IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-694

JOHN K. VREELAND, Administrator Ad Litem for the Estate of JOSE MARTINEZ, and the personal representative of the Estate of JOSE MARTINEZ, deceased,

Petitioner,

vs.

AEROLEASE OF AMERICA, INC.,

Respondent.

_____/

On Discretionary Review from the District Court of Appeal of Florida, Second District

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CASES

Page

AUTHORITIES

TABLE OF CASES

Page

I. STATEMENT OF THE CASE AND FACTS

We are unable to accept Aerolease's lengthy 14-page restatement of the case and facts because nearly all of it is entirely irrelevant to the narrow issue before the Court. Demonstrating its irrelevance will require argument, however, so we will include that demonstration in the argument section of the brief. For the time being, we simply stand upon the accuracy and adequacy of our initial statement of the case and facts.

II. ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT FLORIDA'S "DANGEROUS INSTRUMENTALITY DOCTRINE," WHICH IMPOSES VICARIOUS LIABILITY UPON AIRCRAFT OWNERS FOR NEGLIGENT OPERATION OF AN AIRCRAFT, IS PREEMPTED BY FEDERAL LAW AND THEREFORE UNENFORCEABLE.

A. 49 U.S.C. §44112 does not preempt the tort law remedies that would otherwise be available to the plaintiff.

Aerolease's recitation of the history of 49 U.S.C. §1404 (now 49 U.S.C. §44112) adds nothing to the history of the statute explored in our initial brief, and we are content to rely upon our initial exposition of that history in reply. Aerolease's recitation of the history suffers from two rather glaring omissions, however.

First, Aerolease has simply ignored 49 U.S.C. §1506 (now 49 U.S.C. §40120(c)):

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Ignoring that "general remedies savings clause" will not make it go away. The savings clause exists, and it counsels the narrowest reading of 49 U.S.C. §1404 that its language will permit. We do not deny that the statute in issue here preempts state laws imposing absolute liability upon aircraft owners "for any injury to or death of persons, or damage to or loss of property, *on the surface of the earth (whether on land or water)*" (emphasis supplied). But we continue to insist that the preemption expressed in the statute goes no further than that -- that the statute does not preempt state laws imposing vicarious liability upon aircraft owners for injury to or the death of passengers in an aircraft.

Second -- and this is perhaps the most glaring omission in its brief -- Aerolease fails to address a single word to a fact that we characterized as *dispositive* of the issue before the Court. As we noted in our initial brief, the Uniform Aeronautics Act contained two provisions governing the liability of aircraft owners for injury to or the death of persons. Section 5 of the Act, according to the House Report accompanying 49 U.S.C. §1404, reads in pertinent part:

> The owner of every aircraft which is operated over the lands or the waters of this State is absolutely liable for injuries to persons or property *on the land or water beneath*, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom. . . .

(Emphasis supplied).

Section 6 of the Uniform Aeronautics Act, which is still in effect in several states, reads as follows:

> The liability of the owner of one aircraft, to the owner of another aircraft, or to airmen or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

N. J. Stat. Ann. §6:2-8. *E. g.*, S.C. Code Ann. §55-3-70; Haw. Rev. Stat. Ann. §263-6; Del. Code Ann. Tit. 2, §306.

For an example of how these two provisions of the Uniform Aeronautics Act are interpreted, *see Employers Ins. of Wausau v. Price Aircraft Co., LLC,* 283 F. Supp.2d 1144 (D. Haw. 2003) (section 5 of Hawaii's Uniform Aeronautics Act applies only to damage caused on the ground and not to injuries to pilots and passengers on board an airplane when it crashes; injuries to pilots and passengers are governed by section 6). The Minnesota Supreme Court reached the same conclusion in *Haskin v. Northeast Airways, Inc.*, 266 Minn. 210, 123 N.W.2d 81 (1963). For the convenience of the Court, and so that there can be no dispute

about the existence of §6, we have included the Uniform Aeronautics Act as it presently exists in the four states cited above in an appendix to this brief.

In the House Report accompanying 49 U.S.C. §1404, Congress rather explicitly stated that one of the two purposes of the statute was to displace §5 of the Uniform Aeronautics Act. And that the statute was narrowly limited in that fashion is proven, we submit, by Congress' inclusion of the limiting phrase, "on the surface of the earth (whether on land or water)." That Congress intended only to displace §5 of the Uniform Aeronautics Act, and *not* §6 of the Act, is a fair indication that it intended 49 U.S.C. §1404 to apply only to injuries, deaths, and property damage "caused on the surface of the earth (whether on land or water)," and *not* to injuries and deaths to passengers covered by §6 of the Act, with which it expressed no disagreement at all.

Congress was apparently quite content with §6, which left it to the states to apply their own land-based tort law and damage remedies to aircraft owners where the death of an aircraft *passenger* was involved. And, of course, the rule of law applicable to torts on land in the instant case is Florida's "dangerous instrumentality doctrine." Most respectfully, in our considered judgment, the legislative history of 49 U.S.C. §1404 proves beyond doubt that the statute was narrowly drawn to apply only to damages "caused on the surface of the earth (whether on land or water)," not to the deaths of aircraft passengers -- and the

statute therefore cannot fairly be read to preempt Florida's "dangerous instrumentality doctrine." And, of course, Aerolease's election simply to ignore the existence of §6 of the Uniform Aeronautics Act will not make it go away.

Given the considerable disarray in the decisional law -- caused, we think, by the various courts' failure to examine the Uniform Aeronautics Act for the considerable light that §6 of the Act would have shed on the issue -- no useful purpose would be served by parsing the conflicting decisions again. Aerolease's protestations notwithstanding, we stand by our original reading of them.

Aerolease has mustered an additional decision that we did not initially address: Judge Seitz's dismissal order in *Ellis v. Flying Boat, Inc.* An examination of the order will reveal that the plaintiffs filed no opposition to the defendant's motions to dismiss, and that the order contains no analysis of the issue at all. The order therefore provides little support for Aerolease's position. At best, the order simply adds to the disarray in the decisional law. And it is that disarray in the decisional law that should convince the Court that 49 U.S.C. §1404 (now 49 U.S.C. §44112) lacks the clarity of purpose and intent that is required before a court can declare a federal statute preemptive of state law, as we argued at pages 24-28 of our initial brief.

Although we could probably rest our case here, we should briefly address the additional, miscellaneous arguments advanced in Aerolease's brief. Aerolease

contends that, because Congress recently preempted state laws imposing vicarious liability upon the owners of *motor vehicles* that have been leased -- the Graves Amendment -- this Court should assume that Congress meant to preempt state laws imposing vicarious liability upon the owners of leased airplanes as well. In our judgment, this argument is a considerable stretch -- and well beside the point. The Graves Amendment contains an *express* preemption clause: "An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) *shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle*. . . ." (emphasis supplied).

No such explicit language appeared in 49 U.S.C. §1404, nor does it appear in its "recodified" version, 49 U.S.C. §44112. If anything, the Graves Amendment demonstrates that Congress knows how to preempt state laws when it intends to do so -- and because neither 49 U.S.C. §1404 nor 49 U.S.C. §44112 contains such language, the presumption must be that Congress did *not* intend to preempt state law remedies for aircraft passengers in the aviation context -- which, we remind the Court, is exactly what Congress said in 49 U.S.C. §1506: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law . . . ". In addition, of course, what Congress intended in 2005 when it enacted a statute pertaining to motor vehicles obviously has no bearing on what

Congress intended in 1948 when it enacted a statute pertaining to aircraft. So much for Aerolease's reliance upon the Graves Amendment.

Aerolease also contends that "Public policy favors preemption" (respondent's brief, p. 25). But the public policy of this state at least is expressed in the long line of this Court's decisions embracing the "dangerous instrumentality doctrine" with which we began our argument in our initial brief. And in the precise context presented here, the public policy of this state is squarely established by this Court's decision in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970). In any event, the question before the Court does not turn on what public policy ought to be. It turns exclusively upon the language of 49 U.S.C. §1404 (now 49 U.S.C. §44112), the purpose of the statute, and the intent of the Congress that enacted it in 1948. Congress undeniably meant to preempt §5 of the Uniform Aeronautics Act; it just as clearly did not intend to preempt §6 of that Act.

Finally, Aerolease resorts to decisions addressing the *removal* jurisdiction of federal courts provided by 28 U.S.C. §1441. But these decisions are entirely beside the point in issue here. The "preemption defense" that Aerolease has urged here does not create "federal question jurisdiction" in the federal courts, and would not have supported removal to federal court, even if Aerolease had attempted to do so -- which it did not. *See Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). *See generally* 16 *Moore's Federal Practice*, §107.14[4][b] pp. 107-90

through 91 (3d Ed. 2008). Most respectfully, Aerolease's final miscellaneous argument is so far afield from the question presented here that it simply has no place in the debate. And for all of these reasons, we respectfully submit once again that *Orefice v. Albert*, *supra*, was correctly decided, that it is controlling here, and that the district court erred in concluding otherwise.

B. The irrelevance of Aerolease's "as is" argument.

In a second section of its argument, Aerolease purports to advance a "right for the wrong reason" argument. It is not a "right for the wrong reason" argument, however, because it asks this Court, not to approve the district court's decision, but to quash its holding that "49 U.S.C. §44112 does not preempt Florida negligence law insofar as Vreeland seeks to recover for Aerolease's active negligence in maintaining and inspecting the airplane while it was in Aerolease's possession or control" (slip opinion, p. 12). According to Aerolease, the fact that the lease agreement contained an "as is" clause is dispositive of the error of this holding. Because Aerolease did not petition this Court for review of the district court's decision, and because no "conflict" has been identified that would require resolution here, we doubt that the Court will entertain this contention. We will address it briefly nevertheless because it has no place in this proceeding and it is demonstrably wrong.

According to Aerolease:

> Even ignoring the application of §44112 to the negligence claim of this lessor-not-in-possession, the facts of this case unequivocally establish that (1) this aircraft was leased to Ferrer "as is", (2) it was flown across the United States without incident, (3) the long-term lessee (Ferrer) assumed all liability for inspection, repair, and maintenance of the aircraft, (4) SkyBlue and its federally licensed airframe and power plant mechanics were the entities Ferrer hired to inspect, repair, and deliver the aircraft to Ferrer in airworthy condition and (5) Ferrer relied on the representations of SkyBlue, which certified the plane for service as airworthy.

(Respondent's brief, pp. 40-41).

There are two very good reasons why this argument and the facts mustered in support of it are irrelevant here. First, an examination of Aerolease's amended motion for summary judgment will reveal that it advanced a single ground -- that 49 U.S.C. §44112 preempts all state law remedies that would otherwise be available to the plaintiff because Aerolease was not in "possession or control" of the aircraft at the time of the accident. It did not "state with particularity" the entirely different ground argued here, as Rule 1.510(c), Fla. R. Civ. P., required. The plaintiff was therefore not required to respond to this contention below, and as a result, it cannot legitimately be argued here to support quashal of the district court's decision.

Most respectfully, the law is thoroughly settled that summary judgment cannot be granted on a ground not "stated with particularity" in the motion for

summary judgment. *E. g., H.B. Adams Distributors, Inc. v. Admiral Air of Sarasota County, Inc.*, 805 So.2d 852 (Fla. 2d DCA 2001); *Cheshire v. Magnacard, Inc.*, 510 So.2d 1231 (Fla. 2d DCA 1987); *Williams v. Bank of America Corp.*, 927 So.2d 1091 (Fla. 4th DCA 2006); *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So.2d 283 (Fla. 4th DCA 1995); *George G. Sharp, Inc. v. Doric Marine, Inc.*, 544 So.2d 228 (Fla. 3d DCA 1989). It follows ineluctably that, because the plaintiff had no notice and therefore no opportunity to address Aerolease's argument below, the argument cannot be made here in support of a quashal of the district court's decision.

Second, and just as importantly, the argument reflects a complete lack of familiarity with Federal Aviation Regulations governing maintenance and inspection of the aircraft in issue here. FAR §91.403(a) provides, "The owner or operator of an aircraft is primarily responsible for maintaining that aircraft in an airworthy condition . . .". FAR §91.409(a)(1) provides, " . . . no person may operate an aircraft unless, within the preceding 12 calendar months, it has had -- (1) an annual inspection in accordance with Part 43 of this chapter and has been approved for return to service by a person authorized by §43.7 of this chapter . . .".

FAR §43.11(4) provides that, when an annual inspection required by Part 91 is performed, the following entry must be made in the maintenance record of the aircraft: "I certify that this aircraft has been inspected in accordance with (insert

type) inspection and was determined to be in airworthy condition." The NTSB report included in the appendix that the respondent filed in the district court reflects that Aerolease's aircraft "was last inspected in accordance with an annual inspection on April 24, 2004" -- roughly eight months before the accident -- and it was therefore certified as "airworthy" on that date (Tab 1, Exh. B, p. 1a).

The plaintiff's complaint alleges that Aerolease performed this inspection. And we take it to be self-evident that an aircraft owner cannot lease an aircraft to another with a disclaimer that it makes no representations as to the airworthiness of the aircraft when Federal Aviation Regulations require that it be inspected once a year and certified to be airworthy. We are not dealing with a junk car here; federal law clearly trumps the "as is" argument that Aerolease has made here.

The "pre-buy inspection" conducted by SkyBlue was not an inspection required by Part 91 of the Federal Aviation Regulations. It was simply done at the request of Mr. Ferrer to ensure that some or all of the discrepancies found in the aircraft were fixed before he took possession of it. And unlike the annual inspection required by Part 91, which requires a certification of airworthiness in the aircraft's maintenance record, routine maintenance like the "pre-buy inspection" requested by Mr. Ferrer only requires the signature of a certified mechanic, whose "signature constitutes the approval for return to service only for the work performed." FAR §43.9(a)(4). The NTSB report reflects that, although

some of the discrepancies found by SkyBlue were repaired, the entries required by §43.9(a) were not made in the aircraft's maintenance record (appellee's appendix, tab 1, exh. B, p. 1a).

In short, although Mr. Ferrer certainly expected SkyBlue to detect and correct any unairworthy condition of the aircraft before he leased it from Aerolease, SkyBlue did not "certify" that the aircraft was airworthy; Aerolease did. The argument contained in the concluding paragraphs of Aerolease's brief is therefore contrary to the law established by the Federal Aviation Regulations.

We must also take issue with Aerolease's attempt to demonstrate that the ferry flight in which the aircraft was flown from California to Florida was without incident. According to the NTSB report, the pilot who made the ferry flight complained that the aircraft had an "aggressive pitch up" when rotating for takeoff. The NTSB report collects the statements of witnesses who observed the aircraft pitch up aggressively after takeoff immediately before it stalled and crashed. *Id.* pp. 1, 1f.

For good measure, and in conclusion, it is also worth noting that the following paragraph appears in H.R. Rep. 86-445 of 1959, explaining the purpose of the 1948 enactment of 49 U.S.C. §1404 (now 49 U.S.C. §44112):

> In 1948, Section 504 was added to the original Civil Aeronautics Act of 1938 (62 Stat. 470) to overcome the possible adverse effect on security owners of various state statutes making an aircraft owner or operator absolutely liable for any *damage caused on the ground*

> by the aircraft. Its purpose was to assure that liability under such laws would not attach to the holder of a security interest solely by virtue of that interest. This Section was reenacted as Section 504 of existing law. *It should be stressed that this Section of existing law does not relieve a security titleholder from liability for injury or damage caused as a result of his negligence, for example,* as a manufacturer of faulty equipment or *as a lessor of equipment negligently maintained before the lease*.

H.R. Rep. 86-445, p. 4, at Tab 3 of the appendix submitted with the respondent's brief (emphasis supplied).

In short, this was Congress' understanding of the statute in issue here in 1959 -- that the statute was addressed only to "damage caused on the ground" and was not intended to relieve aircraft lessors from their own negligent maintenance before the lease. And if that was good enough for Congress in 1959, it should be good enough for this Court in 2010. Most respectfully, 49 U.S.C. §1404 (now 49 U.S.C. §44112) may well preempt Florida's "dangerous instrumentality doctrine" where a leased aircraft causes "injury to or death of persons, or damage to or loss of property, *on the surface of the earth (whether on land or water)*" -- but it does not preempt Florida's "dangerous instrumentality doctrine" where a passenger dies in an aircraft accident. And it does not relieve Aerolease of liability for its negligent certification of the aircraft as airworthy before it was leased to Mr. Ferrer.

III. CONCLUSION

We respectfully submit once again that *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), was correctly decided; that the district court erred in concluding otherwise; and to the extent that the district court affirmed the judgment disposing of Count I of the plaintiff's complaint in Aerolease's favor, its decision should be quashed.

Respectfully submitted,

By:_____
JOEL D. EATON

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

_____
JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 15th day of November, 2010, to: **Shelley H. Leinicke, Esq.**, Wicker, Smith, O'Hara, McCoy & Ford, P.A., P.O. Box 14460, Ft. Lauderdale, FL 33302, Attorneys for Aerolease of America; and **Robert Trohn, Esq.**, P. O. Box 3, Lakeland, FL 33802, Co-Counsel for Plaintiff.

By:_____
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