 536 So.2d at 1028. (A. 6).

The Third District then set the appeal for rehearing en banc on the issue of whether King's amended complaint stated a cause of action for "infliction of emotional distress" under Florida law. 536 So.2d at 1032. (A. 10). Subsequently, the Third District again concluded, this time en banc, that the facts pled by King were sufficient to state a claim for intentional or reckless infliction of emotional distress. The decision was 5 to 3. King v. Eastern Airlines. Inc., 536 So.2d at 1032-1037. (A. 10-15).

Chief Judge Schwartz, in a dissenting opinion concurred in by Judges Barkdull and Jorgenson, stated that he thoroughly agreed with "Judge Barkdull's panel dissent and the decision of Judge Davis in In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307 (S.D. Fla. 1986), which, dealing with these very facts, held that there was no abstractly reckless conduct

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in Eastern's maintenance of the airplane."[3] 536 So.2d at 1034. (A. 12). Judge Schwartz further found:

> Even assuming, however, as the majority holds, that Eastern's conduct was indeed reckless, I would nevertheless hold that no claim may be stated under the doctrine set forth in Restatement (Second) of Torts § 46 (1965), as adopted by the supreme court in Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277 (Fla. 1985). This is because it is not enough under this rule, as the appellant and the majority seem to assume, that a defendant merely act "recklessly" and that that conduct is subsequently causally related to severe mental distress suffered by a particular plaintiff. To the contrary, the principles of § 46 require that the defendant's purportedly tortious activities be either intended to cause that mental distress or be undertaken with a reckless disregard of the known likelihood that it will occur.

King v. Eastern Airlines, Inc., 536 So.2d at 1034. (A. 12).

Additionally, the Third District, on motion for rehearing, reconsidered its ruling on King's claim for damages under the Warsaw Convention and substituted another opinion for its previous panel decision on the issue. A panel of the court again concluded that King failed to state a cause of action under the Warsaw Convention as "emotional distress alone is not compensable under the Warsaw Convention." King v. Eastern Airlines, Inc., 536 So.2d at 1031. (A. 9). The panel also further held that the unavailability of a cause of action under the Warsaw Convention did not preempt King's claim for

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[3] Judge Davis' ruling in the federal proceeding was appealed to the United States Court of Appeals for the Eleventh Circuit. There has been no decision from the Eleventh Circuit in this related proceeding. See In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, Case No. 86-5381 (11th Cir. filed May 28, 1986).

relief under Florida law. King V. Eastern Airlines, Inc., 536 So.2d at 1031-1032. (A. 9-10).

Eastern thereafter sought to invoke the discretionary jurisdiction of this Court on the basis of conflict.

ISSUES INVOLVED

I.

WHETHER THE THIRD DISTRICT ERRED IN REVERSING A JUDGMENT IN FAVOR OF EASTERN ON KING'S CLAIM UNDER FLORIDA LAW FOR INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS?

II.

WHETHER THE THIRD DISTRICT, AFTER HAVING PROPERLY FOUND THAT KING'S CAUSE OF ACTION FOR EMOTIONAL DISTRESS IS PRECLUDED UNDER THE WARSAW CONVENTION, ERRED IN RULING THAT KING MAY STILL ASSERT A CAUSE OF ACTION UNDER STATE LAW FOR EMOTIONAL DISTRESS?

SUMMARY OF THE ARGUMENT

I.

The Third District found that King's amended complaint stated a claim for intentional or reckless infliction of emotional distress under Florida law. This was error as King's amended complaint failed to state a cause of action for intentional or reckless infliction of emotional distress, as this tort has been defined under section 46 of the Restatement (Second) of Torts (1965), and as adopted by this Court in Metropolitan Life Insurance Company V. McCarson, 467 So.2d 277 (Fla. 1985). Section 46 provides, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." The conduct alleged in King's amended complaint was neither intentional nor outrageous.

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Even if King may only be asserting a claim for reckless infliction of emotional distress this does not relieve King of the obligation to allege intentional conduct on Eastern's part with knowledge that would lead a reasonable person to conclude that his conduct created a high degree of probability that emotional distress to King would follow. See Restatement (Second) of Torts §§ 46, 500. "Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended." Restatement (Second) of Torts § 500, comment b.

King's claim is based on the allegation that Eastern's records revealed at least a dozen prior instances of engine failures due to missing O-rings, "and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." (R. 43). The failure to institute appropriate procedures does not constitute willful or outrageous conduct and would not subject Eastern to liability for punitive damages. King did not allege in his amended complaint that Eastern failed to initiate any procedures to correct the O-ring problem, and King did not allege that there was any conscious or deliberate decision by anyone at Eastern to ignore the prior O-ring failures.

The fact that Eastern is a common carrier does not relieve King of the necessity of pleading an intentional tort in order to recover damages for emotional distress where there is no physical impact or injury. Even if Eastern owed King the highest duty of care, that duty cannot be used to transform a negligent act into an intentional act.

Because the acts alleged were neither intentional, outrageous, nor undertaken in deliberate disregard of a high degree of probability that emotional distress would result, the Third District erred in finding King had stated a claim under Florida law for intentional or reckless infliction of emotional distress.

II.

The Third District properly found that King's claim for damages for "emotional distress alone" are not compensable under the Warsaw Convention. The Third District erred, however, in ruling that King may still assert a claim for infliction of emotional distress under state law. This is because the Warsaw Convention exclusively governs King's claim for damages that are alleged to have been caused by an accident on an international flight. The rule is well-settled that the Warsaw Convention is exclusive where it applies. In the case at bar, the Convention applies to preclude recovery of damages for pure emotional distress. King's state law claim for emotional distress is, therefore, preempted by the Warsaw Convention because application of Florida law would conflict with the Convention and stand as an obstacle to accomplishing the Convention's goal of uniformity in regulation.

ARGUMENT

I.

THE THIRD DISTRICT ERRED IN REVERSING A JUDGMENT IN FAVOR OF EASTERN ON KING'S CLAIM UNDER FLORIDA LAW FOR INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS.

In the trial court King sought recovery of damages under Florida law for emotional distress, in a case where there was no physical

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impact and no physical manifestation of any emotional injury. King alleged three separate claims under Florida law in his amended complaint: breach of contract (Count I); negligence (Count 11); and entire want of care (Count 111). (R. 40-44). The trial court, citing Judge Davis' opinion in the companion federal litigation, entered judgment in favor of Eastern on all three claims under Florida law. (R. 107). King thereafter appealed to the Third District Court of Appeal.

On appeal King conceded that the trial court's decision was correct in regard to Count I for breach of contract and Count II for negligence. (**See** King's Initial Brief filed in the Third District, at pg. 3). King urged error, however, in regard to the trial court's entry of judgment in favor of Eastern on Count III of his amended complaint, which was captioned, "Eastern's Entire Want of Care." (R. 43). Under Count III King did **not** make a specific claim for "intentional or reckless infliction of emotional distress," although when his amended complaint was filed in June 1984, four District Courts of Appeal in Florida had recognized such a cause of action. See Dominguez v. Equitable Life Assurance Society of the United States, 438 So.2d 58 (Fla. 3d DCA 1983), approved, 467 So.2d 281 (Fla. 1985); Scheuer v. Wille, 385 So.2d 1076 (Fla. 4th DCA 1980); Food Fair. Inc. v. Anderson, 382 So.2d 150 (Fla. 5th DCA 1980); Ford Motor Credit Company v. Sheehan, 373 So.2d 956 (Fla. 1st DCA), cert. dismissed, 379 So.2d 204 (Fla. 1979).

In Count 111, King realleged the allegations of breach of contract and negligence contained in Counts I and 11, and further alleged:

> 18. EASTERN's acts in failing to properly inspect, maintain and operate its aircraft on Flight No. 855 on May 5, 1983, constituted an entire want of care or attention to its duty and showed great indifference to the persons, property and rights of the plaintiff. More particularly, EASTERN's records reveal at least one dozen prior instances of engine failures due to missing O-rings, and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge.
>
> 19. EASTERN's entire want of care or attention to duty and great indifference to the persons property and rights of the plaintiff reasonably implies such wantonness, willfulness, and malice as would justify punitive damages.

(R. 43).

The Third District Court of Appeal ruled that King had stated a claim under Florida law for intentional or reckless infliction of emotional distress. King v. Eastern Airlines, Inc., 536 So.2d 1023, 1031 (Fla. 3d DCA 1988). (A. 1, 9). The ruling of the Third District was error as King's amended complaint did not allege the requisite facts to support a cause of action for intentional or reckless infliction of emotional distress. The decision of the Third District that King had stated a claim for intentional or reckless infliction of emotional distress conflicts with the definition of this tort, as adopted by this Court in Metropolitan Life Insurance Company v. McCarson, 467 So.2d 277 (Fla. 1985). See also, Scheller v. American Medical International Inc., 502 So.2d 1268 (Fla. 4th DCA), rev. denied, 513 So.2d 1060 (Fla. 1987); Ponton v. Scarfone, 468 So.2d 1009

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(Fla. 2d DCA), *m.* denied, 478 So.2d 54 (Fla. 1985); Kent, III v. Harrison, 467 So.2d 1114 (Fla. 2d DCA 1985).

In Metropolitan Life Insurance Company v. McCarson, 467 So.2d at 278-279, this Court recognized a cause of action for intentional infliction of emotional distress based on section 46 of the Restatement (Second) of Torts (1965), which provides that:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Judge Davis, in the related federal action, examined the allegations of Count III based on section 46 of the Restatement when he ruled that the plaintiffs' complaints did **not** state a cause of action for intentional or reckless infliction of emotional distress under Florida law. In re Eastern Airlines, Inc., Engine Failure. Miami International Airport on May 5, 1983, 629 F.Supp. 307 (S.D. Fla. 1986). (A. 16). Relying on McCarson, Judge Davis specifically found:

> In the instant suit, Count III realleges the previous counts for breach of contract and negligence and alleges that EASTERN acted with an "entire want of care" or that the subject incident was caused by the **"outrageous** and willful misconduct" of EASTERN. The facts alleged in support of these claims include EASTERN's alleged failure to properly inspect, maintain, and operate its aircraft. More particularly, it is alleged that EASTERN's records reveal at least one dozen prior instances of engine failure due to missing **"O-rings,"** yet, EASTERN failed to cure the problem.
>
> This last allegation is, perhaps, the Plaintiffs' strongest attempt to allege some type of scienter on the part of EASTERN. The Court finds, however, that the allegations contained in the Complaints, assuming their truth, do not support the

> contention that EASTERN AIRLINES acted "intentionally or recklessly" as required to state a cause of action for intentional infliction of emotional distress. There are no facts alleged to support the claim that EASTERN is guilty of "outrageous and willful misconduct."

629 F.Supp. at 311. (A. 20). Judge Davis' decision is on point and highly convincing.

The allegations of King's amended complaint are insufficient to state a cause of action for intentional or reckless infliction of emotional distress because King never alleged that Eastern acted with an intent to injure, and King never alleged that Eastern deliberately engaged in conduct that was substantially certain to result in injury or death. See Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986). An inadvertent failure to act, or actions which are simply insufficient to cure a problem, cannot form the basis for an intentional tort.

In Fisher, the personal representative of an employee's estate brought a wrongful death action against the employer, Shenandoah. The personal representative claimed that although the Florida Workers' Compensation Act provided the exclusive remedy for injury or death arising out of employment, the Act should not apply to intentional torts of the employer. The complaint alleged that Shenandoah required the decedent to enter pipes, which it knew contained noxious fumes and which would "in all probability" cause injury or death. The complaint further alleged that Shenandoah failed to provide its employees with safety equipment and failed to comply with OSHA regulations. In addition, the complaint alleged that Shenandoah willfully and wantonly required its employees to deliberately evade OSHA safety inspections

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so as to prevent the company from being cited for safety violations. This Court ruled, that even assuming the allegations of the complaint to be true, the conduct of Shenandoah did not constitute an intentional tort. This Court stated:

> In order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death. Spivey V. Battaslia, 258 So.2d 815 (Fla. 1972); Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex. 1985). A strong probability is different from substantial certainty and cannot constitute intentional wrongdoing. Restatement (Second) of Torts § 500 comment f (1965). The complaint involved here does not allege such virtual certainty on the part of Shenandoah; rather, it speaks only in terms of probable injury. Such an allegation is insufficient in light of the strict interpretation that must be given to the definition of intentional tort....In the words of Prosser,
>
> > [T]he mere knowledge and appreciation of a risk - something short of substantial certainty - is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but is not an intentional wrong.
>
> Prosser & Keeton on Torts 36 (W. Keeton 5th ed. 1984) (footnote omitted). Because Shenandoah's conduct does not rise to the level of intentional wrongdoing, we do not reach the question of whether such an intentional tort would fall outside the scope of the act.

Fisher v. Shenandoah General Construction Co., 498 So.2d at 883-884.

The fact that King may only be asserting a claim for reckless infliction of emotional distress does not relieve King from the burden of alleging intentional conduct on the part of Eastern. As the Third

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District held in Dominquez v. Equitable Life Assurance Society of the United States, 438 So.2d at 58, an essential element of a cause of action under Section 46 of the Restatement (Second) of Torts is that "the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result." [Emphasis added]. 438 So.2d at 59. The Restatement (Second) of Torts makes it clear that in order to be reckless, conduct must be intended by the actor. The difference between intentional infliction of emotional distress and reckless infliction of emotional distress is that in the case of intentional infliction, the actor intends not only to act, but also intends to cause emotional distress. In the case of reckless infliction, the actor must intend to act, but it is not necessary that the actor intend to cause emotional distress only that he has acted in deliberate disregard of a high degree of probability that emotional distress would follow.

Comment i of section 46 of the Restatement (Second) of Torts discusses intention and recklessness as follows:

> The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow. [Emphasis added].

Section 500 defines "Reckless Disregard of Safety" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason

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> to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [Emphasis added].

Restatement (Second) of Torts § 500 (1965).

Comment a to section 500 describes types of reckless conduct as follows:

> Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know.. .of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> * * *
>
> For either type of conduct, to be reckless it must be unreasonable: but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

Emphasizing that reckless conduct must be intended, comment b to section 500 provides, in part:

> Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others. [Emphasis added].

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Intentional misconduct and recklessness are contrasted in comment f as follows:

> Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results. [Emphasis added].

Restatement (Second) of Torts § 500, comment f.

Finally, negligence and recklessness are contrasted in comment g, as follows:

> Reckless misconduct differs from negligence in several important particulars. It differs from that form of neslisence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that neslisence which consists in intentionally doing an act with knowledse that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially sreater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind. [Emphasis added].

Restatement (Second) of Torts § 500, comment g.

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In order, therefore, to allege reckless infliction of emotional distress, a party must at least allege facts which show: (1) an intentional act or failure to act: (2) with knowledge of facts which would lead a reasonable person to realize: (3) that his conduct created a high degree of probability that emotional distress to the plaintiff would follow. Restatement (Second) of Torts § § 46, 500. In the case at bar, the amended complaint is devoid of any such allegations. King did not allege that Eastern acted intentionally, nor did he allege that Eastern intentionally failed to take any action whatsoever in response to prior problems with O-rings. Further, King did not allege that Eastern intentionally acted or failed to act with knowledge or having reason to know that there was a high degree of probability that emotional distress to King would follow. The amended complaint asserts that, "EASTERN's records reveal at least one dozen prior instances of engine failures due to missing O-rings, and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." [Emphasis added]. (R. 43). These allegations fall far short of what is required to allege recklessness.

As Judge Schwartz explains in his dissent, "Since it is inconceivable that Eastern's alleged negligence, even if recklessly accomplished, was undertaken in knowing, intentional or wanton disregard of the likelihood that the plaintiff would be mentally harmed, I conclude that no § 46 claim can possibly be asserted." King v. Eastern Airlines. Inc., 536 So.2d at 1034. (A. 12).

Judge Schwartz criticized the majority opinion on this point as follows:

> The decisions upon which they do rely, as collected, for example in note 4 of Judge Baskin's opinion, involve activity in which the actor deliberately engages and which he either intends or recklessly disregards the known likelihood of its causing severe mental distress. As I have endeavored to establish, that is not true here.
>
> In essence, the majority view amounts to establishing an exception to the recently reaffirmed "impact rule," Brown v. Cadillac Motor Car Div., 468 So.2d 903 (Fla. 1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted," or physically injured by a product - like a Mustang or a Dalkon Shield - which may have been recklessly manufactured.

536 So.2d at 1036-1037. (A. 14-15). We adopt Judge Schwartz's analysis.

In addition, the Restatement's definition of "Reckless Disregard of Safety" is consistent with definitions of recklessness contained in Florida cases dealing with punitive damages. Restatement (Second) of Torts § 500 and comments thereto. Accepting as true the allegation of King's amended complaint that Eastern "failed to institute appropriate procedures to cure" the O-ring problem, that conduct does not even rise to the level necessary to support an award of punitive damages under Florida law. See White Construction Co., Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984).

In White Construction Co., Inc. v. Dupont, 455 So.2d at 1026, this Court clarified the standards for punitive damages under Florida

law and reiterated that something more than gross negligence is necessary to justify the imposition of punitive damages. The White Construction case arose out of a collision between a loader and a tractor-trailer. The driver of the tractor-trailer sued the owner of the loader for negligence, claiming compensatory and punitive damages. In holding that punitive damages could not be recovered as a matter of law, this Court stated:

> The evidence in this case showed that the loader's brakes had not been working for some time, and that the petitioners were aware of this fact. Although this evidence would be sufficient to show that the petitioners were negligent, it is not sufficient, as a matter of law, to submit the issue of punitive damages to the jury. This Court has previously stated the degree of negligence necessary to support an award of punitive damages in a civil case in Carraway v. Revell, 116 So.2d 16 (Fla. 1959).
>
> * * *
>
> In Carraway we made it clear that something more than gross negligence is needed to justify the imposition of punitive damages:
>
> > [G]ross negligence...is that kind or degree of negligence which lies in the area between ordinary negligence and wilful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages....
>
> 116 So.2d at 22. This Court agreed with the district court "'that the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages.'"

455 So.2d at 1028. This Court delineated the standard that must be met in order to justify the imposition of punitive damages as follows:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless

> disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

455 So.2d at 1029 (quoting Carrawav v. Revell, 116 So.2d at 20, fn. 12).

In the case at bar, King failed to allege any conduct on the part of Eastern that was wanton or reckless, and King failed to allege any facts which would demonstrate a conscious or reckless indifference to the rights of others. The fact that Eastern's procedures were not "appropriate" to cure the O-ring problem falls far short of the conduct necessary to support an award of punitive damages and, therefore, falls far short of the conduct necessary to state a cause of action for intentional or reckless infliction of emotional distress.

The facts in White Construction are worse than the facts involved in the case at bar, and yet in White Construction, this Court held, as a matter of law, that the defendant's conduct was not reckless. In White Construction, the defendant knew that the brakes on a forty ton loader had not been working for some time. Defendant did nothing to correct the problem, and knowingly continued to operate the loader without brakes at a mining site where people were working. The forty ton loader rolled over the plaintiff, Dupont, causing permanent physical injuries. In the case at bar, King never alleged that Eastern did nothing to correct its maintenance procedures, and King

never alleged that Eastern knowingly failed to institute appropriate procedures to correct its maintenance problem. Based on White Construction, Eastern's conduct cannot be characterized as reckless.

This Court revisited the issue of punitive damages in Chrysler Corporation v. Wolmer, 499 So.2d 823 (Fla. 1986). In that case, the Court held that punitive damages could not be recovered against an automobile manufacturer on "a claim that a motor vehicle was insufficiently crashworthy when precautions had been taken to insure its crashworthiness." 499 So.2d at 826.

There are also number of decisions from the District Courts of Appeal of Florida, where recovery of punitive damages has been denied, in circumstances similar to or worse than the facts alleged in the case at bar. See, e.g. Jeep Corporation v. Walker, 528 So.2d 1203 (Fla. 4th DCA 1988); Ten Associates v. Brunson, 492 So.2d 1149 (Fla. 3d DCA), rev. denied, 501 So.2d 1281 (Fla. 1986); Gerber Children's Centers, Inc. v. Harris, 484 So.2d 91 (Fla. 5th DCA 1986); Louisiana-Pacific Corp. v. Mims, 453 So.2d 211 (Fla. 1st DCA 1984); Mobil Oil Corporation v. Patrick, 442 So.2d 242 (Fla. 4th DCA 1984); Cloney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1977).

In Gerber Children's Centers, Inc. v. Harris, 484 So.2d at 91, punitive damages were claimed in a case where a two-year old child fell through a plate glass window at a day care center and was severely cut. The evidence showed that in the Center's "toddler room" there was a window located a foot above the floor. Originally, the window contained safety glass and was covered by a protective screen. Due to vandalism, the window was repeatedly broken, and the metal

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around the protective screen became bent. The safety glass in the window was replaced by ordinary glass and the protective screen was not replaced. The Center's management was warned by various employees of the danger to children posed by the window and the necessity for extra-strength glass. Nevertheless, the Center relied instead upon barriers (tables, rockers, etc.), placed in front of the window. On the date of the accident, there was no protective screen on the window and there were no barriers in front of it.

In Gerber, the Center's procedure was clearly inadequate and the Center was warned of the danger posed to young children by the window. The court, relying upon White Construction, 455 So.2d at 1026, held that the facts would not support an award of punitive damages and stated:

> We cannot distinguish White. Failure to insulate small children from access to a window with ordinary, as opposed to safety, glass cannot be more flagrant and reckless than knowingly operating an 80,000 pound loader at top speed with no brakes in an area where people are working. In White the Florida Supreme Court reaffirmed its pronouncement in Carraway, "that the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages." White at 1028; Carrawav at 20. The operative question, then, is whether we would sustain a manslaughter conviction in the instant case against the management agents of Gerber had Harris died from the cuts received in his fall. The answer is no.

484 So.2d at 92.

In Mobil Oil Corporation v. Patrick, 442 So.2d at 242, the Fourth District Court of Appeal found there was no basis for an award of punitive damages in a case where a man was injured when he was doused with gasoline at a gasoline truck loading facility operated by Mobil

Oil. The evidence showed that prior to the incident in question, Mobil installed new truck loading equipment, which was designed to shut off automatically after feeding a specified number of gallons of gasoline into a tanker truck. After installation of the new equipment, it was noticed that the automatic valves sometimes malfunctioned, resulting in overfilling or underfilling of the tanks. The manufacturer of the valves advised Mobil to temporarily take the pumps out of service to fix the problem. Instead, Mobil had the manufacturer's representative attempt to adjust the valves, and tried to negotiate with the manufacturer and local mechanics to get the best price for the necessary repairs. 492 So.2d at 243.

The evidence also showed that Mobil's trucks contained their own overflow valves to prevent gasoline spills in the event the pump loading valves malfunctioned, however, the trucks' valves also experienced malfunctions. The plaintiff, Patrick, was doused with gasoline when the loading valve and the overflow valve both malfunctioned while a gasoline truck was being loaded. The evidence showed that neither Patrick nor his employer were warned of the danger of oil spills, despite the fact that as many as "fifteen overflows" had previously occurred. [Emphasis added]. 492 So.2d at 243. The court concluded that punitive damages were inappropriate because negligence alone, and even gross negligence, could not be the basis for an award of punitive damages. Mobil Oil Corporation v. Patrick, 442 So.2d at 243-244.

In Ten Associates v. Brunson, 492 So.2d at 1149, a suit was brought by the victim of a sexual assault and her parents against the

owners of the apartment complex where the assault occurred. Plaintiffs alleged that security measures undertaken at the complex were insufficient and claimed compensatory and punitive damages. The complex was located in a high crime area and during the thirteen months preceding the assault on plaintiff, "more than sixty incidents at the complex were reported to the police." [Emphasis added]. **492** So.2d at 1150. In regard to security at the complex, the evidence showed that after Ten Associates bought the complex, it hired and fired a succession of private security companies. Ten Associates then set up its own security system, which also had problems. None of the guards had any formal training in security. In holding that the conduct of the apartment owner was not reckless as a matter of law, the court stated:

> [W]e find that, as a matter of law, the jury's award of punitive damages was improper. The evidence showed that Ten Associates was negligent. However, there was no showing of any willful and wanton misconduct by Ten Associates which would support the punitive damage award. Ten Associates did make an attempt to provide security and a security guard was on duty at the time of the incident. Ten Associates also attempted, albeit unsuccessfully, to rectify the problems at the complex by focusing its efforts toward rehabilitation of the apartments. Although Ten Associates' security efforts were insufficient, its actions do not rise to the level of willful and wanton misconduct which would support a criminal manslaughter conviction. Accordingly, the award of punitive damages is Reversed.

Ten Associates v. Brunson, **492** So.2d at 1152. In the case at bar, because Eastern attempted, albeit unsuccessfully, to correct the O-ring problem, Eastern's conduct was not, as a matter of law, reckless.

Based on the decisions cited above, particularly White Construction, Ten Associates, Gerber Children's Center and Mobil Oil Corporation, King has failed to allege any reckless conduct on the part of Eastern. King has not alleged any deliberate or intentional conduct on the part of Eastern or its employees: King has not alleged that Eastern did nothing to correct its maintenance procedures; and King has not alleged that Eastern knowingly failed to institute appropriate procedures to correct a maintenance problem.

Furthermore, in order to state a cause of action for reckless infliction of emotional distress, it is necessary for King to not only allege facts showing reckless conduct, but to also allege facts showing extreme and outrageous conduct.[4] See Metropolitan Life Insurance Company v. McCarson, 467 So.2d at 278-279 (adopting comment d to section 46 of the Restatement (Second) of Torts). Comment d provides in part:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the

[4] "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Restatement (Second) of Torts § 46, comment h; see also In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307, 311 (S.D. Fla. 1986). (A. 16, 20).

> facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

In the case at bar, the facts pled do not even rise to the level necessary to state a claim for punitive damages, and there are no facts alleged showing an intent to harm, or aggravated or criminal misconduct. The conduct alleged on the part of Eastern is, therefore, neither reckless nor extreme and outrageous.

The fact that Eastern is a common carrier does not alter the fact King failed to state a cause of action for intentional or reckless infliction of emotional distress. King argued in the Third District that Eastern had a duty to exercise the "highest degree of care" for the safety of its passengers. (See King's Initial Brief filed in Third District, at pg. 4). That duty is simply the duty to exercise reasonable care under the circumstances. In some instances that may be a high degree of care and in other instances it may be something less. Rindfleisch v. Carnival Cruise Lines. Inc., 498 So.2d 488, 490 (1986), rev. denied, 508 So.2d 15 (Fla. 1987). Even an elevated duty of care cannot transform conduct that is inadvertent into conduct that is intentional. Recklessness requires the existence of a particular state of mind. In order to be reckless a person must intentionally act or fail to act with knowledge of facts which would lead a reasonable person to realize that his conduct created a substantial risk of harm. A higher duty of care cannot have the effect of creating a state of mind which never existed.

King also contended before the Third District that liability should be premised on the existence of a "special relationship"

between the passenger and carrier. (See King's Initial Brief filed in Third District, at pg. 4). The cases which have recognized the existence of a "special relationship" have done so for the purpose of imposing vicarious liability on a carrier for the intentional torts of an employee. See Nazareth v. Herndon Ambulance Service, Inc., 467 So.2d 1076 (Fla. 5th DCA), rev. denied, 478 So.2d 53 (Fla. 1985); Commodore Cruise Line, Ltd. v. Kormendi, 344 So.2d 896 (Fla. 3d DCA), cert. denied, 352 So.2d 172 (Fla. 1977). In Nazareth, for instance, the Fifth District Court of Appeal recognized the general rule that an employer is not vicariously liable for the intentional torts of an employee. The court also recognized that there were exceptions to the rule where a "special relationship" existed, such as that of common carrier and passenger. A common carrier, therefore, may be held vicariously liable for intentional torts of an employee. Nazareth, 467 So.2d at 1078. That rule of vicarious liability has no application to the case at bar. King has never alleged that there was any intentional misconduct on the part of Eastern's employees.

Similarly, section 48 of the Restatement (Second) of Torts (1965), also cited by King in the Third District, has no application to the case at bar. (See King's Initial Brief filed in Third District, at pg. 4). Section 48, entitled "Special Liability of Public Utility for Insults by Servants," is a rule of vicarious liability, which makes a carrier liable to passengers for deliberate insults by employees. [Emphasis added]. Clearly, that rule of vicarious liability has no application to the instant case where King

has attempted to allege liability on the part of Eastern for an intentional tort.

King also argued on appeal that he should be permitted to recover, given the peculiar helplessness of a passenger on a commercial airliner, citing comment f to section 46 of the Restatement (Second) of Torts. (See King's Initial Brief filed in Third District, at pg. 4). That condition does not, however, relieve King from the requirement of alleging an intentional act or omission. Dominsuez v, Equitable Life Assurance Society of the United States, 438 So.2d at 58, upon which King relied below, is factually distinguishable from the case at bar. In Dominsuez, an insurance adjuster, knowing that an insured was mentally and physically disabled, intentionally misrepresented facts to the insured about his insurance coverage, and cut off further benefits to the insured. In Dominsuez, unlike the case at bar, there was intentional misconduct on the part of defendant which was extreme and outrageous and justified a finding of intentional infliction of emotional distress.

Because King failed to allege any intentional misconduct on the part of Eastern with knowledge of facts that would lead a reasonable person to conclude that there was a high degree of probability that emotional distress to King would follow, King failed to state a cause of action for intentional or reckless infliction of emotional distress. Based on the foregoing, the decision of the Third District Court of Appeal should be quashed and the decision of the trial court in favor of Eastern should be reinstated.

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II.

AFTER HAVING PROPERLY CONCLUDED THAT KING'S CAUSE OF ACTION FOR EMOTIONAL DISTRESS IS PRECLUDED UNDER THE WARSAW CONVENTION, THE THIRD DISTRICT ERRED IN RULING THAT KING COULD STILL ASSERT A CAUSE OF ACTION UNDER STATE LAW FOR EMOTIONAL DISTRESS.

In the case at bar, the trial court, relying on Judge Davis' opinion in the related federal action, entered judgment in favor of Eastern on King's claim for emotional distress under the Warsaw Convention. (R. 107). King appealed this ruling and a panel of the Third District Court of Appeal, unanimously concluded "that emotional distress alone is not compensable under the Warsaw Convention." King v. Eastern Airlines, Inc., 536 So.2d at 1031. (A. 9). The panel went on to rule, however, that the Warsaw Convention did not preempt King's claim under state law for emotional distress. King V. Eastern Airlines. Inc., 536 So.2d at 1031-1032. (A. 9-10).

Eastern wholeheartedly agrees with the portion of the panel's decision that emotional distress alone is not compensable under Warsaw. Eastern emphatically disagrees, however, with the balance of the panel decision as to whether the Warsaw Convention preempts King's claim under state law. This is because King's claim is exclusively governed by the Warsaw Convention and since the Warsaw Convention

precludes King's claim, King's cause of action, if any, under state law is preempted.[5]

It is undisputed that Flight 855 from the United States (Miami, Florida) to the Bahamas (Nassau) was in international transportation. This case is, therefore, governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C.A. § 1502 (hereinafter referred to as the "Warsaw Convention" or the "Convention.") (A. 27). Both the United States and the Bahamas are High Contracting Parties to the Convention. See Speiser & Krause, Aviation Tort Law, § 11.23, p. 694 (1980). Because the history of the Warsaw Convention is relevant in analyzing Eastern's exclusivity argument, Eastern presents the Court with a background discussion on the Convention.

A. THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT.

The Convention is a treaty governing international aviation to which more than 120 nations now adhere. The Convention's primary purposes are to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. Trans

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[5] This issue was not raised by Eastern in its brief on conflict juridiction. This Court, however, may consider this issue, because once it takes jurisdiction on the basis of conflict, it may decide all issues in the case. See Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985).

Needless to say, if this Court finds that King has not stated a cause of action for intentional or reckless infliction of emotional distress under Florida law, the question of whether the Warsaw Convention preempts King's state law claim need not be considered by this Court.

World Airlines v. Franklin Mint Corporation, 466 U.S. 243, 104 S.Ct. 1776, 1780, 80 L.Ed.2d 273 (1984).

Article 17 of the Convention creates a presumption of liability on the part of the aircraft carrier. (A. 28). The presumption of liability on the part of the carrier, however, is not absolute. Article 20 of the Convention does permit the carrier to raise "due care" defenses. (A. 30). The effect of Articles 17 and 20 is to shift the burden of proof to the defendant carrier to demonstrate an absence of liability.

The Convention also places monetary limits on the carrier's liability. Article 22(1) provides:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(A. 31).

Because of dissatisfaction in the United States with the Convention's low limits of liability, (approximately $8,300 U.S.) on November 15, 1965, the United States gave notice of denunciation of the Convention. 31 Fed. Reg. 7302 (1966). (A. 42-46).

To avoid U.S. withdrawal from the Warsaw system, the major international air carriers, at the urging of the U.S. State Department, met in Montreal and entered into a voluntary arrangement, pursuant to article 22, increasing their liability limits for flights

serving the United States. This arrangement became known as the "Montreal Agreement." (A. **37-41).**

In the Montreal Agreement, the signatories agreed to include within their conditions of carriage and tariffs a provision raising the liability limit to $75,000 on international flights serving the U.S. The parties further agreed to include a provision waiving the right to assert the "due care" defense of Article 20, "with respect to any claims arising out of the death, wounding or other bodily injury to a passenger..." (A. **37-41).** See also Day v. Trans World Airlines, 528 F.2d **31, 36** (2d Cir. **1975),** cert. denied, **429** U.S. **890 (1976).**

B. KING'S USE OF ACTION S EXCI GOVERNED BY E WARSAW NVENT

The provi of the tion i legislative history n case law support Eastern's contention that King's cause of action is exclusively governed by the Convention.

1. PROVISIONS OF THE CONVENTION.

The preamble to the Convention declares the signatories intent as "regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." [Emphasis added]. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, **1929. 49** Stat. **3000,** T.S. No. 876 **(1934),** reprinted in note following **49** U.S.C.A. **§ 1502** (Warsaw Convention).

Article 1(1) of the Convention provides that:

> This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire.

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(A. 27).

Article 17, the relevant liability provision in the case at bar, provides that:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

(A. 28).

Article 24, which is extremely significant in the case at bar, provides that:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

(A. 32).

Based on the foregoing, it is clear that a primary purpose of the Warsaw Convention is to provide uniform regulation of an air carrier's liability. In particular, Article 24 provides that any action may only be brought subject to conditions and limits set out in the Convention. (A. 32).

It is also significant that in any instance where it was intended that local law should apply, the Convention contains specific provisions to that effect. See Article 21 (contributory negligence); Article 24(2) (standing of and allocation among survivors); Article 25

(fault equivalent to willful misconduct); Article 28 (procedure); and Article 29 (running of the statute of limitations). (A. 30-35).

Article 17, on the other hand, contains no reference whatsoever to application of local law. Clearly, if the signatories had intended that local law should apply to Article 17, they would have made such a provision. (A. 28).

2. LEGISLATIVE HISTORY.

It is evident, not only from the terms of the preamble and the Convention itself, but also from its legislative history, that a primary purpose of the Warsaw Convention is to provide a uniform body of rules governing international air travel.[6]

Throughout the Minutes of the Convention, there are numerous statements demonstrating that local law should **not** apply, except in those few instances where specific reference to local law is made. Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw (translated by R. Horner and D. Legrez, 1975) ("Minutes").

For instance, at the very beginning of the conference in Warsaw, the Japanese delegation proposed an amendment that would permit individual countries, by legislation, to lower the liability limits set forth in the Convention. Minutes, p. 34-36. In expressing his displeasure with the proposed amendment, Mr. DeVos, the Reporter, stated:

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[6] In interpreting the Warsaw Convention it is proper to refer to its drafting and negotiation. Air France v. Saks, 470 U.S. 392, 105 S.Ct. 1338, 1343, 84 L.Ed.2d 289 (1985).

> The opinion of your Reporter is very clear and very brief: It is absolutely impossible to accept this amendment; it would be to overturn completely the essence of the present draft, which is a compromise, and of which one of the premier principles is the prohibition of exoneration clauses.

Minutes, p. 35.

Also speaking against the amendment was the delegate from Great Britain, Sir Alfred Dennis, who stated:

> As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity. If the conference adopts the point of view of Japan, we miss the point. The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity.

Minutes, p. 35-36. The amendment was rejected unanimously, less one vote (that of the Japanese Delegation). Minutes p. 36.

While the final draft of the Warsaw Convention does contain some provisions requiring reference to local law, it is clear from the Minutes that those references occurred as a matter of compromise. It is also clear that the drafters did not intend that local law should be applied to an article of the convention, unless specified in that article. Thus, in discussing a proposal that vicarious liability be determined in accordance with the law of the country where a contract was entered into, Mr. Ripert, a member of the French delegation stated:

> We will do our best to find the formula which will be satisfactory, but it is agreed that, from this point on, we are absolutely opposed to a formula that would lead to the application of national law. It's the first time that application of national law is required, and if it were allowed for this question, it would be required for

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> others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article.

Minutes, p. 66.

Also of significance is the discussion surrounding adoption of Article 24 of the Warsaw Convention. In discussing that article, Sir Alfred Dennis, of Great Britain stated:

> We have at the beginning of the article: "...any liability action however founded can only be brought under the conditions and limits provided for by the present Convention".
>
> It's a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law....

Minutes, p. 213.

While there is little discussion in the Minutes of Article 17, both the United States Supreme Court, in Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed.2d 289 (1985), and the United States District Court for New Mexico, in Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D. N.M. 1973), attached significance to the negotiating history of Article 17. In both cases, the courts noted the broad language of the predecessor to Article 17, which was drafted at an international conference in Paris in 1925. That draft provided:

> "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage...."

Air France v. Saks, 105 S.Ct. at 1343. That protocol was revised several times by a group of air law experts, and then submitted to the Second International Conference on Private Aeronautical Law in Warsaw in 1929. The draft submitted at Warsaw provided:

> The carrier shall be liable for damage sustained during carriage:
>
> > (a) in the case of death, wounding, or any other bodily injury suffered by a traveler:
> >
> > (b) in the case of destruction, loss, or damage to goods or baggage:
> >
> > (c) in the case of delay suffered by a traveler, goods, or baggage.

Air France v. Saks, 105 S.Ct. at 1343, citing International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 264-265 (R. Horner & D. Legrez trans. 1975).

In Burnett v. Trans World Airlines, Inc., the court considered the cited drafts and concluded:

> By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

368 F. Supp. at 1157.

3. CASE LAW.

A number of courts have held that the Warsaw Convention's limitation of liability and theory of liability is exclusive when it applies, i.e., when there is an accident, as that term is used in Article 17. As found by the United States District Court for the Southern District of Florida in the related federal action, the loss of engines on Flight 855 constituted an "accident." In re Eastern Airlines, Inc., Engine Failure, Miami International Airport. on May 5,

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1983, 629 F.Supp. at 312; see also, Weintraub v. Capital International Airways, Inc., 16 CCH Av. Cas. 18,058 (N.Y. Sup. Ct., 1st Dept. 1981) (testimony that "sudden dive" leading to pressure change is an "accident" under Article 17), cited in Air France v. Saks, 105 S.Ct. at 1345-46.

The rule is well-settled in the United States Court of Appeals for the Second Circuit that the Warsaw Convention exclusively governs claims for injuries sustained during international air transportation. Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) ("uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action.")[7] Similarly, the Court of Appeals for the Eleventh and the Fifth Circuits have held that the Warsaw Convention creates the exclusive cause of action and is the exclusive remedy. St. Paul Insurance Co. of Illinois v. Venezuelan International Airways, Inc., 807 F.2d 1543, 1546 (11th Cir. 1987)

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[7] When the first suits were filed in the U.S. arising out of accidents in international air transportation, courts ruled that the Warsaw Convention did not create a cause of action for loss or injuries sustained on an international flight. Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir.), cert. denied, 431 U.S. 974 (1977); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957). Subsequently, the United States Court of Appeals for the Second Circuit did an about face in 1978, and held in the case of Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979), that the Warsaw Convention created a separate and independent cause of action. The Benjamins decision was followed by the Ninth Circuit in In re Mexico City Aircrash, 708 F.2d 400 (9th Cir. 1983), and by the Fifth Circuit in Boehringer-Mannheim Diagnostics v. Pan American World Airways, 737 F.2d 456 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985).

("Warsaw Convention creates the cause of action...and is the exclusive remedy"); Highlands Insurance Company v. Trinidad and Tobaso (BWIA International) Airways Corporation, 739 F.2d 536, 537, fn. 2 (11th Cir. 1984) ("Warsaw Convention preempts local law in areas where it applies"); Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 458 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985) (Warsaw Convention creates the cause of action and is the exclusive remedy); see also In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980, 535 F. Supp. 833, 844-845 (E.D. N.Y. 1982), aff'd, 705 F.2d 85 (2d Cir.), cert. denied, 464 U.S. 845, (1983) (Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation); Diaz Luso v. American Airlines, Inc., 686 F.Supp. 373, 376 (D. P.R. 1988) ("The convention's limitation and theory of liability are exclusive when, as here, all of Article 17 conditions have been met.")

In Boehringer, the Fifth Circuit Court of Appeals held that:

> The essential inquiry is whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law. We have not previously addressed this question. We hold today that the Warsaw Convention creates the cause of action and is the exclusive remedy. Our colleagues of the Second and Ninth Circuits previously have so concluded, Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983), reversing positions they had earlier taken.

737 F.2d at 458.

In the case of In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980, 535 F.Supp. at 844-845, the court stated:

> Contrary to plaintiffs' final argument, the Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under California law. The Warsaw Convention, a treaty of the United States and, therefore the "supreme law of the land, equal in stature and force to the domestic laws of the United States," Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 801 (2d Cir. 1971), provides that "[t]he carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger" (Article 17) and that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention...without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." (Article 24) A number of authorities have agreed that the Convention was intended to act as an exclusive remedy for the recovery of damages for personal injury suffered in an international airplane accident, **see**, e.g., Reed v. Wiser, supra, and that the language of Article 24 was included specifically for the purpose of preventing the institution of independent claims outside the sphere of the Convention. H. Drion, Limitation of Liabilities in International Air Law 71-72 (1954). Article 24, along with the Article 22 limitation of liability of a carrier, would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under California law. On the contrary, the purpose of the Convention to regulate in a uniform manner the liability conditions of a carrier engaged in international transportation by air would be defeated. ***See,*** e.g., Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114, 99 S. Ct. 1016, 59 L. Ed.2d (1979); Reed v. Wiser, supra.

In considering whether the Warsaw Convention is exclusive, some courts have drawn a distinction between an exclusive "cause of action"

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and an exclusive "remedy." See Rhymes v. Arrow Air. Inc., 636 F. Supp. 737 (S.D. Fla. 1986). The court in Rhymes held that the Warsaw Convention did not provide an exclusive cause of action, but did provide an exclusive remedy. The court, therefore, concluded that a cause of action based on the death of passengers arising out of a crash of an aircraft on an international flight could be brought under Florida law or under the Warsaw Convention. The court reached that conclusion because both state law and the Warsaw Convention permitted recovery of damages for wrongful death, and the causes of action under state and federal law were consistent.

In Rhymes, however, the court specifically held that any inconsistent provisions of state law would be preempted by the Warsaw Convention. The court stated:

> There is no question that when a state cause of action is in conflict with the provisions of the Convention the conflicting provision of the state action will be preempted by the applicable provisions of the Convention. Boehringer, supra.
>
> > The application of California law suggested here necessarily conflicts with the congressional scheme. Neither uniformity or effective limitation of the airlines liability could be achieved if the state law doctrines could be invoked to circumvent the application of the limitation. Accordingly we hold that the California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the convention's limitation on liability.
>
> In Re Aircrash in Bali Indonesia, 684 F.2d 1301, at 1308 (9th Cir. 1982). The Convention being a treaty of the United States is thus afforded supremacy over conflicting state law. Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920).

> A review of the cases leads to the conclusion that the Plaintiff may choose to state his cause of action solely on a state law theory and bring the action in state court subject to the limitations of the Convention. If the state law conflicts with the Convention, the Convention will preempt the portion of the state remedy that is in conflict.

636 F.Supp. at **741.**

In the case at bar, unlike the situation in Rhymes, a state law cause of action for emotional distress is absolutely inconsistent with the provisions of Article **17** of the Warsaw Convention, because Article **17** precludes recovery for emotional distress alone. King may not, therefore, assert a state law cause of action which is inconsistent with, and precluded by, Article **17** of the Warsaw Convention.

Based on the provisions of the Warsaw Convention, its legislative history, and the weight of case law, it is clear that where the Warsaw Convention applies, it exclusively governs claims for damages as a result of injuries caused by an accident in international air transportation. The Warsaw Convention applies in the case at bar because it is undisputed that the flight in question involved an "accident" which occurred in international transportation. The fact that an accident occurred during an international flight triggers application of the liability provisions of Article **17.** Article **17,** however, limits recovery to "damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger..." (A. 28). Because the claim asserted in the case at bar does not involve the "death or wounding of a passenger or any

other bodily injury," King's claim is precluded by the Warsaw Convention.

4. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL

In rejecting Eastern's argument that King's cause of action is exclusively governed by the Warsaw Convention, the Third District found Eastern was "correct in its assertion that the Warsaw Convention creates a cause of action which preempts all local remedies which are inconsistent with the Convention." King v. Eastern Airlines, Inc., 536 So.2d at 1031. (A. 9). The distinction the Third District failed to recognize, however, is that King's claim for intentional or reckless infliction of emotional distress, is inconsistent with the Convention. The decision of the Third District establishes this as a matter of law.

In King v. Eastern Airlines, Inc., 536 So.2d at 1031, the court specifically held that claims for "emotional distress alone" are "not compensable under the Warsaw Convention." (A. 9). Accord, In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. at 313-314 (A. 22-23); Burnett v. Trans World Airlines, Inc., 368 F.Supp. at 1157 ("Convention intended to narrow the otherwise broad scope of liability...and preclude recovery for mental anguish alone.").

In the Burnett case, the court specifically rejected plaintiff's arguments that state law should apply to their emotional distress claims, stating:

> The key phrase for interpretation is "bodily injury." Plaintiff has argued that since this is a removed action, state law controls in matters of substance, therefore compelling the court to look

> to the tort law of New Mexico to discover the scope of the phrase in controversy. To the contrary, however, the meaning of the Warsaw Convention is a matter of federal law. It is a sovereign treaty and as such is the supreme law of the land, preempting local law in the areas where it applies. United States Constitution, Art. VI, cl. 2; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971).

368 F.Supp. at 1155.

Because, as recognized by the Third District and other courts, the Warsaw Convention precludes recovery for mental distress alone, state law which is inconsistent with the terms of the Convention and contrary to the intent of the drafters may not be applied. King's claim for intentional or reckless infliction of emotional distress under Florida law is, therefore, preempted by the Warsaw Convention.

In order for this Court to find that King's state law claim is preempted by the Warsaw Convention, a treaty of the United States, it is not necessary to find an express preemption. Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d at 459; In re Aircrash in Bali, Indonesia on April 22. 1974, 684 F.2d 1301, 1307 (9th Cir. 1982). It is well established that federal law will impliedly preempt the application of state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)); In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d at 1307; see also Boehringer-

Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d at 459.

In ruling that King's state law claim for emotional distress is not preempted by the Warsaw, the Third District Court of Appeal relies on Hill v. United Airlines, 550 F.Supp. 1048 (D. Kansas 1982), and Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984), cert. denied, 470 U.S. 1059 (1985). Hill and Abramson, are both distinguishable from the case at bar because in both of these cases the courts determined that the plaintiffs' claims were totally outside the scope of the Warsaw Convention. In Hill v. United Airlines, passengers on an international flight had brought suit for intentional misrepresentation. In finding that the plaintiff passengers could recover under state law, the court stated: "Liability, if any, is predicated on defendant's commission of the tort of misrepresentation, a circumstance completely outside of the Warsaw Convention." 550 F.Supp. 1054. Similarly, in Abramson, the court found that plaintiff's injuries were caused by a pre-existing medical condition, not by an "accident," and, therefore, the Warsaw Convention did not apply. In reaching that conclusion, the court stated:

> All the other courts considering this issue have similarly concluded that the Warsaw Convention's limitation and theory of liability is exclusive when it applies (i.e., when there is an accident), but it does not preclude alternative theories of recovery. [Emphasis added.]

739 F.2d at 134.

By contrast, the claim presented in the case at bar is not outside the scope of the Warsaw Convention. The Convention clearly applies to claims for damages caused by an "accident" on an

international flight. It was clearly a primary purpose of the drafters of the Convention to regulate and limit an air carrier's liability for damages caused by an "accident," and the drafters limited that liability to "damage sustained in the event of the death or wounding of a passenger or any other bodily injury." Article 17. (A. 28).

The Third District also relies on In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983), in support of its decision that King's state law claim is not preempted by Warsaw. In that case, the Ninth Circuit, while agreeing with the Second and Fifth Circuits that the Warsaw Convention creates a cause of action, did not appear to regard the Warsaw Convention cause of action as being exclusive to all other remedies available under state or local law. See In re Mexico City Aircrash of October 31, 1979, 708 F.2d at 414, fn. 25. The decision of the Ninth Circuit is contrary, however, to the provisions of the Convention, its legislative history and the weight of case law.

A finding that the Warsaw Convention provides an exclusive cause of action in the case at bar is consistent with the purpose of the Convention to establish a uniform body of rules governing international air travel. Reed v. Wiser, 555 F.2d 1079, 1089-90 (2d Cir.), cert. denied, 434 U.S. 922 (1977). Noting the importance of uniformity the Second Circuit stated in Reed v. Wiser:

> Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to

> international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.

555 F.2d at 1090. The Reed court further stated:

> Confronted with the prospect of a jungle-like chaos unless a uniform system of liability rules governing fundamental aspects of international air disaster litigation was devised, the framers of the Convention proceeded to draft a treaty which laid down uniform rules....

555 F.2d at 1092.

Further, a finding that the cause of action created by Article 17 is exclusive is also consistent with the intent of the signatories, because where the signatories intended that local law should apply, the Convention contains specific provisions to that effect. (See Petitioner's Initial Brief, at pg. 32-34).

The Third District's decision that King should be permitted to bring his claim for pure emotional distress pursuant to state law would have the effect of destroying the uniformity in regulation of claims for injuries which was sought by the drafters and signatories of the Warsaw Convention. If this Court accepts the Third District's decision, this uniformity would be destroyed because claims for pure emotional distress, unlike bodily injury and death claims, would be governed by the diverse local rules of different states and countries.

A finding that King's claim for emotional distress is precluded by the Warsaw Convention, and that King may not, therefore, pursue an inconsistent state law claim, would best serve the avowed purpose of the drafters of the Warsaw Convention to uniformly regulate an air

carrier's liability for injuries caused by an accident in international transportation.

CONCLUSION

Petitioner respectfully requests that the decision of the District Court of Appeal, Third District, that King has stated a cause of action for intentional or reckless infliction of emotional distress under Florida law, be quashed with directions to enter judgment in favor of Eastern.

In the event this Court finds that King has stated a cause of action for intentional or reckless infliction of emotional distress, Petitioner respectfully requests the decision of the Third District Court of Appeal: that the Warsaw Convention does **not** preempt King's state law claim, should be quashed with directions to enter judgment in favor of Eastern.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of April, 1989 to: JOEL D. EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, FL 33130, Attorneys for Charles King.

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