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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000721-MR

PATRICK SCULLY and
MERLYN SCULLY — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 97-CI-00891

AMERICAN AIRLINES — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS and McANULTY, Judges; and MILLER, Special Judge.[1]

COMBS, JUDGE: Patrick J. Scully and Merlyn C. Scully, his wife, appeal from a March 6, 2001, order of the Boone Circuit Court dismissing their personal injury action against the appellee, American Airlines ("American"), a Delaware corporation. The trial court dismissed the case for lack of subject matter jurisdiction. We affirm.

On Monday evening, August 26, 1996, Patrick Scully, and his wife, Merlyn, were passengers on American Eagle flight number 4019 destined for Cincinnati/Northern Kentucky International

[1] Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Airport. Residents of the West Indies, Patrick and Merlyn had arranged to travel that day from Port of Spain, Trinidad, to Northern Kentucky via Miami and Chicago. According to the Scullys, Patrick was severely injured upon his arrival in Kentucky.

In August 1997, the Scullys filed a negligence action in Boone Circuit Court. They alleged that Patrick had fallen directly from the aircraft onto the tarmac when a portable stair railing supporting his weight gave way. They contended that airline employees had negligently assembled the portable stairs causing the railing to collapse. Merlyn alleged that because of the airline's negligence, she had suffered the loss of consortium and services of her husband. American answered the complaint and asserted as a defense that the cause of action was limited by federal law.

In November 2000, American Airlines filed a motion to dismiss for lack of subject matter jurisdiction. It contended that the provisions of the Warsaw Convention applied to this case and preempted claims based on state tort law.[2] Simultaneously, it moved for leave to file an amended answer specifically to include as a partial defense the provisions, defenses, and limitations included in the Warsaw Convention. On March 6, 2001,

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[2]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art.29, 49 Stat. 3000, T.S. No 876 (1934), reprinted in 49 U.S.C. '40105 (1994).

without addressing the pending motion for leave to amend its answer, the trial court granted American's motion to dismiss. This appeal followed.

CR 12.08 provides that a trial court shall dismiss an action whenever it appears that the court lacks jurisdiction of the subject matter. In January 1999, the United States Supreme Court ruled that the Warsaw Convention precludes a passenger on an international flight from maintaining an action for damages under state tort law. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 161, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999). Accordingly, the trial court held that it lacked subject matter jurisdiction in this case.

On appeal, the Scullys argue that the trial court erred by concluding that the Warsaw Convention applies to this action since C by its terms C it pertains only to "international transportation." Because the last leg of their flight originated in Chicago, the Scullys contend that their travel should be characterized as domestic rather than international. We disagree.

Article 1(2) of the Convention defines "international transportation" as:

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation . . . are situated . . . within the territories of two High Contracting Parties. . . .

Convention for the Unification of Certain Rules Relating to International Transportation by Air.

The domestic portion of international travel qualifies as international flight if both the passenger and air carrier are reasonably aware of the international nature of the transportation. Manion v. American Airlines, Inc., 17 F. Supp. 2d 1 (D.C. 1997). A passenger is bound "by the Warsaw Convention where he was aware of the international character of the flight, even though he was injured on the domestic portion of the flight. . . ." Lemly v. Trans World Airlines, Inc., 807 F.2d 26, 27 (2d Cir. 1986).

In Manion, supra, the plaintiff scheduled two consecutive flights C one from Chicago to Boston and one from Boston to Ireland. His return flights connected from Ireland to New York and from New Your to Washington D.C. The plaintiff's itinerary included all of the outgoing and return tickets. The district court viewed this fact to be evidence of international travel, which was "also substantiated by the fact that there was an insignificant time difference between the initial and subsequent flight, and the fact that the original carrier was aware of the passenger's subsequent flight plans." Id. at 4. (Citations omitted). Therefore, the court concluded that the plaintiff's flight from Chicago to Boston qualified as "international transportation" that was governed by the Warsaw Convention.

Similarly, the Scullys' itinerary clearly indicates travel from Trinidad to an ultimate destination in Northern Kentucky. There were only insignificant time delays between the initial flight and subsequent connections both in Miami and in Chicago. Scully remained with the same carrier throughout the trip. American was also aware of the international nature of Patrick's travel plans. The trial court did not err by concluding that the Warsaw Convention governed this claim, thereby preempting the state law cause of action.

The Scullys also argue that the trial court erred by concluding that the Warsaw Convention applies to this action since American cannot show that it met the ticket requirements described in the Convention. Again, we disagree.

Under the terms of the Convention, the ticket must contain a statement in 10-point type that the transportation was subject to the rules relating to liability as established by the Convention. American claims that its ticket jackets for all international flights are in compliance and that it advises customers that the transportation is subject to the terms of the Warsaw Convention. However, a copy of Patrick's ticket was not available as he had disposed of it. The Convention addresses that contingency as well: "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention." Art.

3(2), 49 U.S.C. ' 40105. The trial court did not err by concluding that the terms of the Convention apply despite the fact that Patrick's ticket could not be produced for inspection.

Finally, the Scullys argue that dismissal was improper regardless of whether the Warsaw Convention applies since it does not does preempt state law causes of action. The preemptive effect of the Convention appears to the sole basis of the trial court's order dismissing the action.

As we noted above, the U.S. Supreme Court has directly and unequivocally addressed that argument. In Tsui Yuan Tseng, supra, the Supreme Court held that the terms of the Warsaw Convention preclude a passenger from asserting under state law any personal injury claims resulting from international air transportation. Consequently, the trial court did not err by concluding that resort to state tort law was precluded where the Warsaw Convention expressly applied.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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