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"You Like 'To-may-toe,' I Like 'To-mah-toe'" — Distinctions Without a *Material* Difference: Supreme Court Reverses Lower Court Rejection of ATSA Immunity

By Barry S. Alexander and Jonathan M. Stern

The events of September 11 were by no means the first examples of terrorism involving aviation, but they unified the U.S., if not the world, in its effort to make air travel safer. It was in the wake of 9/11 that Congress enacted the Aviation and Transportation Security Act (ATSA), pursuant to which the Transportation Security Administration (TSA) was created. Among its provisions, the ATSA gave airlines immunity against civil liability for reporting suspicious behavior in an effort to ensure that the TSA would be informed of potential threats.

On January 27, 2014, the U.S. Supreme Court issued its decision in *Air Wisconsin Airlines Corp. v. Hoeper*,[1] in which it relied upon the ATSA's immunity provision to reverse a $1.2 million defamation verdict against Air Wisconsin Airlines Corp. This decision represents a major victory for air carriers, and the safety of air travel as a whole. The decision is especially welcome in the wake of the Supreme Court's disappointing decision not to grant *certiorari* in *Alaska Airlines, Inc. v. Eid*,[2] which involved the Tokyo Convention's provision of immunity to a Captain's actions to ensure the safety of an aircraft during international operation.

William Hoeper had been working for Air Wisconsin for six years when, in 2004, he was required to get certificated on a new aircraft to continue operating out of his home base. After failing three proficiency tests, which in itself was cause for dismissal, Hoeper agreed with Air Wisconsin that he would receive one final chance to pass the test, all but guaranteeing that he would be terminated if he failed.

In December 2004, Hoeper flew to Virginia for the simulator component of the test. Hoeper had difficulty in the simulator and, realizing that he was likely to fail, "blew up" at the instructor and terminated the test. The instructor reported Hoeper's behavior to another Air Wisconsin employee, who then discussed it with others at the company. The Air Wisconsin employees, knowing that Hoeper was going to be flying home that day and recalling prior instances where disgruntled airline employees caused or nearly caused air disasters, became increasingly concerned that Hoeper might pose a threat to the flight. Their fears were exacerbated by the fact that Hoeper was a Federal Flight Deck Officer (FFDO), which increased the risk that he could be carrying a firearm on the flight.

The Air Wisconsin employees decided that the TSA should be apprised of the situation. Patrick Doyle, an Air Wisconsin employee, made the call. The jury concluded that Doyle advised the TSA that Hoeper "was an FFDO who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that an "[u]nstable pilot in [the] FFDO program was terminated today."

As a result of this report, the TSA boarded the plane and removed Hoeper. After questioning him and confirming that his gun was at his home, Hoeper was

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1. *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. _____ (2014) (slip op).

2. *Alaska Airlines, Inc. v. Eid*, Docket No. 10-962.

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permitted to fly later that day. He was fired by Air Wisconsin the following day.

Hoeper commenced a lawsuit against Air Wisconsin in Colorado asserting several causes of action, including defamation, and Air Wisconsin moved for summary judgment based on ATSA immunity. Pursuant to 49 U.S.C. §44941, carriers are immune for reports to the TSA unless the carrier "made the disclosure with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to its truth or falsity." The trial court denied Air Wisconsin's motion and submitted the immunity issue to the jury, which found for Hoeper and awarded him $849,625 in compensatory damages and $391,875 in punitive damages.[3]

The Colorado Court of Appeals affirmed the judgment, holding that the ATSA immunity issue was properly submitted to the jury, the record supported the jury's rejection of immunity and the evidence was sufficient to support the defamation verdict. The Colorado Supreme Court also affirmed. Although the Colorado Supreme Court held that the issue of ATSA immunity was a question of law that should have been determined by the court, it held that this error was harmless because Air Wisconsin was not entitled to immunity.

In a footnote that provided the impetus for the Supreme Court's review, the Colorado Supreme Court found that it did not have to decide whether Air Wisconsin's report was true or false because Air Wisconsin made the report with reckless disregard as to its truth or falsity — in other words, the court held that a report made recklessly is not entitled to immunity even if it is substantially true.

The Colorado Supreme Court then compounded this error by engaging in a hairsplitting analysis comparing Air Wisconsin's actual statements to statements that the court determined would have been permissible. The following side-by-side analysis reflects the statements the Colorado Supreme Court found unacceptable with those that would be acceptable:

Not Acceptable (What Air Wisconsin Said)	Acceptable (What Air Wisconsin Should Have Said)
"[Hoeper] was terminated today"	"[Hoeper] knew he would be terminated soon"
"[Hoeper] was an FFDO who may be armed"	"[Hoeper]was an FFDO pilot"
"[W]e were concerned about his mental stability"	"[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators"

The Supreme Court granted *certiorari* to address whether ATSA immunity could be denied without a determination that the carrier's disclosure was materially false. To all involved, and presumably all who closely followed the case, the Court's unanimous opinion holding that ATSA immunity could not be denied without such a finding came as no surprise. What was far less certain, but of no less importance, was whether the Supreme Court would address the Colorado high court's finding that the report made by Air Wisconsin was false — *i.e.*, whether it would evaluate whether Air Wisconsin was entitled to immunity under the facts of this case. This was of vital importance because, if the Supreme Court decided not to address whether the report was materially false, and the Colorado Supreme Court's hair-splitting analysis was allowed to stand, the Court's decision would provide carriers no real protection at all, rendering the "victory" a pyrrhic one.

In a welcome turn of events, a majority of the Supreme Court decided to address this issue and held that Air Wisconsin's report was not materially false. In an opinion written by Justice Sotomayor, the Court first rejected Hoeper's argument that the requisite material falsity analysis had been performed as part of the lower courts' review of the jury's defamation verdict, holding that the proper ATSA immunity analysis required a determination of "whether a falsehood affects the authorities' perception of and response to

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3. The punitive damages award was reduced to $350,000, making the total award just less than $1.2 million.

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a given threat"— i.e., a falsehood is not material unless there is a substantial likelihood that a reasonable security officer would consider it important in determining the proper response to a supposed threat.

In finding that the distinctions made by the Colorado Supreme Court were as a matter of law immaterial to the ATSA immunity analysis, the Court stressed that "Congress meant to give air carriers 'breathing space' to report potential threats to security officials without fear of civil liability for a few inaptly chosen words."

Perhaps the most important aspect of the Court's opinion is its keen understanding that these reports often must be made without time to investigate or formulate a perfect script, and guidance that airlines and their employees must be given substantial leeway in the language chosen for a report. It is exactly this leeway, or deference, that the Ninth Circuit failed to give to the airline Captain's decision to remove unruly and potentially dangerous passengers in *Eid*, where it imposed a duty to investigate and interpreted the Tokyo Convention's immunity provisions in a manner contrary to both the Convention's goals and the parties' intent.[4]

The Court's decision in *Hoeper* will promote the reporting of suspicious activities, thereby increasing the safety of air travel. Moreover, it indicates the Court's understanding of the deference that must be given to those who must act or report quickly in the face of a potential danger to air travel, which hopefully is a harbinger of good things to come — specifically, a proper, more deferential interpretation of the Tokyo Convention's immunity provisions as well as those provided by other provisions of U.S. law. ◆

4. As readers may recall, in *Eid*, the Captain diverted an Alaska Airlines flight and delivered several passengers to authorities because a flight attendant informed him over the intercom that she had lost control of the cabin while dealing with these passengers. While there may have been some question as to whether the flight attendant acted appropriately, there was no dispute that the Captain had no knowledge of the events occurring in the cabin outside of the flight attendant's report.

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