

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. \_\_\_\_\_

DCA CASE NO. 86-938

EASTERN AIRLINES, INC. )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 CHARLES KING, )  
 )  
 Respondent. )

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

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BRIEF OF PETITIONER  
ON JURISDICTION

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(With Appendix)

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STATEMENT OF THE CASE AND FACTS

This case involves a claim for emotional distress brought by Respondent, Charles King (King), against Petitioner, Eastern Airlines, Inc. (Eastern).<sup>1</sup> King was a passenger on Eastern Flight 855, from Miami, Florida to Nassau, Bahamas, on May 5, 1983, when en route to Nassau, one of the airplanes three engines failed. The flight crew turned the plane around for a landing in Miami, and on the return, the airplane's other two engines failed. As the airplane descended because of the loss of power, the passengers were told that the crew would ditch the plane in the ocean. Subsequently, the flight crew restarted one of the engines and the airplane landed safely at Miami International Airport. (App. 6).

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. (App. 6-7). 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. Shortly thereafter, King filed an amended complaint against Eastern. In his amended complaint, King alleged, inter alia, that Eastern had failed to install the oil seals (O-rings), which were necessary to prevent oil leaks; that Eastern's records revealed at least one dozen prior instances of engine failures due to missing O-rings, that Eastern failed to institute **"appropriate"** procedures to

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<sup>1</sup> In this brief "App." refers to Petitioner's Appendix. All emphasis added unless otherwise indicated.

cure this maintenance problem despite such knowledge; and that "Eastern's entire want of care or attention to duty and great indifference to persons, property and rights of the plaintiff implies such wantonness, wilfulness, and malice as would justify punitive damages." (App. 7).

The trial court stayed King's action because 28 related passenger cases were pending in the United States District Court for the Southern District of Florida. These 28 cases had been consolidated as Multidistrict Litigation (MDL) before the Honorable Edward B. Davis. The complaints in the consolidated federal cases were identical or similar to the complaint filed by King. (App. 7).

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 District Court applied section 46 of the Restatement (Second) of Torts (1965), which had been adopted by the Florida Supreme Court in Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985), as the appropriate definition for the tort of intentional infliction of emotional 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 May 5, 1983, 629 F.Supp. 307 (S.D. Fla. 1986), appeal filed, No. 86-5381 (11th Cir. May 28, 1986). (App. 16-26).

Based on Judge Davis' ruling Eastern moved for a judgment on the pleadings in King's action in state court. (App. 7). 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. (App. 27).

King then appealed the adverse judgment to the District of Appeal of Florida, Third District. The Third District Court in a 2-1, decision held that King had stated a cause of action under Florida law for intentional infliction of mental distress. 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. The Third District Court of Appeal also unanimously ruled that King had failed to state a cause of action under the Warsaw Convention. (App. 28-40).

The Third District Court then set the appeal for rehearing en banc on the issue of whether King's amended complaint stated a cause of action for intentional infliction of emotional distress under Florida law. Subsequently, the Third District Court again concluded, this time en banc, that the facts pled by King were sufficient to

state a claim for intentional infliction of emotional distress. This time the decision was 5 to 3.<sup>2</sup> (App. 6-15).

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 in Eastern's maintenance of the airplane."<sup>3</sup> (App. 10). 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

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<sup>2</sup> The District Court of Appeal, on motion for rehearing, also 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 unanimously concluded that King had failed to state a cause of action under the Warsaw Convention. (App. 1-5).

<sup>3</sup> 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, No. 86-5381 (11th Cir. filed May 28, 1986).

that mental distress or be undertaken with a reckless disregard of the known likelihood that it will occur.

(App. 10).

Eastern thereafter filed this Notice to Invoke the Discretionary Jurisdiction of this Court.

#### ISSUE INVOLVED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT KING HAS STATED A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THIS QUESTION OF LAW?

#### SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal that King has stated a claim for intentional infliction of emotional distress conflicts with the definition of this tort found in section 46 of the Second Restatement, as adopted by this Court in Metropolitan Life Ins. Co. v. McCarson, 467 So.2d at 278-279, and as followed by other district courts of appeal.

#### ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT KING STATED A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THIS QUESTION OF LAW.

The decision of the Third District Court that King has stated a claim for intentional infliction of emotional distress expressly and

directly conflicts with this Court's definition of this tort, as adopted in Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985). In McCarson, 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 to another for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In the instant case King's claim does not allege the requisite facts to support the contention that Eastern acted "**intentionally** or **recklessly**," or that Eastern's conduct was "extreme and outrageous." See Metropolitan Life Ins. Co. v. McCarson, 467 So.2d at 278-279; accord, 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 (Fla. 2d DCA), rev. denied, 478 So.2d 54 (Fla. 1985); Kent, III v. Harrison, 467 So.2d 1114 (Fla. 2d DCA 1985). In this regard, Judge Davis' opinion is on point. In concluding that the allegations of Count III of the plaintiffs' complaints did **not** state a cause of action for intentional infliction of emotional distress, Judge Davis found:

In the instant suit, Count III realleges the previous count 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.

The allegations contained in the Complaints, assuming their truth, do not support the contention that EASTERN AIRLINES acted "intentionally and 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."

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

Restatement (Second) of Torts, § 46, Comment d (1965) (cited in Metropolitan Life Insurance Company v. McCarson, 467 So.2d 277, 278-79 (Fla. 1985)).

In Re Eastern Airlines Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. at 311-312 (S.D. Fla. 1986). (App. 16-26).

Further, in the instant case King's claim does not state a cause of action under section 46 of the Second Restatement, adopted in McCarson, because the facts alleged do not support the contention that Eastern acted recklessly "in deliberate disregard of a high degree of probability" that emotional distress to King would follow. Comment i,

§ 46 Restatement (Second) of Torts. As Judge Schwartz stated in his dissenting opinion:

§ 46 liability is designed to cover the narrow class of conduct in which, without impact, not only are the plaintiff's interests in psychic tranquility severely and adversely affected, but that those interests are designedly or recklessly disregarded by the defendant as well. [Emphasis in original] 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.

(App. 10-11).

Judge Schwartz further suggested:

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.

(App. 14).

Clearly, the majority opinion of the Third District Court of Appeal, in which it found that King had stated a claim for intentional infliction of emotional distress, conflicts with the definition of this tort in section 46 of the Second Restatement, as adopted in McCarson, and followed by other district courts of appeal. See Scheller v. American Medical International, Inc., 502 So.2d at 1270;

Ponton v. Scarfone, 468 So.2d at 1010-1011; Kent. III v. Harrison, 467 So.2d at 1115.<sup>4</sup>

**STATEMENT OF WHY REVIEW SHOULD BE GRANTED**

Eastern respectfully submits that review should be granted herein because the decision of the Third District Court of Appeal will create confusion among practitioners regarding when a claim for intentional infliction of emotional distress has been stated. Since the Florida Supreme Court first recognized a cause of action for intentional infliction of emotional distress in Metropolitan Life Ins. Co. v. McCarson, 467 So.2d at 277, there has been little guidance from the Court in regard to this newly recognized tort.

Further, of the eleven judges that have considered whether King's claim or the related federal claims have stated a cause of action for intentional infliction of emotional distress, five judges have concluded as a matter of law that no claim for intentional infliction of emotional distress had been stated. Judge Davis (the United States District Court Judge in the federal proceeding), Judge Fuller (the trial judge in the case at bar), and Judges Schwartz, Barkdull and Jorgenson of the Third District Court of Appeal, all concluded that under the facts alleged, plaintiff or plaintiffs failed to state a cause of action for intentional infliction of emotional distress.

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<sup>4</sup> It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion to create an express conflict under Art. V, § 3(b)3. A discussion of the legal principles, which the district court applied supplies a sufficient basis for a petition for conflict review. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

Finally, review should be granted because, as the Court is aware, there are approximately 28 consolidated cases brought by other passengers of Flight 855 pending before the Eleventh Circuit Court of Appeals. The state law issue in the case at bar obviously affects numerous parties in addition to King.

**CONCLUSION**

Petitioner respectfully urges that there is direct conflict between the decision of the District Court of Appeal, Third District, in the case at bar, and a decision of this Court and decisions of other district courts of appeal in the cases cited herein. Petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal pursuant to Art. V, § 3(b)(3), Florida Constitution.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5th day of December, 1988 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.

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