STATE OF INDIANA) MARION SUPERIOR COURT
)ss: CIVIL DIVISION 10
COUNTY OF MARION) CAUSE NO. 49D10-0208-CC-01463

BRYAN COOK and)
JENNIFER COOK,)
)
Plaintiffs,)
vs.)
)
DELTA AIRLINES,)
ATLANTIC COAST AIRLINES, and)
GLOBE SECURITY SERVICES, INC.,)
)
Defendants.)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IN PART

I. Statement of Case

Plaintiffs Bryan Cook ("Cook") and Jennifer Cook seek damages for breach of contract and negligence resulting in emotional distress, related to another airline passenger's conduct. Defendants Delta Airlines ("Delta"), Atlantic Coast Airlines ("ACC"), and Global Security Services, Inc. ("Global") move for summary judgment largely claiming no breach of contract, federal pre-emption of negligence claims, and no emotional distress.

The Court finds no breach of contract by Delta or ACC, no federal pre-emption of state negligence claims, and Indiana law allows damages for emotional distress under the undisputed facts, subject to determination of negligence at trial

II. Issues

Do Defendants show an absence of dispute of material fact, and judgment as a matter of law, regarding breach of contract?

Does the Airline Deregulation Act pre-empt Indiana common law negligence claims?

Do Defendants show an absence of dispute of material fact, and judgment of a matter of law, regarding claims of emotional distress?

III. Facts and Procedural History

Cook is an Indianapolis attorney. He and his pregnant wife purchased air travel tickets from Delta to travel to New York City on February 8, 2002, five months after the events of September 11, 200l.

ACC operated the flight for Delta. Globe provided security services related to Cook's flight, although the designated record is unclear regarding precise services or the legal relationship to other parties, if any.

Cook's flight consisted of only eighteen passengers, a pilot, and one fight attendant. When the flight boarded, another passenger (largely identified in the record as the "French National") appeared and acted strange, including running to the plane. On the plane and during the flight, the French National continued to act erratically and attracted the anxious attention of the crew and passengers. Eventually, the crew diverted the flight to Cleveland and removed him. The actions of the French National included:

1. Jumping into a broken seat as he boarded near the front.

2. Playing with passenger controls before the flight.
3. Standing and going up the aisles during take off and during the flight, contrary to directions of the crew.
4. Lighting cigarettes two times despite orders from the crew to the contrary.
5. Speaking in French and English, saying “WTC”, “America”, and perhaps “New York”.
6. Stomping his feet when confronted by the crew.

When the French National lit the second cigarette, the flight attendant asked the captain to divert the flight. Immediately thereafter, the French National would not sit down, mumbled in French and said, “Stay back.” At one point, Cook and other passengers physically blocked the path of the French National as he walked the aisle, and ordered him back to his seat. But there was never any physical contact between the French National, Cook, his wife, or other passengers. Cook did smell smoke from the cigarettes, felt the stomping of the feet, and was otherwise scared, distressed, and upset.

After the flight was diverted and the French National was removed, the flight completed its trip to New York City. Cook and his wife later returned to Indianapolis as planned on the second leg of the trip.

Cook’s flight was governed by Delta’s Contract of Carriage, sometimes known as the “rules of tariff”, which state in part:

<u>Rule 3</u>

Delta will use its best effort to take care of the passenger and baggage with reasonable dispatch. Times shown in the timetables or elsewhere are not guaranteed and form no part of this contract. Delta may without notice . . . alter or may omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Delta is not responsible or liable for making connections or for failing to operate any flight according to schedule, or for changing the schedule of any flight.

Rule 35

Delta will refuse to transport or will remove at any point any passenger; . . . whenever such action . . . is necessary or advisable by reason of . . . conditions beyond its control…actual threatened or reported . . . whose conduct is directly abusive or violent . . . attempts to interfere with any member of the flight crew in the pursuant of their duties . . . unsound mind, whose behavior may be hazardous to himself/herself, the crew, or the passengers . . .

Rule 394

An independent operator will provide commuter service under an agreement with Delta. The independent operator is considered a Delta Connection Carrier as identified . . . below. All terms of transportation applicable to Delta specified in the tariffs are part of flights operated by these independent operators . . . Atlantic Coast Airlines.

Delta and ACC entered a Delta Connection Agreement on September 9, 1999 providing Delta's Contract of Carriage would be adopted by ACC for flights it conducts for Delta. In addition, Delta (as "issuing airline") contracted with ACC to conduct the flight (as "carrying airline") in an Interline Ticketing and Baggage Agreement ("Agreement") on March 28, 2000. The Agreement states: " . . . any injury to . . . a passenger . . . caused by or occurring on or in connection with the premises or airplane . . . of the carrying airline . . . shall not be the responsibility of the issuing airline."

On February 28, 2002, Cook and his wife sued the Defendants in Perry Township Small Claims Court in Marion County, Indiana. On August 19, 2002, the Small Claims Court found for all defendants and ordered Cook to pay attorneys' fees. Cook immediately appealed to the Marion Superior Court under I.C. 33-11.6-4-14 and it was docketed August 27, 2002.

On September 24, 2002, Cook filed his new complaint claiming:

a. Breach of contract for failing to provide a direct, nonstop, and safe flight;
b. Negligence for breaching duties to conduct a safe flight, prevent tickets and boarding of erratic persons, allowing the French National to board with an incendiary device, and failing to train employees properly; and
c. Damages of emotional distress.

On March 2003, Defendants filed their motion for summary judgment arguing:

a. No breach of contract;
b. Federal law pre-empts negligence claims; and
c. The facts do not support a claim of emotional distress under Indiana common law. [1]

IV. Discussion

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d118, 123. If there is sufficient evidence to establish the elements of a determinative defense, the burden shifts to the plaintiff to make sufficient showing to establish the existence of a genuine issue for trial regarding such defense. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. On a motion for summary judgment**,** all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb (2001), Ind, 754 N.E.2d 905, 909.

The Record Shows No Breach of Contract by Delta or ACC

Unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning, and courts will not construe the contract or look at extrinsic evidence,

[1] Defendants also argue judgment should be entered against Cook because he re-plead his complaint eight days late contrary to local Rule 81.1, and did not attach a copy of any contract as required by Trial Rule 9 (A). The Court, in its discretion, finds no judgment for defendants, dismissal, or other sanctions warranted under local Rule 81.1, and in its discretion, finds this action may continue under Trial Rule 9.2 (F).

but will merely apply the contractual provisions. Centennial Mortgage, Inc. v. Blumenfeld (2001), Ind.App., 745 N.E.2d 268, 273-74. Words, phrases, sentences, paragraphs, and sections of a contract cannot be read alone, but the entire contract must be read together and given meaning, if possible. Exide Corp. v Millwright Riggers, Inc. (2000), Ind.App., 727 N.E.2d 473, 479.

There are several contracts between all the parties in this matter. Cook and his wife entered a contract with Delta. Delta entered two contracts with ACC under which the Cook's are third party beneficiaries. The record is devoid, however, of any contract regarding Global, although it was apparently bound to perform some security services at the airport. Nevertheless, Global makes no showing of any contract or any absence of disputed facts to support its motion for summary judgment.

1. *Cook's contract with Delta*:

Delta promised to use its best efforts to carry Cook with reasonable dispatch subject to changes when necessary, refuse to transport and remove any disorderly passenger, and to provide commuter service through ACC. Delta showed no dispute of material fact, and the designated record shows no breach of these contractual provisions. Applying the unambiguous language of Delta's Contract of Carriage, Delta fulfilled its contract, and any stop or schedule irregularity to remove the unsound and hazardous French National is clearly allowed. Although there are duties of care arising out of the contracts, they are fully addressed in Cook's claims for negligence.

2. *Delta's contracts with ACC:*

The Agreement and Delta connection contract bind ACC to carry out all contractual obligations of Delta to its passengers. So, Delta's liability for personal injury

is assumed by ACC. The record clearly shows Delta fulfilled its contractual obligations and no breach occurred.

3. *Obligations to the Cook's as third party beneficiaries:*

Under Delta's contracts with ACC, the Cook's have rights against ACC as a third party beneficiary. However, the record is bereft of any contractual violation, as stated above.

ADA Does Not Pre-empt Cook's Negligence Claims

The pre-emption doctrine is based on the Supremacy Clause of the United States Constitution providing the law of the United States is the supreme law of the land, and any state or local law which conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). There is a presumption against pre-emption in that state police powers are not superseded by federal law unless there is "a clear and manifest intent of Congress," and the pre-emptive scope of a federal act is "governed entirely by the expressed language" of the statute. The clear and manifest purpose of Congress is the ultimate touchstone of pre-emption analysis. Id. at 516; CSX Transportation v. Easterwood, 507 U.S. 658 (1993).

Three variations of federal pre-emption doctrine exist: **express pre-emption**, which occurs when a statute expressly defines the scope of its preemptive effect Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), Metropolitan Life Ins. Co. v. Christ, 979 F.2d 575, 578 (7th Cir. 1992); **conflict pre-emption**, which occurs either where it is impossible to comply with both federal and state or local law, or where state law stands as an obstacle to the accomplishment and execution of federal purposes and objectives Geier v. American Honda Motor Company, 529 U.S. 861, 884 (2000); Hillsborough

County v. Automated Med. Lab., Inc., 471 U.S. 707 (1985), Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992); and **field pre-emption**, which occurs when a pervasive scheme of federal regulation makes it reasonable to infer that Congress intended exclusive federal regulation of the area. Id., Seaboard Sur. Co. v. Ind. St. Dist.Council (1995), Ind.App., 645 N.E.2d 1121, 1123.

Under 49 U.S.C. 1305(a)(1), the Airline Deregulation Act ("ADA") provides:

> No State…shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or *services* of an airline carrier…[2] (emphasis supplied)

The ADA was enacted in 1978 when Congress determined that "maximum reliance on competitive market forces" would best further "efficiency, innovation, and low prices" as well as "variety…quality…of air transportation services." 49 U.S.C. 1302 (a)(4) and 1302 (a)(9). The ADA pre-emption provision insures the states will not undo federal deregulation with regulation of their own. Morales v. Trans World Airlines, Inc., supra. The United States Supreme Court has reiterated the presumption against pre-emption regarding the ADA, but has found the "relating to" language may have a broad sweep similar to ERISA language pre-empting employee benefit plans nationwide. Id. at 386. However, the court later unanimously found ERISA does not pre-empt state health cost regulations and preserved state police powers. Blue Cross and Blue Shield v. Travelers, 514 U.S. 645 (1995).

Under Wilson v. Pleasant (1995), Ind., 660 N.E. 2d 327, 334, Indiana courts should largely analyze questions of federal pre-emption as follows:[3]

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[2] This provision is now amended but does not alter this essential language.

a. If there is federal pre-emption language, does it alone provide reliable indication of congressional intent if considering traditional principles of statutory construction and the statute as a whole? If so, then no need to go beyond the precise and narrow reading of the language. (emphasis supplied).

b. If not, then is state law in actual conflict with the federal law? This question is answered according to the two part analysis from Frieghtliner Corp. v. Myrick, 514 U.S. 280 (1995):

> -Is it impossible for private party to comply with both the federal statute and the state standard?
>
> -Does the state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?

Most importantly, the Indiana Supreme Court has held a federal statute regulating label information for pesticides does not pre-empt a state common law action for negligence regarding failure to warn. Dow Chemical Company v. Ebling, (2001), Ind., 753 N.E 2d 633. The court specifically held that enforcement of a state tort law duty does not conflict with federal regulations related to the same subject, nor does state common law occupy the same "field," regardless of the depth of the federal regulation, but actually furthers the objectives of the federal law.

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[3] Although Wilson's substantive holding regarding "airbag" pre-emption was later reversed by the United States Supreme Court in other cases, its reasoning and analysis regarding federal pre-emption is still binding.

Other state and federal jurisdictions disagree about ADA pre-emption of state tort actions. Some find the ADA pre-emption "relating to . . . services" precludes tort claims arising from boarding, in flight service, deplaning, lost baggage, and similar circumstances. Chekwu v. Board of Directors British Airways, 889 F. Sup. 12 (D.Mass. 1995); Ex parte Delta Airlines, Inc. (2000), Ala. 785 So. 2d 327; Abou-Jaoude v. British Airways (1991), Cal. App., 1991 Cal. App., LEXIS 178. Some courts find common law negligence, like personal injury, is generally not pre-empted. Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993); Torraco v. American Airlines, Inc., 1995 U.S. Dist. LEXIS 19547 (E.D. Ill. 1995). A middle ground is suggested in cases in which ADA pre-emption of state tort claims is determined by the underlying facts and circumstances, and whether they related to the intent of ADA pre-emption, that is, prevention of state economic regulation. Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F. 3d 1423 (7th Cir. 1996); Weber v. U.S. Airways, Inc., 2001 U.S. App. LEXIS 5051 (5th Cir. 2001); (Advertising fraud claim relates to services, so pre-empted); Duncan v. Northwest Airlines, Inc., 208 F. 3d 1112 (5th Cir. 2000) (Personal injury for allowing smoking not pre-empted); United Airlines, Inc. v. Mesa Airlines, 219 F. 3d 605 (7th Cir. 2000) (Tortious interference with commercial contract pre-empted). An even further middle ground may be found in Abdullah v. American Airlines, 181 F. 3d 363 (3rd Cir. 1999) in which the Court held a state tort claim relating to airline safety is covered by ADA pre-emption, but can co-exist as a "federal standard of care" combined with state court remedies.

So, common law regarding ADA pre-emption is far from uniform. Nevertheless, the Court proceeds according to Wilson v. Pleasant, supra.

1. Does the ADA provide reliable indication of congressional intent in its pre-emption language or otherwise?

The Airline Deregulation Act clearly states its purpose to further "efficiency, innovation, and low prices," as well as "variety and quality . . . of air transportation services." Congress intended to ensure that the states would not undo federal deregulation with any regulation of their own regarding rates, routes, or services. Morales v. Trans World Airlines, Inc., supra. at 378. The Court finds Wilson requires application of the "precise and narrow reading" of this language. The Court is also mindful that Indiana rules of statutory interpretation require this Court to determine whether the legislature has spoken clearly and unambiguously. If a statute is clear and unambiguous, there is no need to apply any rules of construction other than requiring words and phrases to be taken in their plain, ordinary, and usual sense. Benham v. State (1994), Ind., 637 N.E.2d 133. Accordingly, after a narrow and precise reading of the ADA, the Court fails to find Cook's claims of *breach of duties* for safe flight, security screening, and training of personnel, are related in any way to the Congressional purpose to prevent States' *economic regulation* upon airlines "services." Congress has expressed no intent in the ADA to pre-empt traditional state law remedies for negligence. Margolis v. United Airlines, Inc., supra. at 323.

2.Regardless, state negligence claims do not conflict with the ADA

Assuming we must proceed to determine conflict pre-emption, Wilson requires the court to follow Myrick's two-part analysis.

a. Is it possible for private parties to comply with both?

In order for Indiana law to conflict with the ADA, Cook's negligence claims would have to require this Court to mandate a "service" that is specifically regulated by federal law. Indeed, it does the opposite. The ADA fails to provide a remedy for airline torts. Negligence claims only seek remedies for contractual duties of care already assumed by Delta, ACC, and perhaps Global. So, it is clearly possible for parties to comply with the ADA and common law remedies of their state negligence claims. Margolis v. United Airlines, Inc., supra. at 324.

b. Does Indiana law stand as an obstruction to the execution of the full purposes and objectives of congress and the ADA?

As indicated above, the remedies accorded the plaintiffs under Indiana tort law clearly compliment the purposes and objectives of the ADA, and accordingly are not pre-empted. Dow Chemical Company v. Ebling, supra. at 640.

3.In addition, there is no "field" pre-emption under the ADA

Simply stated, the defendants failed to show the depth of any statutory scheme under ADA to preclude tort claims. The Court finds the use of state tort law clearly facilitates rather than frustrates the objectives of the federal statute. The designated record makes no showing that the ADA intended to occupy or provide particular tort remedies for breaches of the duties under which Cook claims. Dow Chemical Company v. Ebling, supra. at 640.

Cook Was Sufficiently Directly Involved To Allow Damages For Emotional Distress

In 1991, the Indiana Supreme Court promulgated the "modified impact rule" to recover damages for emotional distress. Shuamber v. Henderson (1991), Ind., 579 N. E.

2d 452. When a plaintiff sustains "a direct impact by the negligence of another and, by virtue of that direct involvement sustains emotional trauma which is serious in nature of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for emotional trauma without regard to whether the emotional trauma rises out of or accompanies any physical injury to the plaintiff." Id. at 456.

In 1999, the Indiana Supreme Court further modified the nature of a "direct impact" necessary to recover damages for emotional distress:

> . . . "direct impact" is properly understood as the requisite measure of "direct involvement" in the incident giving rise to the emotional trauma. Viewed in this context, we find that it matters little how the physical impact occurs, so long as that impact arises from the plaintiff's direct involvement in the tortfeasor's negligent conduct." Conder v. Wood (1999), Ind., 716 N.E. 2d 432, 435.

Most importantly, the court reiterated the policy underlying Shuamber, that is, to distinguish " . . . legitimate claims of emotional trauma from the mere spurious." Id. at 435.

On the same day as Conder, the Indiana Supreme Court found no "direct impact" when plaintiff heard pounding on a door, although the door was damaged. Ross v. Cheema (1999), Ind., 716 N.E 2d 435.

In 2000, the Indiana Supreme Court found "direct involvement" sufficient to recover damages for emotional distress when a patient was misdiagnosed and suffered the destruction of a healthy lung as a result. Alexander v. Scheid (2000), Ind. 726 N.E. 2d 272.

Most recently, the Indiana Court of Appeals found a patient mistakenly diagnosed with a deadly disease was "directly involved" in the result of the doctor's negligence. Keim v. Potter (2003), Ind.App., 783 N.E.2d 731.

But also in 2000, the Indiana Supreme Court found damages for mental distress where an eight-year old girl merely witnessed the immediate aftermath of her little brother being struck and killed by a passing vehicle. Groves v. Taylor (2000), Ind., 729 N.E.2d 569. The Court explained:

> . . . it is undisputed that the plaintiff did not suffer the kind of direct impact required by Shuamber to recover as a bystander for emotional distress. However . . . Condor makes it clear the reason for requiring direct involvement is to be able to distinguish legitimate claims of emotional trauma from the mere spurious. . . logic dictates that there may well be circumstances where, while the plaintiff does not sustain a direct impact, the plaintiff is sufficiently directly involved in the incident given rise to the emotional trauma that we are able to distinguish legitimate claims from the mere spurious . . . Where the direct impact test is not met, a bystander may nevertheless establish "direct involvement" by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one or their relationship to the plaintiff analogous to a spouse . . . caused by the defendant's negligent or otherwise tortious conduct. Id. at 573.

The Shuamber "direct impact" requirement is satisfied by one simple fact: at high altitude, Cook was being transported on a plane and confined to his seat to witness the result of Defendants' alleged negligence. Under the undisputed facts, he and his wife cannot be uninvolved in the events on the plane unless they are asleep. In addition, the combination of sensory and physical factors exceed the standard of direct involvement delineated by the Indiana Supreme Court:

a) Observing erratic actions on the plane;

b) Smelling smoke;

c) Ordering a passenger back to his seat and blocking his path in the aisle;

d) Hearing and feeling the stomping of feet; and

e) Hearing inflammatory comments.

Fairness requires these undisputed facts not be separated from the larger context in which they occurred, that is, on a plane headed to New York City five months after the tragedy of September 11, 2001. This circumstance of involvement may not directly fulfill the Groves standard for cases of death or severe injury to a loved one or spouse, but it clearly underscores the immediacy of the events to make the showing required by the larger policy announced in the Shuamber line of authority: ". . . to distinguish legitimate claims of emotional trauma from the mere spurious."

Under Indiana law, this combination of factors allows Cook to meet the elements of damages for emotional distress, subject to further determination of negligence at trial.

V. Conclusion

Delta and ACC show the absence of dispute of material fact on all issues.

Judgment as a matter of law should be entered for Delta and ACC regarding breach of contract.

Judgment as a matter of law should be entered for Delta on the negligence claims.

Judgment as a matter of law should not be entered on Cook's negligence claims.

Judgment as a matter of law should not be entered regarding damages for emotional distress.

VI. Order

Delta's motion for summary judgment is granted.

ACC's motion for summary judgment is granted with respect to Count 1 of the complaint but denied in all other respects.

Global's motion for summary judgment is denied.

The Court finds, in its discretion, this Order involves substantial questions of law, the early determination of which will promote a more orderly disposition of the case, under Rule 14 (B) (1) (c) (ii) of the Indiana Rules of Appellate Procedure, subject to motion of any party to certify for interlocutory appeal.

Dated this 8th day of January 2004.

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David J. Dreyer, Judge
Marion Superior Court