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News Release

We are pleased to send you the enclosed cover article from today's New York Law Journal reporting our most recent appellate victory.

In this case, *Kemelman v. Delta Airlines*, the Second Department reversed the Supreme Court's dismissal of a suit by a family to recover for the wrongful death of their loved one based upon the airlines negligent and inadequate response to his heart attack. The decision, by a 3-1 majority, also held that the recovery is not necessarily limited by the Warsaw Convention's \$75,000 limit of liability as the airline's acts may be found to be "willful".

New York Law Journal

NEW YORK, TUESDAY, APRIL 23, 2002

Family of Heart Attack Victim May Press Suit Against Airline

BY TOM PERROTTA

THE FAMILY of a man who suffered a heart attack on an international flight and later died may be able to recover damages for willful misconduct against Delta Air Lines Inc., an appellate court ruled last week.

The 3-1 ruling from the Appellate Division, Second Department, overturned a lower court decision that dismissed the suit. The appellate court found that a trial was necessary to determine whether the airline crew had acted unreasonably in attempting to help the ailing man.

In *Kemelman v. Delta Air Lines Inc.*, 9541B, both the majority and the dissent agreed that the international flight was governed by the Warsaw Convention, which says airlines can be held liable for up to \$75,000 per person for accidents during flights that result in injury.

But in this case, the majority said, questions remained as to whether Delta was guilty of willful misconduct, which would leave the airline open to greater liability.

In January 1994, Roman Zonenashuili traveled first class on a flight from New York's John F. Kennedy International Airport to Moscow. Four hours into the flight, he began complaining of chest pains and fretting over what he

feared was an impending heart attack. Mr. Zonenashuili had been smoking and had consumed two or three glasses of cognac, according to the court's opinion.

The senior flight attendant asked the other passengers if there was a doctor on board, but no one came forward. The attendant tried to give Mr. Zonenashuili oxygen, but said Mr. Zonenashuili pushed the tank away. Another attendant said the oxygen tank was empty.

The senior attendant then informed the captain of the situation and asked Mr. Zonenashuili if he would like the plane to make an emergency landing so he could go to a hospital. The attendant said Mr. Zonenashuili declined the offer, but two passengers disputed this account, saying Mr. Zonenashuili had asked to make an emergency landing.

As the plane continued on to Moscow, a flight attendant sat with Mr. Zonenashuili. He soon lost consciousness. The pilot diverted the plane to Copenhagen, Denmark, and flight attendants again asked if there was a doctor on board. Two doctors came forward, and one tried to administer oxygen to Mr. Zonenashuili. The doctor said nothing came out of the oxygen tank.

The decision was published yesterday, page 22.

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Airline Suit

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Attempts to resuscitate Mr. Zonenashuili after the plane landed in Copenhagen were unsuccessful and he later died in a hospital. His family then filed suit in Nassau County Supreme Court.

Reversed on Appeal

Supreme Court Justice Stephen A. Bucaria dismissed the suit, but the Second Department last week reversed that ruling, finding that "it cannot be said, as a matter of law that the routine procedures which [Delta's] employees followed in response to [Mr. Zonenashuili's] medical situation were carried out in a reasonable manner."

In a dissent, Justice Leo F. McGinty agreed there were issues of fact, but said the airline had not engaged in willful misconduct. Citing *Plumba Comes v. American Airlines Inc.*, 177 F.2d 1272, Justice McGinty said the plane's crew would have to have acted "(1) with intent to cause damage, or (2) recklessly and with knowledge that damage would probably result."

"In my view," Justice McGinty said, "there is no evidence that Delta's employees acted intentionally, recklessly with knowledge that their conduct likely would result in damage."

Concurring with the majority opinion were Justices Anita R. Florio, Gloria Goldstein and Howard Miller.

Mr. Zonenashuili's family was represented by Kahn Gordon Timko & Rodrigues, with Sanford F. Young and Jan B. Rothman of Sanford F. Young PC handling the appeal. Marguerite D. Peck of Downing, Mehrrens & Peck represented Delta Airlines.