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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Mauricio Flores, et al.,

Plaintiffs, v. American Airlines Incorporated, et al.,

Defendants.

No. CV-18-04175-PHX-MTL ORDER

Plaintiffs Mauricio Flores and Claudia Flores allege claims for negligence and gross negligence against Defendant Skywest, Incorporated . This order grants Skywest the . (Doc. 55.) 1 I. BACKGROUND FACTS

Phoenix Sky Harbor International Airport to operate aircraft on certain routes under the auspices of American Eagle Airlines . (See Doc. 55-3 at 5 6.) This contract does not provide for ramp services, which includes positioning the motorized passenger ramp alongside the aircraft and hooking up the air conditioning cart to the aircraft. (Id.) For this task, Skywest contracts with . (Id. at 4, 6.)

Piedmont employed Mr. Flores as a ramp agent at Sky Harbor Airport. (Doc. 55-1 1 Although neither party requested oral argument, both parties have submitted legal See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998); see also LRCiv 7.2(f); Fed. R. Civ. P. 78(b).

at 6.) As a new employee, in September 2013, Mr. Flores attended a comprehensive training program administered by Piedmont. (Id.) This training included instruction on the necessary job roles for working out on the ramp from bringing the aircraft into the gate

area, parking it, putting out safety measures around the aircraft, off-loading the aircraft as far as passengers and bag -2 at 3.) the hazards of conditioned air and aircraft pressurization. (Id.) Piedmont also provides new ramp agents two weeks of on-the-job training, which Mr. Flores participated in. (Id.; Doc. 55-1 at 7 8.) Mr. Flores did not receive any training from Skywest. (Doc. 55-1 at 8.)

This case arises from an incident that occurred on September 2, 2016 at Sky Harbor Airport. (Doc. 55-4 at 2 4.) The subject aircraft, a CRJ-200, operated as an American Eagle flight. (Doc. 55-5 at 5.) The captain, first officer, and flight attendant were Skywest employees. (Doc. 55-6 at 4 5.) Piedmont provided the ground crew. (Doc. 55-3 at 5 6.) While the aircraft was parked at the gate, but before any passengers boarded, a Piedmont employee closed the doors to the aircraft. (Doc. 55-1 at 8.) A Piedmont employee then hooked up a conditioned air unit to the sealed aircraft. (Id.) During the discovery phase of this case, one trainers testified that, [i]f the aircraft is closed or sealed when you connect the conditioned air, it causes the cabin on the aircraft to pressurize the same -2 at 3 4.) To avoid pressurization, Piedmont instructed ramp agents that an aircraft door should

be left slightly open when conditioned air is hooked up. (Id. at 4.)

That night, Skywest First Officer Brenden Flygare arrived at the aircraft and tried to, but could not, open the main cabin door. (Doc. 58-5 at 21; Doc. 58-1 at 77.) First Officer Flygare surmised that the aircraft was pressurized and that maintenance should depressurize the aircraft. (Doc. 58-5 at 22.) He knew that opening a door from a pressurized aircraft could be dangerous. (Id. at 18.) In his deposition, Mr. Flores testified that, upon his

Morales, the Skywest flight attendant on duty, stood near the front of the plane waiting for someone to come open the -1 at 82 85; Doc 55-1 at 9 10.) After

discussion, Mr. Flores stated in his deposition [Mr. Flores] should go open the plane and start working on it so they could actually leave

Doc. 58-1 at 85.)

First Officer Flygare has a different recollection. He testified at his deposition that both he and Captain Bart Wensink told Mr. Flores not to open the door because the aircraft was pressurized. (Doc. 58-5 at 19 20.) First Officer Flygare also noted that Mr. Morales Id. at 28.)

Captain Wensink stated in his deposition that he was not present at the time of the accident and only arrived at the ramp area after Mr. Flores was on the ground injured. (Doc. 58-3 at 8, 17.) Mr. Morales testified that he was standing toward the front of the plane with First Officer Flygare when Mr. Flores was injured. (Doc. 58-4 at 10 13.) At his deposition, Mr. Morales stated that he saw First Officer Flygare talk to a ramp agent before the incident. (Id. at 15.) He does not know if this ramp agent was Mr. Flores. (Id.) Mr. Morales surization to anyone,

door. (Id. at 17.)

In the course of his duties, Mr. Flores tried to open the sealed service door, which was opposite from the main cabin door. (Doc. 55-1 at 9 10.) When Mr. Flores tried to open the pressurized door, it flung

open and struck him in the head and face. (Doc. 55-4 at 2.) Mr. Flores sustained serious injuries from this accident. (Doc. 1-3 ¶ 17.) Mr. Flores contends he did not know the aircraft was pressurized before trying to open the service door. (Doc. 58-1 at 82 83.) Afterward, Skywest inspected and performed operation checks on the door and found no defects. (Doc. 55-5 at 4 6.) II. PROCEDURAL HISTORY

Mr. Flores filed his Complaint in August 2018 asserting negligence and gross negligence in Arizona state court against American, American Eagle, Piedmont, and Skywest. (Doc. 1.) Shortly thereafter, the case was removed to this Court. (Doc. 1.) On July 10, 2019, American, American Eagle, and Piedmont moved for summary judgment.

(Doc. 41.) About a month later, Mr. Flores stipulated to dismiss American, American Eagle, and Piedmont. (Doc. 42.) On March 13, 2020, Skywest, the only remaining defendant, filed a Motion for Summary Judgment. (Doc. 55.) The Motion is now fully briefed. (Doc. 58, 62.) III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates 6(a). A

the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 -movant Id. at 255 (internal citations omitted); see also Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1131 (9th Cir. 1994) (court determines whether there is a genuine issue for trial but does not weigh the evidence or determine the truth of matters asserted). opposing parties tell two different stories, one of which is blatantly contradicted by the

record, so that no reasonable jury could believe it, a court should not adopt that version of Scott v. Harris, 550 U.S. 372, 380 (2007). IV. DISCUSSION

A. Previously Undisclosed Theories of Liability Skywest contends that Mr. Flores Motion raises several legal

62 at 4.) These new theories attempt to pin liability on Skywest through (1) the doctrine of respondeat superior, (2) Federal Aviation Administration 1.13(b) and two Arizona statutes, A.R.S. §§ 28-8280(A) and 28-8273, and (3) a borrowed servant relationship with Piedmont employees. (Doc. 58.) Skywest objects to these previously

undisclosed theories, arguing that they role in the determination of this Id. at 4, 6 n.2.) Mr. Flores to file a sur-reply addressing this issue. (Doc. 65.)

Under Rule 8 of the Federal Rules of Civil Procedure, a civil complaint must contain

what the claim is

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). Also, the -08 requires the parties to provide h the categories of information -08, at 2. 2

Specifically, General Order No. 17- 08 directs r claims or defenses, state the facts relevant to it and the legal theories Id. at 2, 5 (emphasis added).

The Complaint in this case barely alleges anything against Skywest. It states that airplane, and/or failed to ensure that all personnel -3 ¶ 14.) It also alleges that a duty requiring them to conform to a certain standard of care with respect to the Plaintiff, Id. ¶ 16.) Mr. Flores did not provide any additional, more specific theories of liability in his Complaint. When Skywest asked in an interrogatory for Mr. Flores to explain in detail the factual and legal bases for his claims in the Complaint, Mr. Flores did not disclose the three new theories advanced in the Response nt. (Doc. 55-7.)

A new theory of liability may not be added at the summary judgment stage as it [previously undisclosed] Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292

2 Although General Order No. 17-08 has expired, this case is still subject to its additional discovery obligations.

(9th Cir. 2000); see also Skelton v. Arizona State Univ., No. CV-17-01013-PHX-GMS, 2019 WL 1077879, at *2 (D. Ariz. Mar. 7, 2019) (barring a plaintiff from bringing a new ummary judgment).

The Court finds that Mr. Flores disclosed his respondeat superior theory, albeit indirectly, in his Complaint. (Doc. 1-3 ¶¶ 10, 14.) The Complaint demonstrates that Mr. Flores Id.) The Complaint negligence claim against Skywest is opening pressurized door. This is sufficiently specific to reasonably put Skywest on notice of the respondeat superior theory of relief.

sur-reply suggests

that he would use the borrowed servant theory at summary judgment. 3

(Doc. 66 at 3 4.)

reveals that Skywest would be ambushed with a borrowed servant defense to summary judgment. (Doc. 66-2 at 4.) Vague deposition questions about Piedmont employees also did not advance this theory. (Doc. 66 at 4.) There are no

complaint allegations or discovery disclosures to put Skywest on notice that it would be employees. Summary judgment is therefore granted

As to the FAA regulation and Arizona statutes, Mr. Flores concedes and regulation in the Complaint or during discovery. (Id. at 7.) Mr. Flores contends that his should not be considered a new theory of liability. Rather, the reliance on the state and

Id.) Mr. Flores also argues that certain vague discovery requests and MIDP disclosures provided notice to Skywest that he would raise these theories. (Id. at 4 7.) The Court is not persuaded by these arguments. 3 Tarron v. Bowen Machine & Fabricating, Inc., 225 o a contract Id.

There is no indication in the Complaint, or throughout discovery, that Mr. Flores would argue that a duty could have arisen through a FAA regulation or Arizona statutes. Looking at these disclosures separately or together does not provide an adequate basis to show that Skywest was reasonably notified of these new duty-based theories. These theories are therefore barred under Coleman on these theories of liability is granted.

B. Negligence negligence claim.

1. Elements defendant to conform to a certain standard of care; (2) breach of that standard; (3) a causal

connection between the breach and the resulting in Quiroz v. ALCOA Inc., 243 Ariz. 560, 563 64 (2018). A claim for gross negligence requires an additional showing of Noriega v. Town of Miami, 243 Ariz. 320, 326 (App. 2017) (alternation in original and citation omitted). The existence of a duty of care is an issue of law that the court will decide, whereas the other elements, including breach and causation, are typically factual issues reserved for the jury. Gipson v. Kasey, 214 Ariz. 141, 143 (2007).

2. Respondeat Superior Under the doctrine of respondeat superior - Kopp v. Physician Grp. of Ariz.,

Inc., 244 Ariz. 439, 441 (2018) (quoting , 230 Ariz. 55, 57 (2012)). This extends to such acts only if the employee is acting within the scope of employment when the accident occurs. Engler, 230 Ariz. at 57 58. Wiggs v. City of Phoenix,

198 Ariz. 367, 371 (2000), Flores for Skywest to be liable. Flygare, knew that the aircraft was pressurized, understood the risks involved with opening

a pressurized aircraft, and had a duty to refrain from putting Mr. Flores in danger. 4

(Doc. 58 at 6 10.)

3. Duty of Care Owed by First Officer Flygare conform to a particular standard of conduct in order to protect others against unreasonable

Markowitz v. Ariz. Parks Bd., 146 Ariz. 352, 354 (1985). In Gipson v. Kasey, 214 Ariz. 141 precedents

to the extent they relied on foreseeability to determine duty. Quiroz, 243 Ariz.

at 565. Post-Gipson, a duty must be based either on (1) a preexisting special relationship between the parties, or (2) a relationship created by public policy considerations. 5

Id. at 565 66. before the case-specific Id. at 564 (citation omitted). Absent held accountable for damages they carelessly cause, no matter how unreasonable their

Gipson, 214 Ariz. at 143 44.

a. Special Relationship Mr. Flores asserts that First Officer Flygare owed a duty to him because of certain special relationships. (Doc. 58 at 7 11.) from several sources, including special relationships recognized by the common law,

Quiroz, 243 Ariz. at 565 (citation omitted).

Mr. Flores first argues him because he instructed Mr. Flores to open the aircraft door. (Doc. 58 at 9 11.) Mr.

Flores cites Ontiveros v. Borak, 136 Ariz. 500, 508 09 4

4.) Although Mr. it has been submitted as an exhibit. (Doc. 58-5.) It will therefore be considered in resolving the Motion. 5 Mr. Flores attempts to distinguish Quiroz. (Doc. 58 at 7.) The Court agrees with Skywest Quiroz 62 at 11.)

common law recognizes a duty to take affirmative measures to control or avoid increasing the danger from the conduct of o 6

This single quotation does not represent the complete picture in that case, which involved dram shop liability. The rationale for the common-law duty holding in Ontiveros was much more narrowly based on the relation of the licensed supplier of liquor and his patron. Delci v. Gutierrez Trucking Co., 229 Ariz. 333, 338 (App. 2012); see also Ontiveros, 136 Ariz. at 5 obligation of a licensee to help control the conduct of others who are patrons of his

Ontiveros reliance on the Restatement (Second) of Torts § 315 confirms that a special relationship, which is missing here, is needed for this affirmative duty to apply. And, the Arizona Supreme Court has held that relying on Ontiveros is not enough to create a duty absent a similar special relationship that would create this affirmative duty. Quiroz, 243 Ariz. at 575. In short, Ontiveros did not establish a presumed duty based on risk creation.

Nothing in the record suggests conduct, created a special relationship with Mr. Flores similar to the

one in Ontiveros.

does not apply. See Alcombrack v. Ciccarelli, 238 Ariz. 538, 542 43 (App. 2015) (finding that Ontiveros did not apply when a similar relationship was not present).

Second, Mr. Flores contends that a landowner-licensee relationship existed between Skywest and himself. (Doc. 58 at 9 11.) Skywest disagrees with the landowner ¶ 2; Doc. 62 at 10.) It is true that a landowner-licensee relationship is a recognized special relationship that can establish a duty of care. See Wickham v. Hopkins, 226 Ariz. 468, 471 (App. 2011). For this 6 This line in Ontiveros cites the Restatement (Second) of Torts § 315. 136 Ariz. at 509 10. so to control the conduct of a third person as See also Ortiz v. Espinoza, No. 2 CA-CV 2013-0081, 2013 WL 6571809, at *2 (Ariz. App. Dec. 12, 2013) (finding between the parties).

to apply, Mr. Flores needs to show that Skywest is a landowner. Mr. Flores relies on a , and cites deposition

the aircraft. 7

(Doc. 58-5 at 35; Doc. 58 at 7.) Even after construing the evidence in the light most favorable to Mr. Flores, mere guesswork by in his deposition does not establish a duty. See Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081 82 (9th Cir. 1996) ( ; Velasco v. Bodega Latina Corp., No. CV-18-02340-PHX-ROS, 2019 WL 1787483, at *2 (D. Ariz. Apr. 24, 2019) (same). There is no other evidence in the record supporting the landowner-licensee argument, including the critical element that Skywest even owned the plane. 8

Still, even if owning an aircraft equates to owning real property, there is no evidence supporting argument that he was in the position of a licensee. Without his argument collapses.

For these reasons, Mr. Flores has failed to assert a special relationship with Skywest or First Officer Flygare.

b. Public Policy

because of untimely disclosure. See supra Section IV.A. Despite this, the Court separately concludes that Skywest owed no duty under the FAA regulation and Arizona statutes. federal statutes Quiroz, 243 Ariz. at 565. the statute and the harm that occurred . . . is the risk that the statute sought to protect

7 -5 at 35.) 8 Mr. Flores does not make the argument that the landowner-licensee duty exists by virtue of Skywest leasing or renting the aircraft from another entity. Thus, the Court will analyze this argument only as it relates to ownership. See United States v. Romm, 455 F.3d 990, ng brief are

deemed

Id. (quoting Gipson, 214 Ariz. at 146). Unlike duties based on special relationships, duties based on public policy do not necessarily require preexisting relationships. Gipson, 214 Ariz. at 145. Mr. Flores argues that First Officer Flygare, as a pilot, owed him a duty by virtue of a FAA regulation and certain Arizona statutes. (Doc. 58 at 8 9.) Based on this, Mr. Flores states that First Officer Flygare

Id. at 9.) Skywest disputes that the FAA regulation and Arizona statutes even apply here. (Doc. 62 at 7 8.)

As a threshold matter, Skywest argues that federal law and FAA regulations preempt all aviation-related state law tort claims. (Id. at 7 10.) But the law is more nuanced than that Montalvo v. Spirit Airlines, Inc., 508 F.3d 464, 470 to in-

9 Elassaad v. Indep. Air, Inc., 613 F.3d 119, 127 (3d Cir. 2010). As the Third Circuit in Elassaad while the aircraft is stopped, the stairs had been lowered, and most passengers had

Id. at 127, 130 31. Here, the aircraft was at a complete stop, closed, and no one was onboard. Any injury incurred would be subject to state tort law. The Court therefore

Flygare owed him a duty based on public policy. First, he contends that First Officer Flygare must follow FAA Regulation 91.13(b), which sets forth the standard required for the safe operation of aircraft. Id. at 129. This regulation provides:

Aircraft operations other than for the purposes of air navigation. No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or 9 See Sierra Pac. Holdings, Inc. v. Cty. of Ventura, 204 Cal. App. 4th 509, 515 n.4 (2012) (discussing Elassaad to in-

property of another. 14 C.F.R. § 91.13(b).

By its terms, this regulation applies only when a pilot is operating an aircraft. The definition of the term o critical. The regulation cause to use or authorize to use aircraft, for the purpose . . . of air navigation including the

In response to comments made he agency explained that the phrase § 91.13 only ma Careless or Reckless Ground Operation of Aircraft, 32 Fed.Reg. 9640, 9640 41 (July 4,

1967).

Consistent with this, Elassaad § and most passengers had disembarked. 613 F.3d at 130 31. Here, like Elassaad, all actions

related to this case occurred when the aircraft was at a complete stop, closed, and no one was onboard. First Officer Flygare was on the ramp awaiting to board the plane. What happened here did not involve the operation of the aircraft. For these reasons, the Court concludes that § 91.13 does not establish a duty.

Second, Mr. Flores contends that Arizona statutes impose a duty on First Officer Flygare. (Doc. 58 at 8 9.) Arizona Revised Statutes § 28-8280(A), provides:

A person who operates an aircraft in the air, on the ground or on the water in a careless or reckless manner that endangers the life or property of another is guilty of a class 1 misdemeanor. In determining whether the operation was careless or reckless, the court shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. A.R.S. § 28-8280(A). Mr. Flores then cites A.R.S. § 28-8273, which states:

A. A pilot is responsible for damage to a person or property

that is caused by aircraft directed by the pilot or under the either in controlling the aircraft or while giving instructions to another person. B. If the pilot is the agent or employee of another, both the pilot and the pilot damage.

A.R.S. § 28-8273. Arizona Revised Statutes § 28-8280 incorporates the standards prescribed by federal statutes or regulations. As mentioned above, 14 C.F.R. § 91.13(b) does not apply. Moreover, even looking at the state statute, neither Skywest nor First Officer Flygare operated meaning. As to A.R.S. § 28-8273, neither here was completely stopped and unmanned at the time of the incident. See Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc., 198 Ariz. 10, 16 n.3 (App. 2000) (finding that A.R.S. § 28-8273 did not It is telling that the Arizona Court of Appeals in Ramsey

held A.R.S. § 28-8273 did not apply in a situation engine in mid-flight. See id. at 12, 16 n.3. Here, First Officer Flygare could not have

directed the aircraft, as required by the statute, while standing outside of a closed, parked, and unmanned aircraft. Accordingly, neither the FAA regulation nor the Arizona statutes provide a recognizable duty that extends to Skywest or First Officer Flygare.

c. Conclusion Regarding First Officer Flygare As stated above, First Officer Flygare owed no duty to Mr. Flores. Because there was no duty, his theory of respondeat superior cannot survive and the Court need not address the remaining elements. See Wickham, 226 Ariz. at 471 cannot be maint Although the parties dispute

whether First Officer Flygare instructed Mr. Flores to open the service door, that issue of fact is irrelevant because no duty existed between Mr. Flores and Skywest or its employee.

4. Duty of Care Owed by Skywest negligence claim emanates from the proposition him to open the service door

under these circumstances. (Doc. 58 at 11.) Further, Mr. Flores contends that working within the scope of his employment, Defendant Skywest is liable for the actions Id.) As analyzed above, Skywest does not have imputed liability through First Officer Flygare. To the extent theories against First Officer Flygare were directed against Skywest itself, those arguments still fail to identify a recognizable duty.

C. Gross Negligence Mr. Flores asserts gross negligence in his Complaint. (Doc. 1-3.) Skywest argues that his gross negligence claim fails because no duty was owed to him. (Doc. 58 at 5 6, 9.) Mr. Flores did not respond to this argument. Skywest is therefore entitled to summary judgment on this basis alone. See LRCiv 7.2(i). That notwithstanding, the Court will address the merits. To establish a claim of gross negligence, the plaintiff must prove, Hogue v. City of Phoenix, 240 Ariz. 277, 280 (App. 2016). Here, Mr. Flores failed to prove that his simple or gross negligence claims established that Skywest owed any duty to him. For the same reasons, his gross negligence claim fails. VI. CONCLUSION

Accordingly, IT IS ORDERED granting Skywest 55.) The Clerk of the Court shall enter judgment in Skywest remaining claims and close this case. Dated this 10th day of November, 2020.