UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-CV-11817WGY

CHRISTINE STONE, AS ADMINISTRATRIX	)
OF THE ESTATE OF BRETT STONE, AND	)
INDIVIDUALLY,	)
Plaintiff	)
vs.	)
	)
FRONTIER AIRLINES, INC.,	)
Defendant	)

PLAINTIFF STONE'S MEMORANDUM IN OPPOSITION TO DEFENDANT FRONTIER'S MOTION FOR SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

Plaintiff Christine Stone, as Administratrix of the Estate of Brett Stone, and Individually ("Stone"), for her Memorandum in Opposition to the Motion for Summary Judgment as to Punitive Damages of Defendant Frontier Airlines, Inc. ("Frontier"), states as follows:

I. FACTUAL BACKGROUND

Frontier is a Denver-based coast-to-coast airline with 2,500 employees flying an average of about two million passengers over the last several years. (Stone's Statement of Material Facts, filed herewith as part of her Response to Frontier's Statement of Undisputed Facts and incorporated herein ["SMF"] ¶¶2-3). Brett Stone died of cardiac arrest on a Frontier flight on July 27, 2000. (SMF¶68-70).

By 1996, or 1997 at the latest, Frontier should have known of the use of automated external defibrillators ("AEDs") in commercial U.S. passenger airlines to resuscitate victims of sudden cardiac arrest. This was information widely publicized beginning in 1996 through the aviation

press, the popular press, through Congressional hearings and legislation, and through coverage of American Airline's announcement in 1996 that it would carry AEDs. (SMF¶¶15-24).[1]

From this available information, Frontier also should have known, in 1996 or 1997, that it was statistically inevitable that one or more of its passengers would be stricken with cardiac arrest, within a year or two, and that only an on-board AED – which were inexpensive, reliable and already saving lives on other airlines – could effectively resuscitate that passenger. (SMF¶¶10, 12-15). Instead, because Frontier lacked a medical department and failed to track industry developments, Frontier employees never heard of AEDs until around March 1999. (SMF¶¶25-27, 30, 34).

A further six months – March to September – elapsed before Frontier middle management brought the question of AEDs to the attention of decision-making senior management. (SMF¶¶31-47). Early during this period, Frontier acquired the actual knowledge of the impending inevitable passenger cardiac arrest, the uselessness of CPR, and the progress of other airlines carrying and resuscitating passengers (and flight attendants). (SMF¶¶31-38). Frontier's medical services vendor noted how badly informed Frontier was, and how poorly it understood the basic issues. (SMF¶40-41).

Frontier's middle managers made a forceful recommendation to senior management by a memo dated September 20, 1999, which stated:

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[1] Stone offers a number of newspaper and magazine articles on the subject of the use of AEDs in passenger aircraft, and related subjects, which were published during the period 1996 to 1998. These materials are self-authenticating under Fed.R.Evid. 902(6). They are relevant to show the kind of information about AEDs on airlines that was publicly available, both in the mass media press (NBC News with Tom Brokaw, Good Morning America, Reader's Digest, Better Homes & Gardens, New York Times, Wall Street Journal) and in the aviation industry press (including Aviation Daily, recognized as authoritative by the experts of both parties and Frontier executives).

These publications are relevant to prove Frontier's constructive knowledge -- what Frontier should have known -- of the use and benefits of AEDs on aircraft beginning in 1996, through early 1999, when it says it first heard of AEDs. *See, Coyne v. Tabor Partners*, 53 F.3d 454, 461, n. 6 (1st Cir. 1995) (local newspaper article describing union protest admissible and relevant to show "constructive notice of the tense circumstances and the potential for violence").

> the defibrillator, which more and more airlines are stocking as a standard part of their onboard medical repertoire, provides an easy-to-use, computerized electrical shock in the event a passenger's heart has stopped beating. …
>
> … although Frontier has never experienced an onboard fatality, the more passengers we carry, the more our chances increase. …
>
> As Frontier continues to grow both financially and in size, we need to be proactive in anticipating that someday, unfortunately, statistics shows that we will have a dire inflight medical emergency. A little planning now, and yes, some additional costs now, will help us prepare for that moment and save that future customer's life. (SMF¶¶46-48, Ex. G).

Despite this urgent (and very accurate) call to action, no decision was made on AEDs for another eight months, which were consumed in bureaucratic wrangling, concerns about cost, miscommunication, and fear of technology. (SMF¶¶49, 52-65). Frontier finally ordered AEDs for its planes on June 8, 2000. (SMF¶¶65).

Frontier claims that the process of installing AEDs reasonably took five to six months, due to factors such as compliance with FAA regulations and engineering questions. These excuses for Frontier's delay are grossly exaggerated; installation reasonably could have been accomplished in two or three months. (SMF¶¶72-81).

Brett Stone had one last chance: other airlines had put AEDs on their aircraft even before all flight attendants were trained, in the hope that a passenger familiar with AEDs would come forward in a medical emergency. (SMF¶¶78-79). Frontier's FAA liaison indicated he would require training of all flight attendants before deployment, a position he later admitted was unauthorized. Frontier did not know any better and did not question this requirement. (SMF¶¶78-79; Frontier Ex. B, Gettig Deposition, at 96-98).

Brett Stone died on a Frontier flight for lack of an AED on July 27, 2000, two weeks after the AEDs were delivered to Frontier. (SMF¶¶66). Both the Emergency Medical Technician and medical doctor who immediately came forward to attend Brett Stone asked for an AED, both

knowing that AEDs were commonly carried on passenger planes. (SMF¶¶70). A jury could reasonably find gross negligence or reckless conduct on Frontier's part, supporting an award of punitive damages. Frontier's Motion for Summary Judgment should be denied.

II. ARGUMENT

A. The Summary Judgment Standard

Under Rule 56, if the evidentiary materials submitted by the parties reveal any "genuine issue of material fact," the motion must be denied. Fed.R.Civ.Pro. 56(c); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1993). In deciding the motion, the Court must take the non-movant's version of the facts as true, resolving all factual disputes and drawing all reasonable inferences in favor of the non-movant. *Fernandez v. Leonard*, 784 F.2d 1209, 1213 (1st Cir. 1986) (affirming denial of summary judgment based on sufficient evidence of gross negligence).

B. The Massachusetts Wrongful Death Act

> A person who (1) by his negligence caused the death of a person, … shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered …; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than $5,000 in such case as the decedent's death was caused by the malicious, willful, wanton, or reckless conduct of the defendant or by the gross negligence of the defendant; …

M.G.L. c. 229, §2 (emphasis added); *see, Knowlton v. Spillane*, 137 F.R.D 196, 197 (D.Mass.1991).

C. Gross Negligence

> Gross negligence ... is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight negligence, or the want of even scant care. ... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure.

Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. Ct. 17, 20 (1997), *quoting Altman v. Aronson*, 231 Mass. 588, 591-592 (1919); *see, Peck v. Garfield,* 862 F.2d 1, 5

(1st Cir.1988). Common indicia of gross negligence include: "deliberate inattention or … voluntary incurring of obvious risk or … persistence in a palpably negligent course of conduct over an appreciable period of time." *Pruzinski v. Malinowski*, 338 Mass. 58, 60 (1958) *quoting, Lynch v. Springfield Safe Deposit & Trust Co*., 294 Mass.170, 172 (1936).

In *Freeman v. Mass. Bay Transportation Authority*, 2000 WL 1909777, 12 Mass. L. Rptr. 621 (Mass. Super. 2000) (Fabricant, J.), a green line train collided with a pedestrian, causing the pedestrian to be stuck under the train, where he died of asphyxiation. The most "egregious" instance of negligence was the defendant's knowledge that manually operated jacks were capable of lifting a train more quickly and reliably than the generator-operated hydraulic jacks which it had on its trucks.

> The jury could also have found that the effect of that decision was to insure that, in the event of an emergency of a type that was foreseeable in light of the nature of the MBTA's operation, as well as in light of past experience, even if the MBTA's equipment were fully operational and were deployed promptly, the delays necessitated by its set-up in use would expose a person trapped under a vehicle to unnecessarily increased risk of death.

2000 WL 1909777 at *4. Other negligence included that the jack brought to the scene by the MBTA failed to work, due to a dirty spark plug; that the MBTA directed a second emergency vehicle away from the scene, without having determined that the equipment on the scene worked; and, due to communication problems, a delay in the arrival of MBTA personnel to the scene.

> In sum, the evidence established a lot of negligence, at various levels in the MBTA hierarchy, involving numerous distinct aspects of its operations. The quantity of negligence, considered in light of the emergency nature of the functions involved, could reasonably be found to rise to the level of gross negligence**.**

Id. at *5.[2]

D. Reckless Conduct

Gross negligence is less than reckless conduct. *Massaletti v. Fitzroy*, 228 Mass. 487, 501 (1916). Conduct is reckless when the defendant "intentionally or unreasonably disregarded a risk that presented a high degree of probability that substantial harm would result to another." *Beausoleil v. National Railroad Passenger Corp*., 145 F.Supp.2d 119, 125 (D. Mass. 2001); *see, Gage v. City of Westfield*, 26 Mass. App. Ct. 681, 691 (1988).

In *Beausoleil v. National Railroad Passenger Corp*., 138 F.Supp.2d 189 (D. Mass. 2001), a 13-year old girl was struck by a train while crossing the tracks at the Attleboro Station. Under federal law, the defendants – Amtrak and the Massachusetts Bay Transit Authority ("MBTA") – could only be found liable on evidence of reckless conduct. 138 F.Supp.2d at 200-01. Summary judgment for the MBTA was denied. One passenger had been killed in 1996 and a state legislator had warned the defendants of the grave risk of a recurrence. The MBTA claimed that it was implementing the legislator's proposal that fencing in the area be improved, but had not yet done so. 138 F.Supp.2d at 205.

In addition, the engineer of the train that struck the girl knew that passengers were scheduled to be left at the Attleboro Station shortly before he arrived there, and knew that passengers who were left off at the Attleboro Station crossed the tracks "all the time." The driver also failed to use his radio to obtain information about passengers at the Attleboro Station. From these

[2] Frontier offers no controlling authority for its assertion that the burden of proof for proving gross negligence should be "clear and convincing" evidence, and properly recognizes that the only Massachusetts court to address the question rejected it. *Santos v. The Chrysler Corporation*, 1996 WL 118818 (Mass. Super.) ("The contention is meritless."). The Supreme Judicial Court has employed this elevated standard in rare circumstances, and where it does so, it does so explicitly. *See, Rotkiewicz v. Sadowsky*, 431 Mass. 748, 755 (2000) (in case of defamation of public official, burden for proof of actual malice, following *New York Times v. Sullivan*); *Adoption of Don*, 435 Mass. 158, 164 (2001) (parental fitness).

circumstances, "a jury could properly conclude that the defendants acted recklessly and, as a result, Danielle Beausoleil is dead." 138 F.Supp.2d at 204-06.

In a different opinion in the same case, Judge Wolf addressed co-defendant Amtrak's motion for summary judgment. *Beausoleil v. National Railroad Passenger Corp.*, 145 F.Supp.2d 119 (D. Mass. 2001). An internal Amtrak memorandum, a year and a half before Beausoleil's death, had recognized the danger of passengers crossing the tracks at the Attleboro station, identifying it as a "considerable safety issue" and the importance of moving "quickly on this issue." 145 F.Supp.2d at 123. Amtrak developed a plan and sent it to the MBTA for approval a little more than a year before Beausoleil's death, but took no other steps. On these facts, Judge Wolf denied summary judgment to Amtrak on the issue of recklessness. 145 F.Supp.2d at 125.

E. A Jury Could Reasonably Conclude That Frontier's Conduct Was Reckless, or At A Minimum, Grossly Negligent

Resolving all factual disputes in Stone's favor, material issues of fact remain as to Frontier's liability for punitive damages under the Wrongful Death Act. A jury could reasonably conclude that Frontier was reckless, or at least grossly negligent.

The "risk" Frontier faced was that a passenger would be stricken with cardiac arrest during a flight, and that the passenger would die without an AED. Frontier constructively knew this – reasonably should have known this – by 1997 and actually knew it in Spring 1999. There was "a high degree of probability" that Frontier would experience passenger cardiac arrest – this was statistically inevitable, and imminent. The resulting "substantial harm" would be death of the passenger, and consequential harm to the victim's family.

In short, "the risk of death or grave bodily injury [was] known or reasonably apparent to [Frontier] and the harm [was] a probable consequence of [Frontier's] election to run that risk or its failure to reasonably recognize it." *Beausoleil*, 145 F.Supp.2d at 125. Alternatively, a jury

could conclude that Frontier was grossly negligent because it was careless with its passengers' welfare in several different ways, which combined to constitute gross negligence resulting in loss of Brett Stone's life.

Passenger cardiac arrest is fatal, unless defibrillation can be administered within 5 to 10 minutes, a practical impossibility if the arrest occurs during a flight. (SMF¶7-9). American Airlines' Medical Director, Dr. McKenas testified before Congress in May 1997 that 42 American Airline passengers suffered cardiac arrest in 1996. (SMF¶¶20-22). Various public sources available in the mid-1990s assessed the frequency at approximately one cardiac event per million passengers. (SMF¶10, 22).

Frontier flew 1.664 million passengers in the year ending March 1999; 2.284 million passengers in the year ending March 2000; and 3.017 passengers in the year ending March 2001. (SMF¶3). In August 1997, Frontier had a passenger heart attack (which did not result in cardiac arrest), though the passenger survived. (Frontier's Exhibit D). By 1997, or 1998, Frontier should have known that it was due, in the next year or two, according to reliable industry statistics, for a passenger cardiac arrest. Frontier's risk of passenger cardiac arrest is comparable to the risk of train passengers becoming pinned under a rail car, as in *Freeman,* or train passengers straying onto the tracks as in *Beausoleil*: in each case, a common carrier of passengers foresees a recurring, potentially fatal danger to its passengers.

Also by 1997, or at the latest, early 1998, Frontier should have known that other airlines were equipping their planes with AEDs, and the reasons for their doing so: AEDs could restart the hearts of most passengers experiencing cardiac arrest, something no other treatment (including CPR) could do; AEDs were effective, inexpensive, reliable and easy to use. (SMF¶10-12, 15-24).

That Frontier remained unaware of these developments is due to several factors: Frontier had no medical department and no employees with medical training dedicated to passenger (or even employee) medical care. (SMF¶28-30, 34). Frontier made no sustained effort to keep itself aware of industry developments, including health and safety developments, activities of Congress, or even the steps taken and publicized by its closest competitors, such as United. (SMF¶2, 18, 25-27).

In short, Frontier was a national airline in terms of its routes, size, number of passengers, size of its planes, ambitions and profits, but, as Christine Stone learned, a cost-cutting, backwater airline in terms of its attention to passenger health concerns and willingness to adopt and pay for life-saving passenger health equipment. Or, so a jury could reasonably conclude.

Had Frontier kept itself informed, it would have known by 1998 at the latest that one of its passengers would – inevitably -- be stricken with cardiac arrest in 1999 or 2000, and that that passenger would certainly die unless Frontier equipped its planes with AEDs. Frontier's failure to learn of AEDs until March 1999 – caused by its lack of dedicated medical personnel and failure to be even generally current with industry activities – was by itself negligence contributing to Brett Stone's death.

When Frontier first heard of AEDs on passenger planes in March 1999, AEDs on U.S. passenger planes had been debated for over a decade; had been recommended for almost as long; had been carried and used to save lives on foreign airlines for over five years; had been embraced by major U.S. airlines for two years; and had been the subject of Congressional hearings two years earlier and federal legislation the year before. (SMF¶¶15-24). American Airlines made a nationally publicized save of Michael Tighe – in Frontier's hometown of Denver – the year before, in late 1998. (SMF¶24). All of these developments were reported extensively

in the aviation press, and more widely in mass media outlets such as People magazine, Better Homes & Gardens, USA Today and national network television news. (SMF¶¶16-17).

In its brief, Frontier complains a great deal about the restraints of federal regulation. However, had Frontier kept itself informed even of federal law – not just FAA regulation -- it would have known in April 1998 that the issue of AEDs on U.S. passenger planes was, at a minimum, an issue of serious concern to Congress. The AMAA was enacted in April 1998, the culmination of the hearings which began in May of 1997. (SMF¶¶21). Yet Frontier remained ignorant.

By 1998, most Americans probably had read or heard about the use of defibrillators in planes. (SMF¶¶17-24). Frontier -- with its one hundred daily flights, its fleet of Boeing 737 aircraft, each seating over 100 passengers, with its millions of annual passengers and thousands of employees -- had not. (SMF¶¶2-3, Frontier Ex. M, Gardner Affidavit, ¶2). According to Beau Morrow, talking about AEDs with Frontier colleagues on his return from the March 1999 conference was like speaking a "foreign language." (SMF¶41).

Little of substance was done from the time Mr. Morrow brought the news of AEDs to Frontier middle management, until the September 20, 1999 recommendation. In Spring and Summer 1999, MedAire supplied, through written materials and presentations at Frontier, a variety of up-to-date and accurate information on the subjects of cardiac arrest, AEDs and airline success with AEDs. (SMF¶¶31-47). By May or June, Frontier's constructive knowledge of passenger cardiac arrest and AEDs had transformed into actual knowledge.

The September 20 recommendation properly acknowledged what other airlines had known for some time: that lives were at stake that could fairly easily and fairly cheaply be saved with AEDs. (SMF¶¶47-48, Ex. G). According to Frontier, this was the first time Frontier's senior

management had heard of AEDs. (SMF¶46). In the six months between March and September, Frontier lost still more time, but this time with the actual knowledge that inaction meant the certain death of a Frontier passenger.

Following the September 1999 recommendation, despite its accurate assessment that lives were at stake, the Frontier AED project once again fell through the cracks. During this time, nothing of substance was done to advance the installation. Despite the medical benefits of AEDs, as demonstrated by the experiences of other airlines, internal Frontier deliberations continued to be mired in cost concerns, confusion, miscommunication, and bureaucratic dithering. (SMF¶¶52-64).

Frontier did not order its AEDs until June 8, 2000, eight and a half months after the September 20, 1999 recommendation. (SMF¶65). During this entire period, Frontier knew at all levels of its management – actually, not constructively -- that a passenger was statistically due for a cardiac arrest, and that, without an AED, that passenger would die. (SMF¶¶46-51).

Frontier took about six months to equip its planes with AEDs. Frontier offers a variety of excuses about why it took this long, such as FAA oversight and engineering issues. The excuses are generally exaggerated or without substance. Had Frontier acted with an urgency appropriate to meet the known likelihood of passenger cardiac arrest, deployment could certainly have been completed within two or three months. (SMF¶¶72-83). Frontier's delay during this period is only one instance of negligence among many, but not among the worst.

Even assuming six months is a reasonable amount of time to complete deployment, Frontier needed to have begun in January 2000 to save Brett Stone. By then, however, Brett Stone had been doomed to an early death years before, the result of a series of recklessly missed chances. Before and during 1999, Frontier (1) failed to have a medical department; and (2) failed to

apprise itself of industry events; and so (3) remained completely ignorant of AEDs and the likelihood of passenger cardiac arrest. Then, having learned by early 1999 that passenger cardiac arrest was statistically imminent and that only AEDs could save those passengers, Frontier (4) failed to take and meaningful steps to acquire or install AEDs for sixteen months, until June, 2000, by which time it was too late to save Brett Stone.

As in *Beausoleil*, the jury could reasonably find that Frontier knew that the manner in which it was operating the airline involved a high degree of likelihood of substantial harm to passengers like Brett Stone. Alternatively, as in *Freeman*, Frontier's several instances of negligence could be found by the jury to combine to rise to the level of gross negligence. The jury should determine whether Frontier acted with "deliberate inattention" or "persisted in a palpably negligent course of conduct over an appreciable period of time." *Pruzinski*, 338 Mass. at 60.

III. FRONTIER'S EXCUSES FOR ITS FAILURE TO CARRY AEDS DO NOT PRECLUDE A FINDING OF GROSS NEGLIGENCE OR RECKLESS CONDUCT

Frontier argues that several excuses justify its failure to have an AED on board Brett Stone's flight: that it was acting as comparable airlines were acting; that it complied with federal regulation on the contents of its in-flight medical kit; and that it acted with reasonable dispatch in installing AEDs, once it learned of them and investigated them. These excuses are unfounded or irrelevant.

A. Frontier's Compliance with "Minimum" Federal Regulations Does Not Fulfill its Duty as A Common Carrier

Frontier admits that it is a common carrier. (Answer, ¶2). "[T]he standard to which common carriers are held is the very highest, approaching that of an insurer." *Worcester Insurance Company v. Fells Acres Daycare, Inc.*, 408 Mass. 393, 406 (1990); *see also, Zedros v. Hudson*, 11 Mass. App. Ct. 889, 1007 (1981) ("utmost" care). The highest degree of care which a

common carrier owes to its passengers means that degree of caution which is reasonable in view of the relation of the parties and the fatal consequences which may ensue from breach of this duty. *O'Leary v. Metropolitan Transit Authority,* 339 Mass. 328, 331 (1959).

> Because of the nature of the carrier's undertaking and the relation between the carrier and its passengers, reasonable care under the circumstances is a high degree of care, 'the utmost caution which is compatible with the conduct of the business, according to the requirements of the public, as to rapidity, expense and comfort.'

Bannister v. Berkshire Street Railway, 301 Mass. 598, 600 (1938), *quoting Fitzgerald v. Boston Elevated Railway*, 274 Mass. 287, 289.

Frontier generally takes the mistaken position that federal regulations, as on the subject of medical kits, define the extent of its duty to passengers. (*See, e.g.*, Frontier's Statement of Undisputed Facts, ¶5). This Court was the second Court in this District to reject this position. *See, Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78, 87 (D.Mass. 1999). Frontier incorrectly asserts that its compliance with federal regulation precludes a finding that it was grossly negligent. Frontier continues to misunderstand its duty to its passengers.

Compliance with federal regulation or requirements may be considered, but is not conclusive, on the question of the defendant's negligence. *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140 (1985). The regulation Frontier which invokes, governing medical kits, is by its own terms a "minimum" standard, a floor over which state law supplies the standard for conduct. *See, Somes,* 33 F.Supp.2d at 87. The state law standard of care for a common carrier is the highest in all of tort law, "approaching that of an insurer." *Worcester Insurance,* 408 Mass. at 406. The kit itself is a bare-bones collection of bandages and medications, costing about $100. (Plaintiff Stone's Ex. G, last page; 14 CFR 121 Appendix A). A jury should properly decide what weight to give Frontier's compliance with the federal medical kit requirement.

Frontier also points to the timing of Proposed and Final FAA Rule on the subject of AEDs as demonstrating the reasonableness of its conduct. As an initial matter, the Final rule is irrelevant because it post-dates Brett Stone's death by almost a year. The Proposed Rule is an illustration of the vitality and beneficial effect of the common law: the Proposed Rule itself acknowledges that airlines carrying a majority of passenger traffic already carried AEDs or were in the process of installing them. (Notice of Proposed Rulemaking, Frontier Ex. G, at 33721, 33723 ["as more airlines began carrying them," 33727 [cost-benefit discussion]). This can only mean that the U.S. aviation industry, rightly, paid no attention to the minimum federal standard and exceeded it by carrying AEDs, which were not required under federal law. Frontier traditionally did the same thing. (SMF¶6).

The wisdom of the elevated common carrier standard is manifest in this case. Millions of passengers trust their lives to Frontier, and put themselves completely and irrevocably in Frontier's hands during a flight. Had Frontier displayed even a small amount of the conscientiousness and prudence required of it under Massachusetts common law, Brett Stone would be alive today. As recently acknowledged by a unanimous Supreme Court, state common law remedies can serve federally declared safety objectives. *Sprietsma v. Mercury Marine*, 123 S.Ct. 518 (2002).

Punitive damages are especially appropriate here to remind Frontier – and other carriers – that federal regulation of many aspects of air travel is <u>not</u> an excuse for any airline to abdicate its elevated duty of care to passengers. Frontier should be deterred from raising federal regulation as a shield to protect it from the consequences of its own reckless conduct.

B. Frontier's Claimed Reliance on Industry Practice Is Misplaced Both As A Matter of Law and Fact

Frontier claims that it was not alone among airlines in failing to have AEDs on its planes in July 2000, which is true, to a limited extent. Frontier attempts to compare itself to small regional carriers, with small fleets of small planes on short routes. Frontier ignores the law and distorts the facts: the law recognizes that an industry's conduct may be unreasonable, and that there is no reasonableness in numbers. Nor can Frontier be fairly compared to airlines with shorter routes and smaller planes.

The custom or practice of a trade or industry is not a substitute for the legal standard of reasonable care under the circumstances. *Upham v. Chateau DeVille Dinner Theatre, Inc.*, 380 Mass. 350, 354 (1980); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) ("a whole calling may have unduly lagged in the adoption of new and available devices"); *see also*, 57A Am.Jur. 2d, Negligence, § 175 at p. 229-230.

Evidence of compliance with industry practice may be overcome by evidence of negligence notwithstanding conformity with industry usage. *Bergendahl v. Massachusetts Electric Company*, 45 Mass. App. Ct. 17, 720 (1998). Evidence sufficient to overcome a defendant's evidence of compliance with industry practice may include: that the defendant knew of the likelihood of danger or risk to the plaintiff; that the defendant had taken some measures to reduce the risk or danger; that the defendant knew that its measures to respond to the danger or risk were inadequate. *Bergendahl*, 45 Mass. App. Ct. at 720. These are roughly the same elements as recklessness and gross negligence, which Frontier met though its conduct, as discussed above.

On this point, Frontier advances a "small carrier" exception to the standard of care, by suggesting that it had a lower standard of care than bigger airlines, such as United, American and Delta – all of whom completed fleet-wide AED deployment a year or more before Brett Stone

died on a Frontier flight. Frontier's own president, Jeff Potter, and other senior Frontier executives, squarely rejected this doubtful proposition. (SMF¶5). He denied that a passenger should, or could, reasonably expect to be less safe on Frontier, than on American or Delta. (Id.). In his view, Frontier is a coast-to-coast low-fare airline. (Id.). Frontier's argument that it justifiably lagged behind the bigger airlines is refuted by her own executives.

In addition, as a matter of fact, Frontier is not fairly comparable to the airlines it lists in the chart in its brief. The measure of the likelihood of cardiac arrest is dependent on how many passengers are carried, the passenger capacity of the planes, the number of routes and the length of the routes. The number of planes is ultimately irrelevant, because the cost is the same per plane. Frontier's cost in carrying AEDs on its 27 planes is not proportionally any greater than American Airline's cost, with its 600 planes. This risk per flight is also identical, if the planes are the same size.

Frontier's Boeing 737 planes seated over 100 passengers. (Frontier Ex. M, Gardner Affidavit, ¶2). During 1999, 2000, and 2001, Frontier flew an average of over two million passengers a year on flights between 1.5 and 4.5 hours in length. (SMF¶2). Frontier flew over 100 routes a day in 2000. (Frontier Exhibit M). Statistically, Frontier could expect a cardiac arrest every year or two, or more frequently, as it carried increasingly more passengers. (SMF¶3, 10, 22).

For this reason, the risk of cardiac arrest on Frontier's planes was vastly greater than on, say, Nantucket Air, with its fleet of Cessnas and puddle-jumping routes. Frontier is more fairly comparable to United and Delta and American than the small regionals. Even if it were reasonable for Frontier to have failed to carry AEDs when these larger airlines did so, it remains

inexcusable that Frontier had not even heard of their highly publicized AED programs and successful resuscitations until a year or two later, in early 1999.

Conclusion

For all of the foregoing reasons, Frontier's Motion for Summary Judgment as to the issue of punitive damages should be denied.

THE PLAINTIFF CHRISTINE STONE, AS
EXECUTRIX OF
THE ESTATE OF BRETT P. STONE

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CERTIFICATE OF SERVICE

I, Paul S. Weinberg, Esq., hereby certify that on this 31st day of March, 2003, I served a copy of the above upon the parties in the action, mailing postage pre-paid to counsel.

Subscribed under the penalties of perjury.

_____
Paul S. Weinberg