Air Wisconsin Airlines Corp., v. Hoeper, 571 U.S. ___ (2014) (holding that ATSA immunity may not be denied to materially true statements, and under the material falsity analysis, Air Wisconsin is entitled to immunity as a matter of law).

Respondent Hoeper was a pilot for petitioner Air Wisconsin Airlines Corp. (Air Wisconsin). Air Wisconsin changed the type of aircraft flying out of Hoeper's home base, so Hoeper needed to become certified on a different type of aircraft in order to keep his job. Hoeper failed in his first three attempts at certification, and Air Wisconsin gave him one final chance. After Hoeper performed poorly during the required simulator session, he reacted angrily. He tossed his headset, raised his voice, and accused the instructor of railroading the situation. The Air Wisconsin manager discussed Hoeper's behavior with other airline officials, and ultimately, Air Wisconsin notified the Transportation Security Administration (TSA) of the situation. The manager told the TSA that Hoeper was a Federal Flight Deck Officer (FFDO), and so he may be armed, they did not know the whereabouts of his firearm, and they were concerned about his mental stability, saying that Hoeper had been terminated from his employment. In response, the TSA removed Hoeper from the plane, searched him, and questioned him about the location of his gun. Hoeper eventually boarded a later flight home and Air Wisconsin fired him the next day. Hoeper sued for defamation in a Colorado state court.

Air Wisconsin moved for summary judgment and later for a directed verdict under the Aviation and Transportation Security Act (ATSA), which grants immunity to airlines and their employees against civil liability for reporting suspicious behavior to the TSA. This immunity does not attach to "any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading" or "any disclosure made with reckless disregard as to the truth or falsity of that disclosure." The trial court denied the motions and submitted the ATSA immunity question to the jury. The jury found for Hoeper on the defamation claim, and the Colorado Supreme Court affirmed, holding that the trial court erred in submitting the question to the jury, but the error was harmless. The Colorado Supreme Court held that Air Wisconsin was not entitled to immunity because its statements to the TSA were made with reckless disregard of their truth or falsity.

The Supreme Court granted certiorari to decide whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false.

The Court first examined the congressional intent behind the exception to ATSA immunity, holding that a statement otherwise eligible for ATSA immunity may not be denied immunity unless the statement was

materially false. The exception was patterned after the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which defined 'actual malice' for the purposes of denying immunity to public officials for a statement made, "with knowledge that it was false or with reckless disregard of whether it was false or not". Congress used this exact language in defining ATSA immunity in the 2001 statute.

In addition, the Court examined the requirements to establish actual malice. The Court has long held that actual malice requires falsity. The Court has further held that this falsity must be more than mere falsity; the falsity must be material. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). These holdings regarding 'actual malice' were settled when Congress enacted the ATSA. The Court presumed that Congress meant to adopt the material falsity requirement when it incorporated the actual malice standard into the ATSA immunity exception. The Court found no other indicia of statutory meaning to rebut this presumption.

Finding that the actual malice standard does not cover materially true statements made recklessly, the Court concluded that Congress did not mean to deny ATSA immunity to such statements. Correspondingly, the Court held that the ATSA immunity may not be denied to materially true statements.

The Court rejected Hoeper's argument that, despite the Colorado Supreme Court's misapprehension of the ATSA's immunity standard, the judgment should be affirmed because Air Wisconsin failed to argue the truth of its statements in asserting immunity, therefore forfeiting the claim. The Court found that Air Wisconsin correctly contended in its brief to the Colorado Supreme Court that the immunity exception incorporated the *New York Times* standard of actual malice, which requires material falsity.

The Court also rejected Hoeper's argument that the Colorado Supreme Court performed the requisite analysis for material falsity through its finding that the record was sufficient to support the jury's defamation verdict. The Court listed several reasons why the Colorado Supreme Court's analysis was not sufficient. First, a court's deferential review of a jury finding cannot substitute for its own analysis of the record. Next, the jury was never instructed to find material falsity. The jury was asked only to determine if one or more of the statements was false without addressing materiality. Finally, applying the material falsity standard to a defamation claim is quite different from applying it to ATSA immunity. The Court held that the Colorado Supreme Court's analysis of material falsity was clearly erroneous.

The Court next examined how to determine materiality of a false statement in the ATSA context. The Court stated that a materially false statement is generally one that "would have a different effect on the mind

of the reader [or listener] from that which. . .truth would have produced." *Masson v New Yorker Magazine, Inc.*, 501 U.S. 496, 517. The Court determined that this standard suffices to address the ATSA immunity as long as the hypothetical reader or listener is a security officer. For purposes of ATSA immunity, the Court held that a false statement is not material unless there is a substantial likelihood that a reasonable security guard would consider it important in determining a response to the supposed threat.

Lastly, the Court applied the material falsity standard to the facts of this case in the manner most favorable to Heoper, concluding that any falsehoods in Air Wisconsin's statements to TSA were not material. The Court reasoned that a reasonable TSA officer, having been told only that Hoeper was an FFDO and that he was upset about losing his job, would have wanted to investigate whether Hoeper was carrying a gun. The Court found that the manager's statement regarding Hoeper's termination was immaterial, as everyone knew that Hoeper's termination was imminent. As to the statements of Hoeper's mental instability, the Court determined that there was no material difference between stating that Hoeper had just "blown up" in a professional setting and a statement that he was "unstable". To require the precise wording demanded by Hoeper would vitiate the purpose of the ATSA immunity.

Accordingly, the Court reversed the judgment of the Supreme Court of Colorado.

Justice Scalia, joined by Justice Thomas and Justice Kagan, agreed with the Court's standard for material falsity for determining denial of airline immunity under the ATSA, and further agreed that neither the jury nor the courts below considered material falsity in the ATSA-specific way. However, Justice Scalia dissented to the Court's application of the ATSA material falsity standard to the facts of the case, stating that the Court granted certiorari only to decide the standard for denying ATSA immunity, but not to apply that standard to the facts of this case. Justice Scalia cited to *New Yorker Magazine*, holding that a court's role is to determine whether a reasonable jury could find a material difference between the defendant's statement and the truth. *Masson v New Yorker Magazine, Inc.*, 501 U.S. 496, 522. Only when "the facts and the law will reasonably support only one conclusion" on which "reasonable persons . . . could [not] differ," can this type of question be withdrawn from the jury. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). Justice Scalia argues that the questions of this case belong in front of a jury. Based on the evidence presented, Justice Scalia argues that a reasonable jury in this case *could* have found that the falsehoods in Air Wisconsin's statements to TSA were material based on the evidence presented. As such, the Court cannot hold as a matter of law that Air Wisconsin's report

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was not materially false, and the jury's role in making these determinations should have been preserved.

Emma Tauchman

Honolulutraffic.com v. Federal Transit Admin., 742 F.3d 1222 (9th Cir. 2014) (holding that the granting of summary judgment in favor of the FTA was proper because the FTA followed NEPA in preparing a FEIS and because the FTA reasonably and in good faith complied with § 4(f) in identifying and studying historic sites along the proposed route).

A consortium of interest groups filed suit to prevent construction of an elevated rail line across greater Honolulu, Hawai'i, raising issues under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4312–47, the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6, and the Department of Transportation Act, 49 U.S.C. § 303(4)(f).

The Federal Transportation Administration ("FTA") published a notice of intent to prepare an environmental impact statement on December 7, 2005 to begin studying a corridor linking Kapolei, Waikiki, and the University of Hawai'i at Manoa. A fixed guideway system was recommended, and a second notice of intent was issued on March 15, 2007 to prepare an environmental impact statement to select the preferred technology to be used. The public was requested to comment on five potential technologies: light rail, rapid rail, rubber tire, magnetic levitation, and monorail. Rapid rail technology was selected. The FTA then prepared a final environmental impact analysis which selected a preferred route. This preferred route runs close to several historic sites, implicating the Department of Transportation Act § 4(f), which says that use of an historic site is only allowed if there is no "prudent and feasible alternative" and the project minimizes all possible harm to the site. The FTA approved the project on January 18, 2011 in a Record of Decision.

The plaintiffs were not satisfied with the planning process because the FTA did not consider their preferred alternative: managed lanes to be used by busses, car pools, and toll-paying single-occupant vehicles. The district court granted summary judgment to the defendants on all but some of the 4(f) claims, allowing the first three phases of construction to commence. The court ultimately enjoined construction on the fourth phase of the project pending further study. Neither party appealed the ruling as to the fourth phase, so the Court of Appeals did not consider it.

The United States Court of Appeals for the Ninth Circuit first considered whether it had jurisdiction to hear the appeal. The defendants