AVIATION LAW SECTION

SUMMER 2015 NEWSLETTER

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CHAIRMAN'S MESSAGE: PAT EPPS THROWS A WHALE OF A PARTY COMPLETE WITH AIRSHOW

By Alan Armstrong, Chair

The 50th Anniversary of Epps Air Service was celebrated on May 28, 2015, and a huge audience turned out to honor Pat Epps and his 50 years of service to the aviation community. Throwing a large party in his main hangar was not enough, since Pat had on hand the B-17, Memphis Belle, as well as the Aeroshell Formation Aerobatic Team. To use the cliché of Ed Sullivan (for those of you who still remember him), "It was a really big show."

For those of you who drove into the event, you were greeted by marshallers wearing luminescent rain suits (the weather was a bit dreary), and flashlights to ensure you safely parked your car. As you made your way into the Epps Terminal Building, you were greeted by Pat Epps and other Epps employees where you obtained your name tag. Then you found your way into the main Epps hangar which was practically devoid of aircraft and was filled with a large stage with a jumbo-tron screen. Our Master of Ceremonies was Jack English, an accomplished film director and aviation aficionado. Jack summoned Pat to the stage and recounted Pat's amazing journey as an aviation entrepreneur, explorer and pilot. People who had been a part of Pat's life also appeared on the stage and gave testimonials.

In the midst of this on-stage performance, an airshow was unfolding. DeKalb Peachtree Airport was shut down for the big event. The B-17 named "Memphis Belle" was starting up and being piloted

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FROM THE EDITOR'S DESK

by Arthur J. Park

While we all look forward to the Aviation Law Section's upcoming seminar, please also keep the following aviation conferences in mind as you make your plans for CLE and travel in late 2015 and early 2016:

- ABA Forum on Air & Space Law, Annual Meeting - Sept. 17-18, 2015
  Ritz-Carlton, Marina Del Rey, Calif.
  www.americanbar.org/groups/air_space.html
- IATA's 11th Maintenance Cost Conference & The World Maintenance Symposium
  Sept. 23-24, 2015
  Miami, Fla.
  www.iata.org/events/Pages/index.aspx
- ABA Forum on Air & Space Law, Aviation Finance - Dec. 3, 2015
  New York, N.Y.
  www.americanbar.org/groups/air_space.html
- Embry-Riddle Aeronautical University, 2016 Aviation Law and Insurance Symposium
  Jan. 20-23, 2016
  Villas of Grand Cypress, Orlando, Fla.
  www.alisymposium.com/
- The 49th Annual SMU Air Law Symposium
  Approx. March 24-25, 2016
  Omni Mandalay Hotel in Las Colinas, Texas
  http://smulawreview.law.smu.edu/Symposia/Air-Law/Symposium-Brochure.aspx
- 2016 AIA Annual Conference
  May 19-21, 2016
  Philadelphia, Penn.
  http://convention.aia.org/event/homepage.aspx
- 15th AIAA Aviation and Aeronautics Forum and Expo - June 13-17, 2016
  Washington, D.C.
  www.aiaa.org/research/
- EAA AirVenture Oshkosh
  July 25-31, 2016
  Oshkosh, Wis.
  http://tinyurl.com/oppwtwa

The Aviatation Law Section Newsletter is looking for authors.

If you would like to contribute an article or have an idea for content, please contact Arthur Park at APark@mfllaw.com

"TOWER, I HAVE A PROBLEM" – EVIDENCE OF PRE-IMPACT FRIGHT

*By Anne M. Landrum**

Across the country, the states are split on whether to allow recovery for pre-impact fright in a civil suit, and this article will give a quick overview of some of those decisions. On the one hand, damages can be awarded for a decedent's pre-impact fright under the laws of many states including Georgia,[1] Florida,[2] Louisiana,[3] and Texas,[4] provided there is evidence the decedent was aware of his impending injury or death.[5] On the other, several states including Kansas,[6] Kentucky,[7] Illinois[8] and Arkansas[9] have refused to allow any recovery for pre-impact fright. A number of states remain silent on the issue. For example, in 2012, the South Carolina Supreme Court declined to decide whether to allow recovery for pre-impact fright.[10]

The decision of the New Jersey court in *In re Jacoby Airplane Crash Litigation,*[11] which collected and analyzed pre-2006 cases from across the United States allowing or precluding recovery for pre-impact fright, explained the theory behind such recovery. The court in *In re Jacoby* concluded that the New Jersey Supreme Court would find the state's survivors act allowed a decedent's representative to recover damages in the same manner as the decedent had he lived.[12] The court then drew an analogy to recovery by a living person for emotional injury experienced prior to an impact followed by physical injury.[13] The evidence of pre-impact fright in *In re Jacoby* included the pilot's communication with the tower shortly after take-off, where he stated twice, "I have a problem." The last thirty seconds of radar data showed the aircraft reached a maximum altitude of 2,800 feet and 161 knots of airspeed before beginning a final descent of approximately 10,000 feet-per-minute before impacting a chimney on a three-story building, crashing into another three-story building, and ultimately breaking apart and coming to a rest on a street. The total flight time lasted approximately four to six minutes.[14]

While Georgia courts have not addressed the sufficiency of evidence of a decedent's pre-impact fright during an air crash, the decision in *Monk v. Dial*[15] established that a factfinder may infer from the evidence that the decedent was aware of his impending injury and death, "and from these circumstances [the factfinder] could extrapolate the probable mental state of decedent in that last moment of consciousness."[16] The court in *Monk* noted there was evidence the decedent's vehicle veered shortly before the crash, suggesting he was aware of the impending crash and attempted to avoid it.[17]

In *Department of Transportation v. Dupree,*[18] a Georgia court held that "for pre-impact pain and suffering to be awarded, the jury must have some evidence that the deceased at some point in time was conscious of her imminent death; the jury may infer such consciousness from evidence immediately prior to impact or following her injury."[19] The court in *Dupree* concluded there was sufficient evidence the decedent suffered pre-impact fright before her automobile accident, reasoning:

> The headlights would have been visible to Mrs. Lamb at least 150 feet away from her. Mrs. Lamb would have been able to see the approaching headlights rounding the curve over 350 feet away and up to 14 seconds away. Since it would take the van approximately 120 to 180 feet to change lanes, then Mrs. Lamb would have had several seconds to realize her deadly peril as the headlights of the following car loomed behind the swerving van. Thus, Mrs. Lamb would have gone from relief at seeing the van swerve away from her to horror at seeing the car's lights looming at her in her lane.[20]

In *Byrd v. Wal-Mart Transportation, LLC*,[21] which involved a collision between a tractor-trailer and a passenger van, a Georgia federal court held that the evidence – including dicing injuries from safety glass on the decedent's left cheek and neck – indicated the decedent was looking straight ahead and never turned her head toward the oncoming vehicle, thereby precluding an award of damages for pre-impact fright.[22]

Georgia allows recovery of damages for a decedent's pre-impact fright even when there is no evidence the decedent suffered post-impact conscious pain and suffering.[23] In *Lewis v. D. Hays Trucking, Inc.,*[24] the court held that "[t]he fact of instantaneous death, however, does not always preclude damages for pain and suffering."[25] Discussing the evidence of

the decedent's pre-impact fright, the court in *Lewis* held that "[p]laintiff responds that it was a clear, dark night and the accident happened on a straight stretch of road. Therefore, [the decedent] would have been aware of the headlights of the tractor trailer bearing down on her and would have known that the tractor trailer was not stopping."[26]

In some cases, the passage of time between commencement of problems in flight and the crash of the aircraft, by itself, is not sufficient evidence of the passengers' awareness of their impending death. In *Shu-Tao Lin v. McDonnell Douglas Corp.*,[27] the Second Circuit noted that "there was insufficient evidence to support a finding that a passenger seated on the right side of the plane suffered any pre-impact conscious pain and suffering or that he was even aware of the impending disaster until approximately three seconds before the crash."[28] The Second Circuit then held that, "[i]n contrast, Dr. Lin had been assigned a seat over the left wing and … a jury might find that he saw the left engine and a portion of the wing break away at the beginning of the flight, which lasted some thirty seconds between takeoff and crash."[29]

In *Moorhead v. Mitsubishi Aircraft International, Inc.*,[30] a Mitsubishi MU-2B-25 aircraft en route to Augusta, Georgia from Dallas, Texas accumulated ice, lost velocity, entered a spin and crashed near McLeod, Texas.[31] Affirming the Texas district court's denial of damages for pre-impact conscious pain and suffering, the Fifth Circuit held that "[a] ll indications are that the pilot and passengers occupants were killed instantly in the crash. The record contains no evidence as to what happened inside the plane before its crash. The district court is well within its discretion in refusing to speculate about how much, if at all, [the pilot's] passengers were aware and fearful of their plight."[32]

Expert opinion testimony also can provide evidence of the decedent's pre-impact fright, but such testimony can be excluded when unreliable or speculative. In the Georgia federal case of *Swinney v. Schneider National Carriers, Inc.*,[33] witnesses presented conflicting evidence regarding where the decedent was standing when he was struck by the defendant's truck. Defendants moved to exclude the plaintiff's expert's opinion on this point and the court granted the motion, finding the expert's opinion

unreliable and based upon speculation.[34] Defendants then sought partial summary judgment in their favor on the plaintiff's claim for the decedent's alleged pre-impact fright, arguing there was no evidence the decedent was aware of the impending collision or even alive when the defendant's vehicle struck him. The plaintiff did not respond to these arguments and the court granted the motion, holding that "[p]laintiff has presented no evidence that the decedent was aware of the impending crash or that he did not die instantly."[35]

Testimony of an accident reconstructionist was insufficient evidence of the decedent's alleged pre-impact fright in *Stegner v. Estate of Carter*,[36] where the Maryland federal court found the plaintiff's claim was "based on an accident reconstruction that shows the possibility of less than a second's realization of the impact by [decedent] before it occurred." The court held that, "[t]his possibility, however, is not supported by any tire marks left by the [decedent's] vehicle at the scene, nor by any other evidence of braking or swerving by his car. Damages for pre-impact fright may be awarded if they are 'capable of objective determination.'"[37]

Next, damages for a decedent's pre-impact fright can be recovered even when an action for his wrongful death is procedurally barred.[38] This likely is because the claim for a decedent's wrongful death belongs to his survivors, while the claim for the decedent's pre-impact fright belongs to him and survives his death. In *Estate of Anderson*, the Maryland federal court entered summary judgment in favor of the defendant on the claim by the decedent's siblings for the decedent's wrongful death, holding there were no proper beneficiaries to maintain a wrongful death action.[39] With regard to the survival action for the decedent's alleged pre-impact fright, the court held that "pre-impact fright … is the mental anguish or anxiety a decedent experiences as he becomes aware that he is in imminent danger due to an impending collision."[40] "Accordingly, pre-impact fright damages 'should compensate a decedent's fright, not the resultant death.'"[41] Ultimately, the court in *Estate of Anderson* held that damages for the decedent's pre-impact fright were not recoverable based upon evidence that the decedent walked out into traffic with his head down. The court reasoned that "in this case, the [p]laintiff merely speculates that perhaps the decedent lowered his head in fear of the impending collision. This speculation is insufficient to meet the standard of an objective determination of the decedent's pre-impact fright."[42]

As this article has demonstrated, the states vary on whether pre-impact fright is recoverable and the procedure for establishing such fright. Therefore, the facts and the applicable choice of law must be carefully analyzed in every aviation case.

(Endnotes)

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1 *Monk v. Dial*, 212 Ga. App. 362, 362-63 (1994).

2 *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1967) (applying Florida law). In his final transmission, the pilot radioed, "I think my fuel is going out. The merchant vessel has a K on its funnel. I'll bring it down as close to the vessel as I can." The court found this and other evidence sufficient to support an inference that the pilot and his wife knew and appreciated their impending injury or death. *Id*. at 792-93.

3 *Haley v. Pan Am. World Airways*, 746 F.2d 311 (5th Cir. 1984) (applying Louisiana law) (Pan Am. Flight 759 crashed in Kenner, Louisiana, after it took off and rose to an altitude of 163 feet before it began its fatal descent, rolled to its left, struck its wing on a tree fifty-three feet above ground, and disintegrated four to six seconds later).

4 *Yowell v. Piper Aircraft*, 703 S.W.2d 630, 634 (Tex. 1986) (affirming Texas judgment for "mental anguish the decedents suffered from the time of the plane's break-up [at 10,000 feet] until it hit the ground").

5 The laws of the state in which the decedent was domiciled at the time of the air crash may determine whether his estate can recover for his pre-impact fright. In *Lloyd v. American Airlines, Inc. (In re Air Crash at Little Rock, Arkansas on June 1, 1999)*, 118 F. Supp. 2d 916, 921 (E.D. Ark. 2000) *aff'd in part, rev'd in part* 291 F.3d 503 (8th Cir. 2002), the court explained that it previously ruled that passengers on a flight who were domiciled in Oklahoma could recover damages for pre-impact fright, while passengers domiciled in Arkansas could not.

6 *See Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986) (interpreting Kansas law as not allowing recovery for pre-impact fright in auto accident despite evidence indicating sixty feet of yaw marks prior to the collision).

7 *Combs v. Comair, Inc. (In re Air Crash at Lexington, Ky.)*, 2008 U.S. Dist. LEXIS 1216 (E.D. Ky. Jan. 3, 2008) (citing the decision of the Supreme Court of Kentucky in *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 929 (Ky. 2007), disallowing damages for pre-impact fright).

8 *In re Air Crash Disaster Near Chicago*, 507 F. Supp. 21, 23 (N.D. Ill. 1980) ("Under Illinois law, an individual can recover for emotional distress or suffering only when the distress is caused by a physical injury, [therefore], plaintiff cannot recover for the fright and terror … [she] may have experienced in anticipation of physical injury").

9 *In re Air Crash at Little Rock*, 118 F. Supp. 2d 916 (E.D. Ark. 2000).

10 *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209 (2012)

("[Plaintiff] argues we should recognize pre-impact fright or fear as a cognizable element of damages in a survival action. Because we find no evidence of conscious pain or suffering either prior to or after impact, we disagree and reserve the novel question of whether South Carolina should allow recovery for pre-impact fear for another day.").

11 2006 U.S. Dist. LEXIS 87816 (D. N.J. Dec. 4, 2006).
12 *Id.* at *13-15.
13 *Id.* at *15-17.
14 *Id.* at *6-7.
15 212 Ga. App. 362, 362-63 (1994).
16 *Id*.
17 *Id*.
18 256 Ga. App. 668 (2002).
19 *Id*. at 680.
20 *Id*.
21 2009 U.S. Dist. Lexis 99692 (S.D. Ga. Oct. 22, 2009).
22 *Id*. at *16 n.5.
23 *Monk,* 212 Ga. App. at 362.
24 701 F. Supp. 2d 1300, 1313-14 (N.D. Ga. 2010).
25 *Id.* at 1314 (citing *Monk)*.
26 *Id.* at 1313-14.
27 742 F.2d 45 (2d Cir. 1984) (applying New York law).
28 742 F.2d at 53 (citing *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984)). The aircraft took off smoothly despite the loss of the engine, climbing to 325 feet in a slight left wing-down attitude. The pilots corrected this condition and the aircraft continued to climb until approximately eleven seconds before impact when it began to roll slightly to the left. It was not until three seconds before impact that the aircraft reached a 90-degree position.
29 *Id*.
30 828 F.2d 278 (5th Cir. 1987).
31 *Id*. at 280-81.
32 *Id*. at 288.
33 829 F. Supp. 2d 1358 (N.D. Ga. 2011).
34 *Id*. at 1362-63.
35 *Id*. at 1366 (citing *Byrd v. Wal-Mart Transp., LLC,* 2009 U.S. Dist. LEXIS 99692 at *16 (S.D. Ga. Oct. 23, 2009) ("Georgia law requires some evidence that the decedents actually anticipated the collision before a recovery for pre-impact pain and suffering is allowed")).
36 2009 U.S. Dist. LEXIS 93016 (D. Md. Oct. 2, 2009).
37 *Id*. at *2-3 (citing *Beynon v. Montgomery Cablevision Ltd. P'ship.*, 351 Md. 460, 464 (1998).
38 *Estate of Anderson v. United States*, 2011 U.S. Dist. LEXIS 32443 (D. Md. Mar. 28, 2011).
39 *Id*. at *7-8.
40 *Id*. at *9 (citing *Beynon*). The decision in *Beynon* collected and analyzed cases discussing recovery of damages for pre-impact fright across the United States. The court in Beynon held that the decedent's apprehension of imminent death was proven by evidence that he slammed on his brakes and created more than seventy-one feet of skid marks in an effort to avoid an impending automobile crash. 351 Md. at 508.
41 Id. (citing Beynon, 351 Md. at 508).
42 2011 U.S. Dist. Lexis 32443 at *9-10.

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PUBLIC FINANCE AND INTERGOVERNMENTAL CONTRACTING: FROM STADIUMS AND BALLPARKS TO YOUR LOCAL MUNICIPAL AIRPORT

*by Blake C. Sharpton and Ashton M. Bligh**

Introduction

The State of Georgia has become both a dynamic and progressive place for business, commerce and leisure. The city of Atlanta (the "City"), in particular, has become a hub of business and commerce and plays host to a robust tourism and leisure destination for residents of Georgia and out-of-state travelers alike. Some of the projects built to support the City's thriving business, commerce and leisure industries are the result of revenue bonds secured by the revenue generated by the project. In order to structure a financing that incorporates revenue bonds, a local governmental entity may enter into a financing structure that involves one or more intergovernmental agreements ("IGAs").

Public financings may involve one or several industrial, housing or building authorities as well as counties and/or municipalities. Depending on the financing structure, a governmental entity may own the project, operate the project, or own the land upon which the project is constructed. One of the first steps a governmental entity must consider in order to finance a contemplated project with bond proceeds is to determine which other public or private entities must, or might like to, execute contracts to facilitate the financing of the project. This is the same broad concept whether an entity is seeking to finance the building of a stadium, a ballpark, or expand airport flight operations. Moreover, it is the intergovernmental contracts clause, Article IX, Section III, Paragraph I of the Constitution of the State of Georgia (the "Intergovernmental Contracts Clause"), that authorizes governmental entities to contract with one another to help finance a project.

This article will explain how IGAs are used and incorporated into project financing structures that utilize amongst other debt vehicles, public debt in the form of bonds. This article will include the history of certain projects underway or previously financed using IGAs, in particular, the new stadium for the Falcons football team (the "New Atlanta Stadium") and the new baseball field for the Atlanta Braves ("SunTrust Park"), which we have had the privilege of serving as bond counsel to Cobb County. Additionally, this article explains how the financing structures of the New Atlanta Stadium and SunTrust Park can be utilized to expand the flight operations of a municipal airport to include commercial airline traffic through the construction of an additional terminal or expansion of a runway.

Intergovernmental Contracts Clause

The Intergovernmental Contracts Clause authorizes any county, municipality or other political subdivision of the state to contract for a period not exceeding fifty years. IGAs include contracts amongst counties, municipalities and other public agencies, public corporations or public authorities for (a) joint services, (b) the provision of services, or (c) the joint or separate use of facilities and equipment. IGAs must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide.[1] By providing a means for governmental entities to collaborate, this clause encourages a cooperative approach between government entities and other public entities. Two current examples of such cooperation in Georgia include the New Atlanta Stadium and SunTrust Park. While each one is a unique project, there are similarities shared with the New Atlanta Stadium and SunTrust Park's financing structures that can be used to better understand how a municipal airport could be expanded through public financing by IGAs.

The New Atlanta Stadium

The New Atlanta Stadium will be an approximately one billion dollar retractable-roof stadium and will replace the current Georgia Dome, which was previously financed with bonds. The financing structure of the New Atlanta Stadium consists of a public-private partnership in financing and contracting between the Falcons franchise organization (the "Falcons"); the Georgia World Congress Center Authority (the "Congress Center Authority"); the Atlanta Falcons Stadium Company, LLC ("StadCo") and other private organizations. Public funding, through the issuance of bonds, will cover approximately 20-30 percent

of the New Atlanta Stadium's construction costs, while private funding from the Falcons will cover approximately 70-80 percent of the construction costs. In addition, the Falcons will be responsible for any construction cost overruns and for operating and capital risks currently borne by the Congress Center Authority for the Georgia Dome. The public funding component of the New Atlanta Stadium financing will be secured by the existing hotel/motel tax, which is largely provided by tourism. The same public funding scheme has been used to fund the debt of the Georgia Dome for the past 20 years.

Prior to and contemporaneously with the financing of the New Atlanta Stadium, the City, the City of Atlanta Georgia Economic Development Authority ("Invest Atlanta") and the Congress Center Authority will collaborate with StadCo and the Falcons in the construction, operation and maintenance of the New Atlanta Stadium, to be located on property owned by the Congress Center Authority. It is the Intergovernmental Contracts Clause that authorizes the City, Invest Atlanta and the Congress Center Authority to work together to partially fund the New Atlanta Stadium with bonds. The respective parties have memorialized their agreement regarding development, funding, and financing of the New Atlanta Stadium through a series of contracts including:

- an Indenture of Trust;
- a funding agreement (the "Stadium Tax Funding Agreement");
- an operation and maintenance agreement;
- a bond proceeds funding and development agreement;
- an Invest Atlanta rights and funding agreement;
- a transaction agreement; and
- a non-relocation agreement (the "Stadium Non-Relocation Agreement").

SunTrust Park

SunTrust Park in Cobb County will serve as the future home of the Atlanta Braves baseball team. Financing of SunTrust Park involves the collaboration of the Cobb-Marietta Coliseum and Exhibit Hall Authority (the "Cobb Authority"), Cobb County, the Atlanta National League Baseball Club, Inc. ("ANLBC"), owner and operator of the Atlanta Braves baseball franchise (the "Braves"), and certain affiliates of ANLBC.

The SunTrust Park financing structure will include more than $350 million in bonds, which amounts to approximately one half of the total construction cost with the remainder to be funded by the Braves. A majority of the principal and interest on the bonds will be paid by Cobb County from various revenue sources while the Braves will cover the remaining amount. Additional funding for SunTrust Park will be generated by the business owners within the self-taxing Cumberland Community Improvement District where SunTrust Park will be located. The financing structure involved with SunTrust Park became a litigious matter when several residents of Cobb County intervened in the bond validation proceeding related to the revenue bonds to be issued by the Cobb Authority.[2]

Contiguous with the financing, the following contracts have been drafted, and in some cases executed, amongst the private and public entities involved with the financing of SunTrust Park:

- an IGA (the "Ballpark IGA");
- an Indenture of Trust;
- an assurance agreement (the "Ballpark Assurance Agreement");
- an operating agreement;
- a development agreement; and
- a non-relocation agreement (the "Ballpark Non-Relocation Agreement").

How could IGAs be used to finance an airport project?

Typically, a municipal airport is owned by the county in which it is located, and administration oversight can either be through a department of that county or a governmental entity, such as an airport authority. In addition, each airport is typically managed by a full-time, professional airport manager.

Described below are the various contracts and agreements involved with the New Atlanta Stadium and SunTrust Park financings and how a municipal airport could incorporate similar contracts to expand its airport and flight operations.

A. An Intergovernmental Agreement

For the SunTrust Park financing, Cobb County and the Cobb Authority have entered into the Ballpark IGA, which provides among other items, that Cobb County will contribute payments to be used to pay a portion of the costs of SunTrust Park, various transportation improvements and public infrastructure. For the New Atlanta Stadium, a Stadium Tax Funding Agreement between the City and Invest Atlanta ensures the City will provide to Invest Atlanta a certain percentage of hotel/motel tax proceeds it collects to serve as security for the bonds and then Invest Atlanta can use those proceeds to pay debt service (principal, interest and other related expenses) on the bonds. An airport could incorporate an IGA between its airport authority, if applicable, and the county where it is located whereby the airport authority would agree to operate and maintain an airport and provide other necessary airport services. An airport's applicable county could then agree to pay the airport authority from various revenue sources an amount necessary to pay for all or a portion of the principal and interest on the bonds.

B. An Indenture

An Indenture of Trust is an agreement between the applicable issuer of the bonds and the requisite bank that will serve as trustee for the bonds. An indenture will provide for repayment of the bonds and a security interest in favor of the qualified trustee in whatever revenue source the bonds are to be paid pursuant to the terms of the indenture. The trustee will oversee the payment of the principal and interest on the bonds as well as certain other covenants detailed in the indenture on behalf of the holders of the bonds. An airport could issues bonds under an indenture and specific all or a portion of the revenues to be paid to the airport authority as security for repayment of the bonds.

C. An Assurance Agreement

For SunTrust Park, the Cobb Authority and Cobb County have entered into a Ballpark Assurance Agreement with ANLBC whereby ANLBC has guaranteed the payment and performance of the other affiliates in the project and construction related agreements that govern the development of SunTrust Park. An airport could incorporate a similar contract to insure the payment of its bonds between the airport authority and a relevant private party, typically the entity that will operate and use the project to be financed with bond proceeds.

D. Non-Relocation Agreement

One other compelling agreement used in both the New Atlanta Stadium and SunTrust Park projects is a non-relocation agreement, which, as the name suggests, obligates a party to stay put for some period of time. An airport could, and routinely does, enter into a similar agreement with a commercial flight carrier to ensure that commercial flights would be flown out of an airport during the term of the contract period as a way to ensure a consistent revenue stream for an airport from such flights.

E. Other Agreements

The parties involved in the development and construction of the New Atlanta Stadium and SunTrust Park have entered into a plethora of other agreements that describe the duties and obligations of the parties with respect to construction costs, operations, and ongoing funding. An airport could enter into any of a multitude of similar agreements for any proposed improvements to be financed with bond proceeds.

Conclusion

While this article does not describe every agreement and contract involved with the New Atlanta Stadium and SunTrust Park financings, it is clear that bond issuances such as these involve many different entities and contracting logistics in order to successfully finance the projects. Moreover, any financing for a municipal airport will involve the strategic partnering and contracting with many different entities. For an airport, contracts such as an indenture, operating agreement and funding agreement would play key parts in the intergovernmental contracting scheme if such a financing structure were desired.

(Endnotes)

* Blake C. Sharpton is a partner and Ashton M. Bligh is an associate at the Atlanta office of Butler Snow LLP.

1 Ga. Const. of 1983, Art IX, Sec. III, Par. I(a).

2 *See Larry Savage v. Cobb-Marietta Coliseum and Exhibit Hall Authority and Cobb County, Georgia, No. S15A0277; Richard A. Pellegrino v. Cobb-Marietta Coliseum and Exhibit Hall Authority and Cobb County, Georgia, No. S15A0278; and T. Tucker Hobgood v. Cobb-Marietta Coliseum and Exhibit Hall Authority and Cobb County, Georgia, No. S15A0279.*

ARE NTSB PROBABLE CAUSE REPORTS ADMISSIBLE?

*By Matthew E. Fennell**

After many fatal aviation incidents, the National Transportation Safety Board (NTSB) will issue a report outlining the probable cause of the accident. In Georgia, are these NTSB probable cause reports admissible at trial?

Across the country, courts have routinely ruled that it is improper to admit NTSB reports in their entirety; conclusions and hearsay statements should be redacted from NTSB reports in order to be properly admitted. Often, state law is the hurdle that the requesting party cannot overcome while attempting to admit the NTSB report with regards to judicial notice. This is due to some portions of the NTSB report that (1) are subject to dispute, (2) may be rebutted at trial, or (3) contain hearsay statements, conclusions and opinions.

A. The Accepted Procedures for Introducing NTSB Probable Cause Reports.

As is often the case in the world of aviation, the starting point of the legal analysis is a federal statute. 49 U.S.C. § 1154(b) provides that "[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." The majority view is that the statutory exclusion of 49 U.S.C. § 1154(b) applies only to the probable cause conclusions and that the underlying facts contained in a NTSB report are generally admissible. The U.S. District Court for the Northern District of Georgia has adopted the majority view. In *Knous v. United States*,[1] Judge O'Kelley also addressed the issue of admitting evidence of what the NTSB "did not" find stating, "the difference between Board accident reports and factual accident reports is that Board accident reports actually determine causation, while factual accident reports merely recite the relevant facts."[2] Next, "[a]llowing plaintiffs to allege what the NTSB *did not* find to be a cause of the crash still improperly entangles the NTSB in private civil litigation. Given the clear statutory language that no part of a Board accident report may be submitted into evidence '*or used*' in a civil action, plaintiffs' attempt to backdoor NTSB findings into civil litigation is impermissible."[3]

Under the majority view, a number of cases are also instructive on the proper procedure for introducing portions of the NTSB report. First, we will look at *In re Air Crash at Charlotte, N.C. on July 2, 1994*,[4] where the plaintiff made a motion in limine to admit portions of the NTSB report. While the factual portions of NTSB reports are generally admissible, "the defendants will be afforded the opportunity to point out any particular parts of these reports that might contain opinions or conclusions which should be redacted."[5] The court further explained the procedure to be used: the defendant has an opportunity to identify material within the documents that the defense believes should be redacted if the documents themselves are going to be used. The defendant should supply both the court and the plaintiff with identical documents by the deadline imposed by the court with the content in question highlighted. The court will then review the proposed edits and determine what will or will not be redacted from the documents.[6]

Second, a federal court in Maryland has clearly held that "[r]eferences to NTSB opinions and conclusions rendered inadmissible by the Safety Act must be stricken."[7] The district court therefore redacted certain parts of the plaintiff's response in opposition to a motion for summary judgment.[8]

Where the plaintiffs tendered the whole NTSB probable cause report as evidence in a Colorado federal court, "some editing was necessary at trial," and the parties had also "stipulated deletions."[9] After the defendant "objected generally to admission of the entire report and specifically to" certain portions, the court "admitted the edited report into evidence."[10] For example, "[w]here investigators rely on hearsay and non-hearsay in compiling a report, the court may review and edit certain portions of the report, rather than excluding the entire exhibit."[11]

These persuasive cases indicate the proper method of introducing factual portions of NTSB probable cause reports into evidence. While the entire report cannot be entered as a whole, the facts themselves are admissible. The parties must be given the opportunity to redact conclusions, opinions, hearsay statements, and the like before admission is proper.

Next, the California case of *Betham v. City of Ukiah*[12] must be considered in context. It is true that the California Court of Appeals took judicial notice of the factual material in the NTSB's report.[13] In *Betham*, the defendant had filed a demurrer for failure to state a claim upon which relief could be granted. For purposes of ruling on the demurrer, the court considered the facts in the NTSB report as to whether the FAA or the defendant city had operated the airport navigation facilities and whether a FAA investigation found the facilities to be "satisfactory." Ultimately, the court of appeals affirmed the trial court's granting of the demurrer.[14] In short, the *Betham* court took judicial notice of the facts for the purpose of ruling on the demurrer but did not take judicial notice of facts contained in the NTSB probable cause report for the purposes of the actual trial.

B. Under Georgia State Law, Judicial Notice Is Not Proper Because Some Facts in the NTSB Report Are Generally Subject to Dispute.

A request for judicial notice related to a NTSB probable cause report must meet the requirements of Georgia state law. O.C.G.A. § 24-2-201(b) outlines the key components of judicial notice: "A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either: (1) Generally known within the territorial jurisdiction of the court; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." "There are two kinds of judicial notice: notice of legislative facts and notice of adjudicative facts. Legislative facts are the laws and court cases of Georgia, other states, the federal government, certain state regulations, as well as the official seals of the departments of the State of Georgia."[15]

The following have been considered proper examples of "facts that are not subject to dispute" under O.C.G.A. § 24-2-201:

1. "a trial court must take judicial notice of the rules and regulations of the State of Georgia that are published under authority by the Secretary of State."[16]
2. "This Court may take judicial notice of the statutorily mandated official state highway map."[17] In *Hendrix v. State,* the Court of Appeals took judicial notice of a statutorily mandated highway map to establish the location of a road that was being traveled along during the commission of an aggravated battery.
3. Courts will regularly recognize locations for purposes of establishing venue based on a description of the location in relation to natural landmarks or a town.[18]
4. Georgia courts also regularly take notice of population statistics.[19]

While the facts in the NTSB report are admissible, it is unlikely that a party could make a proper request for judicial notice. As stated by the Maryland federal court in *Major*, "references to NTSB opinions and conclusions rendered inadmissible by the Safety Act must be stricken, therefore, regardless of whether they are used to address issues of probable cause and negligence or to bolster the credibility of experts and their opinions."[20]

Despite the thorough efforts employed by the NTSB while preparing its factual reports, it cannot be said that they are completely infallible. Some of the factual portions of the NTSB report, although admissible, are "subject to dispute," are not "capable of accurate and ready determination," and do not come from "sources whose accuracy cannot be questioned." At trial, the parties must be allowed to contradict or rebut some of the factual assertions made by the NTSB. This point is particularly applicable to NTSB probable cause reports as they do generally contain some hearsay statements that should not be admitted under the judicial notice doctrine.[21] As discussed above, the proper procedure for introducing the factual portions of the NTSB probable cause report involves redaction of conclusion and hearsay, not wholesale admission and certainly not judicial notice. Since some of the factual portions of the NTSB report are subject to dispute and contradiction, a request for judicial notice in Georgia should usually be denied.

(Endnotes)

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1 981 F. Supp. 2d 1365, 1367 (N.D. Ga. 2013).

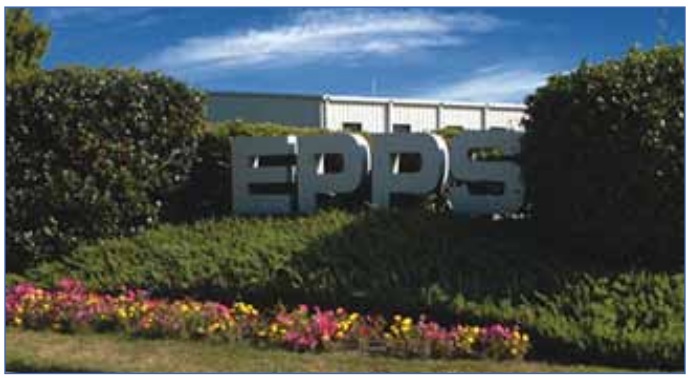
2 *Id.*

3 *Id.*

4 982 F. Supp. 1071 (D. S.C. 1996).
5 *Id.* at 1075.
6 *Id.* at 1078.
7 *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 604-05 (D. Md. 2003).
8 *Id.*
9 *In re Air Crash Disaster at Stapleton Intern. Airport*, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1493, 1499 (D. Colo. 1989).
10 *Id.* at 1495 (emphasis added).
11 *Id.* at 1497.
12 216 Cal. App. 3d 1395 (1989).
13 *Id.* at 1400 n.5.
14 *Id.* at 1409.
15 Ga. Rules Of Evidence § 4:2. It should also be noted that O.C.G.A. § 24-8-803(8) provides that certain public records and reports will not be excluded by the hearsay rule.
16 *Enchanted Valley RV Resort, Ltd. v. Weese*, 241 Ga. App. 415, 419 (1999).
17 *Hendrix v. State*, 242 Ga. App. 678, 679 (2000).
18 *See Williams v. State,* 246 Ga. App. 347, 349 (2000) (venue may be established by the state if the trial court takes proper judicial notice of the relevant facts); *Jackson v. State,* 177 Ga. App. 718 (1986) (court took "judicial notice that Statesboro is centrally located in Bulloch County and that locations just outside the city limits would therefore be located in Bulloch County").
19 *See In re Knight*, 232 Ga. 721 (1974) (court took judicial notice that DeKalb County contains more than 10,000 inhabitants); *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 634 (1954) (court judicially knew that the City of East Point had a population of more than 20,000); *Tift v. Bush*, 209 Ga. 769, 771 (1953) (court judicially recognized the official census of the United States).
20 *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 604 (D. Md. 2003).
21 *See In re Am. Milling Co.,* 270 F. Supp. 2d 1068 (E.D. Mo. 2003) (hearsay statements contained in NTSB documents held inadmissible).

Chairman's Message from page 1

by John Hess. With light rain and overcast skies, John got the B-17 started which attracted a crowd. In no time at all he was airborne for several passes over the airfield. With the return of the B-17, the crowd had to wait awhile for the departure of the Aeroshell Formation Aerobatic Team. Just as the sun was setting and the airport was becoming dark, the Aeroshell started their engines, and the four AT-6 aircraft taxied from Runway 21L. Aeroshell lead and No. 2 took off in formation followed by Aeroshell No. 3 in formation with Aeroshell No. 4. In no time at all, they were over the airport forming up as a four ship and made a series of aerobatic passes over and around the runway. These included a barrel roll, a loop, a starburst, and what one would refer to as a squirrel cage, that is, the aircraft performing loops in a concentric circle at the same time. Observing this formation flight at night



with smoke coming from the four aircraft flown in formation was quite spectacular. At the conclusion of their performance, the Aeroshell pilots taxied before the crowd, did a 180 degree turn, blowing smoke which is the customary completion of their performance.

As I looked about the hangar during the course of the celebration, I could see Don Brooks, the owner of the B-17 Liberty Belle and the sponsor of the B-17 Memphis Belle; Ray Fowler, who flies the Memphis Belle and a number of other Second World War aircraft; Richard Taylor who was Pat's sidekick during the Greenland expedition where the P-38 Lightening *Glacier Girl* was recovered; pilots; aviation lawyers; adventurers; and even an astronaut (Gene Cernan, the last man to walk on the moon) all present for this magnificent event. Pat's children were also in attendance and honored their father during the course of the evening.

The Epps Air Service 50th Anniversary celebration may be the first time and the last time that Peachtree DeKalb Airport is closed for an exclusive airshow performance as part of a celebration. Only Pat Epps could pull off such a remarkable achievement and such a remarkable party. The next time you are in Atlanta at Epps Air Service, drop by Pat's office and give him a word of thanks for his contributions to aviation.