THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2020-001150

Josh Hawkins,…..……Appellant,

v.

American Airlines, The Qantas Group d/b/a Qantas Airlines, Expedia, and Travel Guard Insurance

Of Which American Airlines and Expedia are,……Respondents.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC.

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TABLE OF CONTENTS

Page

TABLE OF CASES

Page(s)

Cases

Statutes and Court Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Did the Montreal Convention "trump the United States Constitution" by preventing Appellant "from exercising his right to a trial by jury"?

2. Did the Circuit Court correctly hold that, because Appellant's travel and baggage delay claims against Respondent American Airlines, Inc. ("American") are within the scope of Article 19 of the Montreal Convention, pursuant to Article 29 therein the Convention exclusively governs Appellant's claims and American's liability and expressly preempts all of Appellant's travel and baggage delay claims against American?

3. Did the Circuit Court correctly hold that 49 U.S.C. § 41713(b)(1) expressly preempts Appellant's state common law and South Carolina Unfair Trade Practices Act claims against American related to Appellant's travel and baggage delay claims because they constitute impermissible attempts to enforce South Carolina common law and statutory law "related to" American's flight operations, aircraft maintenance and checked baggage handling "service"?

4. Did the Circuit Court correctly hold that 49 U.S.C. § 41713(b)(1) expressly preempts Appellant's state common law and South Carolina Unfair Trade Practices Act claims against American related to Appellant's frequent flyer program miles claims because they constitute impermissible attempts to enforce South Carolina common law and statutory law "related to" American's frequent flyer program and thus to its "price" and "service"?

5. By failing to argue such issues in his Brief, did Appellant abandon any appeal of the Circuit Court's holdings that (i) Appellant failed to allege legally sufficient travel delay claims against American, and (ii) Appellant's breach of contract accompanied by fraudulent act cause of action against American was insufficient under South Carolina law because Appellant failed to adequately plead two of the three elements of the cause of action?

STATEMENT OF THE CASE

American filed its Motion to Dismiss with the Circuit Court on April 21, 2020. After a hearing on July 21, 2020, the Circuit Court issued its Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss on July 24, 2020. Appellant filed a Motion to Reconsider on July 27, 2020. The Circuit Court issued a second Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss on August 5, 2020. American filed its Memorandum of Law in Opposition to Plaintiff's Motion to Reconsider on August 6, 2020.

The Circuit Court issued its Order Denying Plaintiff's Motion to Reconsider the Court's Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss on August 7, 2020. Appellant filed a second Motion to Reconsider on August 7, 2020. The Circuit Court issued its Order denying Appellant's second Motion to Reconsider on August 11, 2020 (at 12:29 p.m.).

Appellant filed his Notice of Appeal on August 20, 2020.[1]

STANDARD OF REVIEW

"Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its 'failure to state facts sufficient to constitute a cause of action.' In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014) (citation omitted). In reviewing the complaint, "[T]he facts alleged and inferences reasonably deducible therefrom" must be "viewed in the light most favorable to the plaintiff." *Id.* (citation omitted).

APPELLANT'S COMPLAINT

In his Complaint filed with the Circuit Court, Appellant alleged that he purchased a ticket for air transportation by American and Qantas Airways from Greenville-Spartanburg International Airport to Christchurch, New Zealand, via Dallas, Texas. Complaint ¶¶ 2, 6, 9-14 (R. pp. 33-34). Appellant alleged that there was (i) a delay in his transportation by

[1] In his Notice of Appeal, Appellant refers only to the Circuit Court's Order denying Plaintiff's Motion to Reconsider, filed on August 11, 2020. Appellant does not refer to the underlying Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss, filed on August 5, 2020.

American from Greenville to Dallas, (ii) a delay in his transportation by Qantas from Dallas to Christchurch, and (iii) a delay in the delivery of his checked baggage at Christchurch. Complaint ¶¶ 6, 10-15 (R. pp. 33-34). Appellant alleged that, despite the alleged delay of American's flight from Greenville to Dallas, he traveled on the connecting Qantas flight from Dallas to New Zealand. Complaint ¶ 11 (R. p. 34). Appellant also alleged that American failed to credit his frequent flyer program account for the "miles he earned for buying the airplane ticket." Complaint ¶ 19 (R. p. 34).

As against American, Appellant alleged causes of action for common law negligence and recklessness (First Cause of Action), South Carolina Unfair Trade Practices Act ("UTPA") violation (Second Cause of Action), insurance bad faith (Third Cause of Action), and breach of contract accompanied by fraudulent act (Fourth Cause of Action) (R. pp. 35-38).

ARGUMENT

I. American Never Argued That the Montreal Convention Prevented Appellant from Exercising His Right to a Jury Trial, and the Convention Does Not Prevent the Exercise of Such Right

Bereft of any reference to the record, Appellant contends that "American has argued that the Montreal Convention[2] prevents the appellant from exercising his right to a trial by jury." Brief at 4. American never made this argument before the Circuit Court, which did not address this issue in its Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss, filed on August 5, 2020 ("the Order") (R. pp. 9-14), or in its Order denying Plaintiff's

[2] The Montreal Convention is formally known as the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on May 28, 1999, ICAO Doc. No. 9740 (entered into force on November 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734.

Motion to Reconsider, filed on August 11, 2020 (R. p. 26). Appellant raised a jury trial argument during the July 21, 2020 hearing before the Circuit Court on American's Motion to Dismiss, but, as discussed below, American's counsel responded that jury trials routinely take place in cases governed by the Montreal Convention.

During the July 21, 2020 hearing, Appellant argued that, as to the Montreal Convention, the "obvious elephant in the room is the Seventh Amendment problem, probably an equal protection Fourth Amendment problem, too." Hearing Transcript at 10, lines 16-18 (R. p. 93). This was the first time that Appellant had made this argument – or any argument at all – in opposition to American's Motion to Dismiss.[3] Appellant stated, without citing any authority, that his argument was based on the Convention's purported denial of his right to a jury trial. *Id*., lines 22-25 (R. p. 93); *id*. at 11, line 1 (R. p. 94). In response, American's counsel informed the Court that the Convention does not prevent a plaintiff's right to a jury trial:

> [Appellant] argues there's some kind of Seventh Amendment equal protection deficiency here because [the Montreal Convention] limits the right to a jury trial. I've participated in jury trials defending carriers with claims being brought by passengers under the Montreal Convention. They happen all the time. There's no limitation on -- on that.

Hearing Transcript at 12, lines 4-9 (R. p. 95).

As American pointed out in its Memorandum of Law in Opposition to Plaintiff's Motion to Reconsider the Court's Order Granting Defendant American Airlines, Inc.'s Motion

[3] American filed the Motion to Dismiss and a supporting Memorandum of Law with the Court on April 21, 2020 (R. pp. 39-40). Prior to the July 21, 2020 hearing on the Motion, Appellant never filed a responsive memorandum of law, despite the requirement set forth in the *Memorandum Policies for Greenville County Court of Common Pleas* requiring the filing of memoranda in cases to be heard by the Honorable Perry H. Gravely "at least 72 hours prior to the hearing."

to Dismiss, the Montreal Convention does not address, let alone prevent, a plaintiff's right to a jury trial. Jury trials in cases governed by the Convention take place frequently. *See, e.g.*, *Quevedo v. Iberia Lineas Aereas de Espana Sociedad Anonima Operadora Co.*, 811 F. App'x 559, 561 (11th Cir. 2020) ("Quevedo sued Iberia for damages under Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air ('Montreal Convention'). S. Treaty Doc. No. 106-45, 1999 WL 33292734. . . . After deliberations, the jury found that Quevedo and Iberia each were negligent but found Quevedo ninety-nine percent at fault."); *Schaefer-Condulmari v. U.S. Airways Group, LLC*, 547 F. App'x 123 (3d Cir. 2013) ("Judith Schaefer-Condulmari, who went into anaphylactic shock after eating a meal provided to her on a flight operated by U.S. Airways Group, LLC, appeals the jury's verdict that she failed to establish by a preponderance of the evidence her claim under the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734. For the reasons that follow, we will affirm.").

To the extent that Appellant is also arguing that the Montreal Convention is unconstitutional, that argument fails as well. *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 662 (N.D. Cal. 1994) ("Plaintiffs' contention that the Warsaw Convention is unconstitutional because it violates the right to international travel is also rejected. The assumption underlying plaintiffs' argument—that international travel is a fundamental right—is erroneous. The Warsaw Convention easily passes constitutional muster when evaluated under the proper test."). The Montreal Convention superseded the Warsaw Convention, which had previously governed an airline's liability related to international air transportation.

Coppens v. Aer Lingus Ltd., No. 14-6597, 2015 WL 3885742 at *7 (E.D.N.Y. June 22, 2015). Like the Warsaw Convention, the Montreal Convention is a treaty ratified by the United States and is thus "the law of this land." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

II. The Circuit Court Correctly Held That the Montreal Convention Preempts Appellant's Travel Delay Claims and Baggage Delay Claims Against American

As to Appellant's travel delay claims and baggage delay claims against American, the Circuit Court held as follows:

> 5. Plaintiff alleges that, for the ticket he purchased, the place of departure was the United States and the place of destination was New Zealand. Since 2003, the United States and New Zealand have been States Parties to the Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on May 28, 1999, ICAO Doc. No. 9740 (entered into force on November 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 ("the Montreal Convention").
>
> 6. Because Plaintiff's air travel constitutes "international carriage" as defined in Article 1(2), the Montreal Convention applies to Plaintiff's travel delay claims and checked baggage delivery delay claims against American.
>
> 7. Plaintiff's travel and baggage delay claims against American are within the scope of Article 19 of the Montreal Convention because Plaintiff seeks damages for alleged delays in his travel from Greenville to Christchurch and an alleged delay in the delivery of his checked baggage at Christchurch.
>
> 8. Because Plaintiff's travel and baggage delay claims against American are within the scope of Article 19 of the Montreal Convention, pursuant to Article 29 therein the Convention exclusively governs Plaintiff's claims and American's liability (if any) and expressly preempts all of Plaintiff's travel and baggage delay claims against American.

Order at 2-3 (R. pp. 10-11).

Appellant argues that his travel delay claims "are not encompassed in the meaning of 'international carriage' as defined by the Montreal Convention" because such claims "are related to American's failure to keep sufficient staff at the airport, which causes delays and missed flights." Brief at 5. Appellant's argument appears to be that his travel delay claims are not within the scope of the Montreal Convention; Appellant is wrong.

Article 19 of the Montreal Convention provides as follows:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Because Appellant seeks damages for alleged delays in his travel from Greenville to Christchurch and an alleged delay in the delivery of his checked baggage at Christchurch, his claims fall squarely within the scope of Article 19. *Masudi v. Brady Cargo Services, Inc.*, No. 12-2391, 2014 WL 4416502 at *2 (E.D.N.Y. Sept. 8, 2014) (The Convention's "scope encompasses . . . delay in the carriage of passengers, baggage or cargo (Article 19)."); *Smith-Ligpn v. British Airways Worldwide*, No. 11-7437, 2012 WL 1382468 at *2 (E.D. Pa. Apr. 20, 2012) ("Because Plaintiffs' claim is for damages arising from delay of the flight out of Philadelphia and loss of baggage, those claims plainly fall within the scope of liability set by the Montreal Convention.").[4]

[4] A "delay" within the meaning of Article 19 has happened whether a plaintiff was sitting in an aircraft on the tarmac or waiting to board an aircraft. *Helge Management, Inc. v. Delta Air Lines, Inc.*, No. 11-10299, 2012 WL 2990728 at *2 (D. Mass. July 19, 2012) (ruling that, for delay caused "by an unforeseen mechanical failure" of aircraft component resulting in flight cancelation prior to boarding, "Article 19 of the Convention . . . provides the exclusive remedy for damages"); *Ikekpeazu v. Air France*, No. 04-711, 2004 WL 2810063 at *2 n.1 (D. Conn. 2004) ("[T]he reason

Because Appellant's claims are within the scope of Article 19 of the Montreal Convention, the Circuit Court correctly held that the Convention exclusively governs Appellant's claims, and American's liability (if any), and expressly preempts all of Appellant's travel and baggage delay claims against American (R. pp. 10-11). *Nwokeji v. Arik Air*, No. 15-10802, 2017 WL 4167433 at *2 (D. Mass. Sept. 20, 2017) ("Plaintiff . . . asserts claims for breach of contract as well as intentional and negligent infliction of emotional distress . . . as a result of a delayed and damaged bag and a delayed flight. . . . Article 19 provides the exclusive remedy for damages in instances of delay."); *Booker v. BWIA W. Indies Airways Ltd.*, No. 06-2146, 2007 WL 1351927 at *3 (E.D.N.Y. May 8, 2007) ("Plaintiff seeks damages for injuries caused by events which are covered by the Montreal Convention, specifically the seizure of her baggage on board the aircraft, and the damage to and delay of her baggage. Because plaintiff's claims are within the scope of the Montreal Convention her claims are exclusively governed by the Montreal Convention and thus, her state law claims are preempted."), *aff'd*, 307 F. App'x 491 (2d Cir. 2009).

Because all of Appellant's travel and baggage delay claims against American are preempted by the Montreal Convention, the Circuit Court correctly dismissed all such claims as against American (R. pp. 10-14). *Llanes v. Iberia Air Lines of Spain, S.A.*, No. 08-21445, 2008 WL 11417407 at *2 (S.D. Fla. June 30, 2008) ("Plaintiffs' Complaint alleges negligence against Defendant Iberia in connection with the loss of Plaintiffs' luggage during a flight.

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for a carrier's refusal to allow a person to board a scheduled flight is of no consequence; the result of a delay in transportation is the same.") (citation omitted); *Lee v. AMR Corp.*, No. 15-2666, 2015 WL 3797330 at *3 (E.D. Pa. June 18, 2015) (" '[I]nternational air carriage' has repeatedly been deemed to include activities beyond actual travel.").

Because such claim clearly falls within the scope of the Montreal Convention, it is preempted and must be dismissed."); *Ambe v. Air France, S.A.*, No. 17-8719, 2018 WL 6435875 at *3 (C.D. Cal. Dec. 7, 2018) ("Courts regularly, however, dismiss state law claims that fall within the Montreal Convention's scope.").

Appellant also argues that the Circuit Court erred in holding that the Montreal Convention preempts his miles claims. Brief at 5. The problem with Appellant's argument is that the Circuit Court did not make any such holding; it held that 49 U.S.C. § 41713(b)(1), the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), not the Montreal Convention, expressly preempts his miles claims. Order at 4 ¶ 13 ("Section 41713(b)(1) expressly preempts Plaintiff's state common law and UTPA claims against American related to Plaintiff's miles claims because they constitute impermissible attempts to enforce South Carolina common law and statutory law 'related to' American's frequent flyer program and thus to its 'price' and 'service.' ") (R. p. 12). As discussed below, Appellant's arguments as to the ADA fail.

III. The Circuit Court Correctly Held That the ADA Preempts Appellant's State Common Law and State Statutory Claims Against American

Appellant argues that the Circuit Court erred by enforcing 49 U.S.C. § 41713(b)(1),[5] the ADA's preemption provision, because "the issue in this case is not a South Carolina statute aimed at airlines, but rather general concepts of the law, which are generally applicable to defendants in lawsuits" and because "courts should begin with a presumption against

[5] **"(b) Preemption.--(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

preemption." Brief at 5. Appellant's arguments fail because (i) he is asserting them for the first time on appeal, and (ii) they ignore applicable law and rely on inapplicable law.

A. Appellant Failed to Preserve His ADA Arguments for Appellate Review

Before the Circuit Court, Appellant failed to assert the arguments that the ADA should not apply because "the issue in this case is not a South Carolina statute aimed at airlines, but rather general concepts of the law" and "courts should begin with a presumption against preemption." Accordingly, Appellant failed to preserve these arguments for appellate review. *Kagan v. Simchon*, 429 S.C. 516, 522, 839 S.E.2d 106, 109 (Ct. App. 2020) ("We find this argument is unpreserved for appellate review as Kagan's argument regarding the applicability of section 37-10-107 to the Second Loan differs on appeal from what he argued below. . . Kagan raises this argument for the first time in his appellate brief.") (citations omitted), *reh'g denied* (Mar. 30, 2020).

B. Appellant's Arguments Against ADA Preemption Ignore Applicable Law and Rely on Inapplicable Law

Appellant's argument that "the issue in this case is not a South Carolina statute aimed at airlines, but rather general concepts of the law" is not only a new argument asserted on appeal, but it is unsupported by the record and legally incorrect as well. As against American, Appellant alleged a cause of action for violation of the UTPA (R. pp. 36-37), in addition to various state common law causes action, so an issue in this case is in fact "a South Carolina statute aimed at airlines," among other claims.

Appellant fails to cite any authority for the proposition that the ADA preempts state statutory claims against airlines but not "general concepts of the law" (Brief at 5), *i.e.*, common

law causes of action. Appellant is wrong; the United States Supreme Court has held that the ADA preempts both state statutory and state common law claims against airlines:

> The first question we address is whether, as respondent now maintains, the ADA's pre-emption provision applies only to legislation enacted by a state legislature and regulations issued by a state administrative agency but not to a common-law rule like the implied covenant of good faith and fair dealing. We have little difficulty rejecting this argument. . . . [S]tate common-law rules fall comfortably within the language of the ADA pre-emption provision. . . . Accordingly, we conclude that the phrase "other provision having the force and effect of law" includes common-law claims."

Northwest, Inc. v. Ginsberg, 572 U.S. 273, 281-84 (2014); *see also Eggleston v. United Parcel Service, Inc.*, 428 S.C. 373, 380-81, 834 S.E.2d 713, 716 (Ct. App. 2019) ("State common law rules fall within FAAAA preemption. *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 281, 134 S.Ct. 1422, 188 L.Ed.2d 538 (2014). The regulatory bite of tort law is powerful and direct.") (citations omitted), *reh'g denied* (Nov. 27, 2019), *cert. dismissed* (Feb. 4, 2020).[6]

Wyeth v. Levine, 555 U.S. 555 (2009), cited by Appellant (Brief at 5), does not support his argument against ADA preemption. In *Wyeth*, the Court rejected a drug manufacturer's argument that federal law impliedly preempted the plaintiff's state law tort claims because Congress had empowered the U.S. Food and Drug Administration to regulate drug labeling. The Court reasoned that, "[i]f Congress thought state-law suits posed an obstacle to its

[6] Section 41713(b)(1) does not preempt breach of contract claims "seeking recovery solely for the airline's breach of its own, self-imposed undertakings." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995); *Klutho v. Southwest Airlines Co.*, No. 20-00672, 2020 WL 6703283 at *3 (E.D. Mo. Nov. 13, 2020) ("*Wolens* controls as to Plaintiff's breach of contract claim. If he has adequately pleaded breach of a contract provision that Southwest voluntarily entered into, his claim is not preempted.") (citation omitted). Appellant's Complaint before the Circuit Court did not contain a breach of contract cause of action.

objectives, it surely would have enacted an express pre-emption provision at some point during the [Food, Drug, and Cosmetic Act]'s 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, . . . Congress has not enacted such a provision for prescription drugs." *Id.* at 574.

Here, by contrast, American relied on an express preemption provision, 49 U.S.C. § 41713(b)(1), and the Circuit Court correctly held that such provision expressly preempts all of Appellant's claims against American:

> 12. Section 41713(b)(1) expressly preempts Plaintiff's state common law and UTPA claims against American related to Plaintiff's travel and baggage delay claims because they constitute impermissible attempts to enforce South Carolina common law and statutory law "related to" American's flight operations, aircraft maintenance and checked baggage handling "service."
>
> 13. Section 41713(b)(1) expressly preempts Plaintiff's state common law and UTPA claims against American related to Plaintiff's miles claims because they constitute impermissible attempts to enforce South Carolina common law and statutory law "related to" American's frequent flyer program and thus to its "price" and "service."

Order at 3-4 (R. pp. 11-12). Thus, *Wyeth* is inapplicable in this case.[7]

[7] *Cf. Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 247 (3d Cir. 2009) ("In *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1189, 173 L.Ed.2d 51 (2009), the Supreme Court examined whether federal law preempted state tort claims alleging that a drug manufacturer failed to adequately warn of the dangers associated with a drug. *Id*. at 1189. Though we recognize that the Supreme Court concluded that state tort law claims were not preempted in that case, *id*. at 1203-04, *Levine* is readily distinguishable on several grounds. First, the Court explicitly noted the absence of an express preemption provision and found Congress's silence, 'coupled with its certain awareness of the prevalence of state tort litigation, [ ] powerful evidence.' *Id*. at 1199–1200. In this case, however, Congress included an express preemption provision that was prompted, as evidenced by the Committee Report, by the prevalence of state tort litigation.") (emphasis added), *aff'd*, 562 U.S. 223 (2011).

Finally, to the extent that Appellant is also arguing that 49 U.S.C. § 41713(b)(1) is unconstitutional, that argument also fails. *Scarlett v. Air Methods Corp*., 922 F.3d 1053, 1069 (10th Cir. 2019) (rejecting argument that "the ADA violates the procedural and substantive components of the Due Process Clause of the Fifth Amendment"); *Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1299 (N.D. Fla. 2018) ("Plaintiffs' state-law claims are preempted by the ADA and, based on established precedent, Plaintiffs' constitutional attacks on the ADA are without merit and insufficient to breathe life back into their case.").

IV. Appellant Abandoned His Travel Delay Claims Against American and Breach of Contract Accompanied by Fraudulent Act Cause of Action Against American

In the Order, the Circuit Court held in part as follows:

> 14. Plaintiff fails to state legally sufficient travel delay claims against American under South Carolina law. Despite the alleged delay of American's flight from Greenville to Dallas, Plaintiff traveled on the connecting Qantas flight from Dallas to New Zealand. Thus, even assuming that Plaintiff's travel to Dallas was delayed, Plaintiff sustained no loss arising from such delay and thus has no cognizable claim against American.
>
> 15. Plaintiff does not allege any basis under any law for attributing liability to American for the delay, allegedly caused by Qantas, in his travel from Dallas to Christchurch. Plaintiff's conclusory assertion of American's liability is insufficient.
>
> 16. Plaintiff's breach of contract accompanied by fraudulent act cause of action against American is insufficient under South Carolina law because Plaintiff fails to adequately plead two of the three elements of the cause of action: "fraudulent intent relating to the breaching of the contract and not merely to its making" and "a fraudulent act accompanying the breach."

Order at 4 (R. p. 12).

Appellant does not address, let alone argue, these holdings in his Brief. Thus, the holdings should be affirmed as issues that Appellant abandoned on appeal. *Nationwide Mutual Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 270, 818 S.E.2d 447, 455 (2018) ("[O]ur appellate jurisprudence has clearly established that '[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.' *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006).").

CONCLUSION

For the foregoing reasons, the Circuit Court's Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss, filed on August 5, 2020, and its Order denying Plaintiff's Motion to Reconsider, filed on August 11, 2020, should be affirmed as to Respondent American Airlines, Inc.[8]

[8] As to the arguments set forth in section II of Appellant's Brief, American adopts by reference Respondent Expedia, Inc.'s Brief.

Respectfully submitted,

Dated: February 24, 2021

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated: February 24, 2021

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