IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,395**

EASTERN AIRLINES, INC.,

Petitioner,

VS.

CHARLES KING,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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AUTHORITIES

I.
STATEMENT OF THE CASE AND FACTS

We have no quarrel with Eastern's statement of the case and fact – except we note that the decision of the United States District Court in ***In Re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983,*** **629** F. Supp. **307** (S.D. Fla. **1986),** ***appeal pending,*** is irrelevant to the issue presented here (and arguably did not belong in Eastern's appendix). In addition, the several opinions comprising the decision sought to be reviewed have been placed in Eastern's appendix in the wrong order. For ease of comprehension, and as a convenience to the Court, we have therefore included a copy of the recently published decision in the appendix to this brief: ***King v. Eastern Airlines, Inc.,*** *532* So.2d **1070** (Fla. 3rd DCA **1988).**

II.
ISSUE ON JURISDICTION

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN EXPRESS AND DIRECT CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

III.
SUMMARY OF THE ARGUMENT

All of the decisions relied upon for conflict say exactly the same thing that the decision sought to be reviewed says--that the tort of "intentional or reckless infliction of mental distress" is defined by §46 of the Restatement (Second) of Torts. Since all of the decisions are perfectly consistent on the single point of law involved, there clearly is no "express and direct conflict" sufficient to support an exercise of this Court's jurisdiction. Eastern also cannot make even a colorable argument that any one of the consistent decisions relied upon for conflict involves substantially the same set of facts, but reaches a different conclusion than the conclusion reached by the district court. At bottom, Eastern is simply quarreling with the merits of the district court's decision (which we will defend in due course)--but that does not amount to a demonstration of "express and

direct conflict". No conflict has even arguably been demonstrated, and we respectfully submit that review should therefore be denied.

IV.
ARGUMENT

Eastern begins its argument by noting that this Court adopted **S46** of the Restatement (Second) of Torts as a definition of the tort of "intentional or reckless infliction of mental distress", in ***Metropolitan Life Insurance Co. v. McCarson,*** **467** So.2d **277** (Fla. **1985).** Of course, the decision sought to be reviewed does not say anything to the contrary. All that it holds is that our complaint alleged sufficient facts to state a cause of action under **S46** of the Restatement. Neither do any of the other decisions relied upon by Eastern say anything different. ***All*** of them, including the decision sought to be reviewed, say ***exactly*** the same thing--that the tort of "intentional or reckless infliction of mental distress" is defined by **$46** of the Restatement. Because all of the decisions are perfectly consistent on the single point of law involved, there is clearly no "express and direct conflict" on the same point of law to support the exercise of this Court's conflict jurisdiction.

Eastern recognizes as much, of course, because it does not argue for any conflict between decisions. Instead, it argues that the decision sought to be reviewed conflicts with the "definition" of the tort contained in **$46** of the Restatement. That is not a demonstration of conflict, however; that is simply a quarrel with the manner in which the district court applied the law to the facts in this case. Put another way, Eastern is simply quarreling with the merits of the district court's decision, contending that its conclusion is wrong. This Court has no jurisdiction to review a decision merely because it might wish to disagree with its conclusion, however. ***See Nielsen v. City of Sarasota,*** **117** So.2d **731** (Fla. **1960).** What is required is an "express and direct conflict" on the same point of law--and that is clearly lacking here.

Given the fact that the decision sought to be reviewed is consistent with all of the

decisions relied upon for conflict--consistent, that is, in simply applying §46 of the Restatement to the facts involved in the case--the only way that conflict could arise is if one of the decisions relied upon for conflict involved substantially the same facts, but reached a different conclusion. ***See Nielsen v. City of Sarasota, supra.*** None of the decisions relied upon involve facts which are even ***remotely*** similar to the facts involved in this case, however. ***See Metropolitan Life Insurance*** Co. ***v. McCarson, supra*** (intentional breach of insurance contract does not give rise to cause of action under §46); ***Ponton*** v. ***Scarfone,*** 468 So.2d 1009 (Fla. 2nd DCA), ***review denied,*** 478 So.2d 54 (Fla. 1985) (requests for sexual liaison do not give rise to cause of action under §46); ***Kent v. Harrison,*** 467 So.2d 1114 (Fla. 2nd DCA 1985) (telephonic harassment as aftermath of argument does not give rise to cause of action under §46); ***Scheller v. American Medical International, Inc.,*** 502 So.2d 1268 (Fla. 4th DCA), ***review denied,*** 513 So.2d 1060 (Fla. 1987) (various acts of harassment against staff physician by hospital administrator did not give rise to cause of action under §46).

In short, not even a colorable contention can be made that any of the decisions relied upon reached a different conclusion on substantially the same set of facts. And because all of the decisions relied upon are perfectly consistent on the single point of law involved, Eastern has clearly failed to demonstrate an "express and direct conflict" sufficient to support the exercise of this Court's jurisdiction--all of which renders the ***merits*** of the district court's decision irrelevant here.

Although the merits of the decision are clearly irrelevant here, Eastern has devoted most of its brief to an argument on the merits. The Court should therefore forgive us a brief demonstration that the decision was correct on the merits. To begin, it is worth repeating the "definition" of the tort which Eastern claims we did not satisfy, with appropriate emphasis:

> 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.

Section **46,** Restatement (Second) of Torts (emphasis supplied).

Given the enormity of the risk and the gravity of the potential harm involved, an engine failure in a commercial airliner full of people is a potential catastrophe of the highest order. An occasional engine failure from the simple omission of an "o-ring" by maintenance personnel is perhaps to be expected, and even arguably to be tolerated by the travelling public. When the same easily preventable error occurs a fourth, fifth, and sixth time, however, something is seriously amiss. And when the same thing happens a seventh, eighth, and ninth time, it is clear that the failure to take any appropriate measures to ensure that it does not happen again approaches extreme and outrageous conduct--conduct which the travelling public would surely deem unforgivable. Three more failures for the same stupid omission makes it a certainty, in our judgment, that the failure to take any appropriate measures at that point satisfies the test of "extreme and outrageous conduct". And we have not even arrived at the facts in this case yet. The ***triple-engine failure*** which undeniably terrified Mr. King involved the ***thirteenth, fourteenth, and fifteenth*** engine failures, for the same simple omission--and if that is not "extreme and outrageous conduct", then no set of facts will ever fit the definition of the tort.

For essentially the same reasons, Eastern's failure to take any appropriate measures to prevent the recurring failures can properly be found "reckless". The first few failures arguably amounted only to negligence, of course. But at some point in that long trail of near disasters, Eastern clearly had knowledge that its maintenance procedures were seriously deficient, and that additional engine failures were predictable if it did not correct them. Yet it did nothing. When it ***continued*** to do nothing after ***twelve*** engine failures--all caused by the same simple omission of an "0-ring"--it is arguable that its conduct could properly be found to have been ***intentional*** at that point. We did not have

that burden, however; we were only required to allege facts from which a jury could find "recklessness"--and if we did not do that, then we submit that there is no such thing as "recklessness" anymore. ***See Piper Aircraft Corp. v. Coulter***, 426 So.2d **1108** (Fla. 4th DCA), ***review denied,*** 436 So.2d **100** (Fla. **1983)** (failure to correct known defect in face of substantial danger to lives of aircraft occupants constitutes reckless conduct sufficient to justify civil punishment).

Most respectfully, the facts in this case fit squarely within the definition of the tort, and the **6** to **3** decision below is not, as Eastern insists, clearly wrong.[1/] The decision is also not even arguably in "express and direct conflict" with any of the decisions upon which Eastern relies, and we respectfully submit that review should therefore be denied.

V.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of December, **1988,** to: Kathleen O'Connor, Esq., Thornton, David & Murray, **2950** S.W. 27th Avenue, Suite 100, Miami, Florida **33133.**

Respectfully submitted,

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[1/] Although only eight judges participated in the rehearing en banc below, a total of nine judges participated in the case. The late Judge Hendry joined in the majority opinion filed by the initial panel, but passed away before the en banc decision was rendered. Since Eastern has made a point of counting votes here, we think it is appropriate that Judge Hendry's vote be counted as well.