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In the

Supreme Court of the United States

GEORGE HENSON MIREE ET AL.,
PETITIONERS
V.
DEKALB COUNTY, GEORGIA, RESPONDENT.

JUDITH ANITA PHILLIPS, ETC.,
PETITIONER
V.
DEKALB COUNTY, GEORGIA, ET AL.,
RESPONDENT.

FIREMAN'S FUND INSURANCE COMPANY
PETITIONER,
V.
DEKALB COUNTY, GEORGIA, ET AL.,
RESPONDENT

V.
WILLIAM MICHAEL FIELDS,
PETITIONER,
V.
DEKALB COUNTY, GEORGIA, ET AL.,
RESPONDENT.

Nos. (607
(659
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Washington, D. C.
April 27, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE HENSON MIREE ET AL., Petitioners v. DEKALB COUNTY, GEORGIA, Respondent.	:	
JUDITH ANITA PHILLIPS, ETC., Petitioner v. DEKALB COUNTY, GEORGIA, ET AL., Respondent.	:	(607 (659 Nos. 76-700 (722
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WILLIAM MICHAEL FIELDS, Petitioner, v. DEKALB COUNTY, GEORGIA,ET AL., Respondent.	:	

Washington, D. C.

Wednesday, April 27, 1977

The above-entitled matter came on for argument at 11:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

J. ARTHUR MOZLEY, ESQ., Smith, Cohen, Ringel, Kohler & Martin, 2400 First National Bank Tower, Atlanta, Georgia 30303; on behalf of Petitioner Fireman's Fund Insurance Company.

ALAN W. HELDMAN, ESQ., Johnston, Barton, Proctor, Swedlaw & Naff, 1212 Bank for Savings Building, Birmingham, Alabama 35203; on behalf of Petitioners Miree, et al.

F. CLAY BUSH, ESQ., Long, Weinberg, Ansley & Wheeler, 3000 Equitable Building, Atlanta, Georgia 30303; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 607, 659, 700 and 722, Miree and others against DeKalb County.

Mr. Mozley, you may proceed when you're ready.

ORAL ARGUMENT OF J. ARTHUR MOZLEY, ESQ.,

ON BEHALF OF THE PETITIONERS MIREE ET AL.

MR. MOZLEY: Mr. Chief Justice, may it please the Court:

Mr. Heldman and I have a divided argument, pursuant to the permission of the Court. And I will speak for approximately fifteen minutes, and will provide the Court with a brief outline of the case, and will devote my arguments to the questions of Federal pre-emption and implied private rights. Mr. Heldman will argue the issues involving third party beneficiary status.

Whatever time remains after our argument, we would like to reserve for rebuttal.

QUESTION: When you say, implied private rights, do you mean an implied cause of action under the Federal Airport Act?

MR. MOZLEY: Yes, I do, your Honor.

QUESTION: Will you address yourself somewhere in your argument to where that was first raised? I've read the District Court opinion and the Court of Appeals opinion and

I find no hint in either of them that that was ever raised.

MR. MOZLEY: I believe that it was raised throughout the case, your Honor, in terms of being beneficiaries of the safety covenants in the grant agreements, and being able to sue as third-party benefits -- to sue for breach of those grant agreements as third party beneficiaries.

QUESTION: Well, you're simply talking then, when you say, implied right of action, you mean a third party beneficiary claim; not an implied Cort versus Ash type of claim?

MR. MOZLEY: Yes, sir, I'm speaking of an implied Cort v. Ash type of claim based upon breach of these safety covenants and the Grant Agreements. The safety covenants and the Grant Agreements are also statutorily imposed safety covenants under the Federal Airport Act.

QUESTION: Well, are they two different theories of action?

MR. MOZLEY: Yes, sir, I believe if we wanted to possibly split hairs, there would be two different theories, yes, sir.

QUESTION: Well, then, if you have time, will you say when you first raised your Cort v. Ash claim?

MR. MOZLEY: I believe it was probably in the 5th Circuit, your Honor, when it became apparent that the 5th Circuit had turned the question on Federal law.

These cases, may it please the Court, arise from the crash of a Lear Jet airplane at DeKalb Peachtree Airport caused by ingestion of a large number of starlings in both jet engines. The starlings had been attracted to the airport by an open, raw garbage dump maintained by the county alongside the only jet runway at the airport. And this garbage dump had been in existence for some time, and as the record reflects, was an attraction to literally huge flocks of tens of thousands of starlings to the jet runway area.

Prior to the crash and under the aegis of the Federal Airport Act and related regulations, the county and the FAA had entered into a series of six grant agreements, whereby the county had received Federal funds for airport improvements, including construction of the very jet runway in question in this case. These Grant Agreements imposed upon the county the following specific safety covenants: one, operation and maintenance of the airport in a condition, quote, safe for aeronautical users, end quote; two, restriction of airport property to uses compatible with normal airport operations including, quote, landing and takeoff of airplanes; three, prohibition of any activity at the airport that would interfere with its use for airport purposes; and four, and possibly --

QUESTION: Did you say, air force?

MR. MOZLEY: Airport purposes, excuse me, your Honor.

QUESTION: Not air force.

MR. MOZLEY: And possibly the most important is four, mitigation and removal of existing airport hazards, an airport hazard being defined by Federal law as anything that adversely affects safety or flight.

QUESTION: Now, this -- these are cited in the statute -- these are the conditions on which the Federal government --

MR. MOZLEY: Yes, sir.

QUESTION: -- may give the grants; is that correct?

MR. MOZLEY: These were recitals in the Grant Agreements between the FAA and the County. And they are also statutory requirements under the Federal Airport Act.

QUESTION: Well, they come into the contract because they're in the statute, I take it.

MR. MOZLEY: Yes, sir; they come into the contract because Congress required them to be there.

The petitioners base their claims against the county on basically four theories: negligent operation of the airport; maintenance of a nuisance; maintenance of a Federally proscribed airport hazard, which is the implied private claim, Mr. Justice Rehnquist, that we claim we have; and breach of the Grant Agreement safety covenants.

QUESTION: Well, why does the District Court, then refer to your claim as a diversity suit, and the 5th Circuit

too?

MR. MOZLEY: We have both types of jurisdiction here, Mr. Justice Rehnquist. We have complete diversity jurisdiction. And if we have Federally protected rights, then we have Federal question jurisdiction, also.

QUESTION: I would -- I don't doubt it, but all I'm saying is, the District Court opinion refers to it as diversity litigation --

MR. MOZLEY: Yes, sir.

QUESTION: -- the 5th Circuit refers to it as diversity litigation.

MR. MOZLEY: That is correct, yes, sir.

The issues here, therefore, are whether --

QUESTION: Your Federal question jurisdiction is linked entirely to your claim of an implied cause of action, I take it?

MR. MOZLEY: Yes, sir.

QUESTION: If you don't have an implied cause of action, then you don't have the Federal --

MR. MOZLEY: We don't have Federal question type jurisdiction. But we would still remain with complete diversity jurisdiction.

QUESTION: Complete diversity jurisdiction?

MR. MOZLEY: Yes, sir.

With respect to our argument based on Federal

pre-emption, we wish to make these points. Federal safety regulation of aeronautical interstate commerce extends to practically all phases of aviation and it specifically includes Federally funded airports. The primary purpose of Federal regulation of aviation, including the safety covenants involved here, is to provide for the safety of interstate aeronautical travellers.

The extensive and pervasive Federal regulation of aeronautical commerce by necessity must pre-empt and preclude any conflicting local laws or policies. This is simply a logical extension of this Court's rulings in Northwest Airlines v. Minnesota and City of Burbank v. Lockheed Air Terminal.

Application of the local county immunity law to shield the county for liability for breaches of safety covenants imposed by Congress certainly does absolutely nothing to foster or enhance the Federally expressed concern for airport safety.

To the contrary, shielding the county from liability can serve only to emasculate and burden the Federally expressed concern for aeronautical safety, and for safety at Federally funded airports.

QUESTION: If you had a highway negligently built, but with a Federal grant of money, a joint construction project of the State and Federal government, would the states, in these circumstances, be liable in tort, or would

it have sovereign immunity for the negligent maintenance or construction of the highway?

MR. MOZLEY: A lower court, your Honor, has held that the state would have sovereign immunity, in a different factual situation than this case. We believe that aeronautical commerce and the extensive Federal regulation of aeronautical commerce and the deep concern of the Federal government with safety, distinguishes this case from the example your Honor just cited.

However, a lower court has held, as it is cited in the briefs, that sovereign immunity would exist under the limited example your Honor just gave.

So we -- it is our position that the doctrine of Federal pre-emption here must pre-empt the County's immunity, because otherwise, the safety objectives of the covenants would be completely thwarted.

QUESTION: So I take it then your position includes the notion that Federal law governs this controversy, and you think the Court of Appeals simply made a mistake in saying that you weren't entitled to sue under Federal law here?

MR. MOZLEY: Yes, sir.

QUESTION: And that's exactly the opposite position from what you took in the District Court and the Court of Appeals?

MR. MOZLEY: Well, no, sir, that's not quite correct,

Justice Rehnquist.

QUESTION: Well, you won in the District Court on Georgia law.

MR. MOZLEY: No, sir, the District Court ruled against us.

QUESTION: Oh, that's right.

MR. MOZLEY: The original 5th Circuit opinion ruled in our favor.

QUESTION: Yeah, that's right.

MR. MOZLEY: And it was only really until we got to the 5th Circuit and to the en banc majority opinion that the question of Federal common law really became involved in the case, whether the parties had overlooked it, or whether the earlier courts had overlooked it, remains to be said.

QUESTION: Well, I take it you wouldn't -- if Georgia -- would you concede that if Georgia -- what is your position if Georgia law applies to this case?

MR. MOZLEY: Our opinion that Georgia'a law of third party beneficiaries is exactly the same as the Federal law should be under Cort v. Ash and under the original opinion of the 5th Circuit, that anyone who is an intended beneficiary of a safety covenant can sue for breach of contract, and that such principle applies to counties.

QUESTION: But if we disagreed with the Court of Appeals on which law governs, I suppose we would remand

to see what the Georgia law is.

MR. MOZLEY: No, sir, I believe the Georgia law has been stated in the 5th Circuit opinion, and is untouched by any reversal; and that is, that a county has no immunity with respect to claims arising from contracts it was lawfully authorized to make. So it simply --

QUESTION: Judge Morgan took one position, kind of had a detailed analysis; Judge Dyer took another position with a much more detailed analysis under Georgia law.

MR. MOZLEY: Yes, sir, but Judge Dyer did not disagree with Judge Morgan's comments that a Georgia County can be sued for breach of any contract that it was lawfully authorized to make.

QUESTION: But you think that panel decision is still in effect?

MR. MOZLEY: That aspect of the panel decision is in effect, because it is in parts one, two and four of the panel decision that was adopted by the en banc majority.

May it please the Court, I would like to turn now briefly to the subject of our equal protection argument which was first made to the 5th Circuit, and it's basically an argument that application of county immunity here, or any interpretation of the county immunity statute would work the denial of equal protection. We have this situation. Under the classification scheme urged by DeKalb County, if the

county seat of DeKalb County, the city of Decatur, had operated this airport, we would not be involved here. There would be no immunity issue.

So the result of the classification scheme urged by the county is simply that some suits against some local governmental entities can be allowed, but other suits against a practically identical governmental entities, with respect to identical airports, are disallowed.

We believe this is an unconstitutional burden on the rights of interstate aeronautical travellers, and would serve to deny them equal protection.

May it please the Court, I would like to reserve whatever time I have.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Heldman.

ORAL ARGUMENT OF ALAN W. HELDMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HELDMAN: Mr. Chief Justice, may it please the Court.

I represent the Miree petitioners. They are three minor children whose father and mother were both killed as passengers on this airplane. They're from Birmingham. The crash took place near Atlanta.

I'd like to begin by responding, if I may, to your question, Mr. Justice Rehnquist, and yours, Mr. Justice White,

with respect to the question of whether Federal law was asserted below, and whether the notion of an implied Federal remedy was asserted below. And I think I responded to this on the first page or so of our reply brief. But more specifically, I can refer you to the Joint Appendix, at page 21, which is part of our complaint. And I'm assured by counsel in the related cases that there was similar language there.

At page 21 in the record we asserted that the maintenance of the garbage dump at the airport constituted an airport hazard, as defined in several recited sections. At Section 1711 is the definition of airport hazards; at 1718(3) requires that aerial approaches will be protected, and that adjacent land use not be incompatible. We think that's a more than adequate assertion of Federal remedies for --

QUESTION: It's simply a third party beneficiary theory, though, isn't it?

MR. HELDMAN: Your Honor, it has no relationship to the third party beneficiary argument. And it is in the context of the paragraphs of the complaint, it is unrelated. As a matter of fact, the original complaint asserted that to cover the waterfront, we argued tort, nuisance, contract -- or pleaded, rather.

QUESTION: Are you talking about page 22 of the big Joint Appendix?

MR. HELDMAN: Page 21, your Honor.

QUESTION: Page21.

MR. HELDMAN: Paragraph 28 thereon. And those section references are to the specific Federal statutory requirements that aerial approaches be protected, and that adjacent land not be used incompatibly. It had in mind the very sort of situation that we have here. The County owned this airport. The County maintained an open garbage dump literally adjacent to the runway. And over a period of years, they were told by the FAA that they were getting reports of flocks of birds interfering with aerial navigation. There were actual reports made from the FAA to the County of birds striking airplanes, yet not with fatal results. And what we have is an apathetic response, not to say a hostile response, from the County. Why? Simply because the County deemed itself to be immune, and there was no adequate sanction to make them take notice of this problem.

So it's my position that the immunity here caused these deaths. Immunity created an apathetic attitude with respect to ignoring these Federal safety standards. And I think it's fair to say that if this County had had to recognize an absence of immunity, this wouldn't have happened.

QUESTION: Couldn't the -- some Federal agency have closed it down?

MR. HELDMAN: Your Honor, the FAA --

QUESTION: My question was, could?

MR. HELDMAN: My answer has to be, I don't know. I can answer you to this extent, Mr. Justice Marshall: after this sad crash, and after these deaths, the FAA brought a lawsuit to close it down.

QUESTION: Which, the airport or the garbage dump?

MR. HELDMAN: To close the garbage dump down. And I'm having, I'm afraid, to go beyond the record. But my impression is that that was vigorously defended and ultimately compromised. Also, if I may continue outside the record, I think that the garbage dump is a nuisance --

QUESTION: You mean you cannot make an airport without Federal approval?

MR. HELDMAN: The Federal approval, per se, was never withdrawn. There were threats --

QUESTION: Well, couldn't it be withdrawn? Couldn't it have been withdrawn?

MR. HELDMAN: That I don't know, your Honor.

QUESTION: I mean, your argument is that there's immunity -- I mean, the Federal government had a little responsibility for that too, didn't they?

MR. HELDMAN: Well, we have sued the United States, your Honor, and we do feel --

QUESTION: Well, I better leave it alone, then.

MR. HELDMAN: -- it is part their responsibility.

I want to suggest that there's a spectrum here of

a reasonable possible result. With Erie applied State law the third -- the Georgia third-party beneficiary exception to its general immunity doctrine being at one end of a reasonable spectrum. And the implication of a Federal remedy under Cort v. Ash at the other end of a reasonable spectrum.

And while adopting both of those arguments, I think it might be more useful if I would devote myself primarily to the application of Federal common law to some or all of these issues.

The irony of the case is that the majority of the panel decision below took the case as an Erie case construed properly Georgia law to find this narrow contract exception to the general rule of county immunity, and granted us standing.

Judge Dyer, who dissented from that, said no. This is a case where serious Federal interests are involved. The United States is a party to the contract; the United States is a defendant in the lawsuit; this is aviation, which is Federally pre-empted. So we've got to try this case under Federal common law.

And then he went on and found that as a matter of Federal common law, the old restatement of contracts rule 145 from 1932 would give us a less liberal and a result we can't -- a standard we can't meet as third party beneficiaries. He ignored the recent cases, including the Bossier Parish case which you, Mr. Chief Justice, sat on the panel of with

the 5th Circuit, ten or so years ago where you held that children had standing to assert rights as third party beneficiaries under an agreement between a county and the United States with respect to access to schools. That was certainly a Federal common law decision.

The Inglewood -- city of Inglewood case from the 9th Circuit is an airport grant agreement case which held that not only the City of Inglewood, but individual citizens there as a class could sue as third party beneficiaries to enforce aviation grant agreements.

So we assert that very clearly Federal common law is at least as liberal on the third party beneficiary issue as is Georgia law. And I think this is -- ought to be put to rest by the fact that just about ten years ago the restatement draftsman offered a new Section 145 which brings doctrinal third party beneficiary concepts in line with reality, and says that there could be no significant differences between the rights of third party beneficiaries with respect to contracts to which the government's a party and those with private --

QUESTION: Well, in terms of immunity in this case, with respect to the contract claim, do you have to rely on the panel decisions?

MR. HELDMAN: In construction of Georgia law, if this Court should ddeem that this is an Erie case, I would

assert that the panel's majority decision ought to control, if the correct interpretation of Georgia --

QUESTION: Well, let's assume it isn't -- assume it's a Federal question, but let's assume that the Georgia law is that the county is immune from contract claims.

MR. HELDMAN: Your Honor, I don't think any judge in the courts below took that position.

QUESTION: I just -- let's assume that Georgia law is that the county is immune also from contract claims.

MR.HELDMAN: Then I would think that that would be an overpowering -- clear and overpowering urgency for the Court to consider this not a mere Erie case, because I think that would --

QUESTION: Well, I know, but let's assume we decided on the one hand that Federal law governs this case. But then we are faced with the --

MR. HELDMAN : I understand.

QUESTION: -- problem of --

MR. HELDMAN: If Federal law governs this case, you can interpret the contract to which the United States was a party, and which involves a federally pre-empted area of commerce; you can construe it by Federal common law rules of interpretation.

QUESTION: But what about the immunity of the county?

MR. HELDMAN: That's not a constitutional issue.

There was some -- the phrase here, the state, and there was some phrase, sovereign immunity. We don't have that. This is -- Lincoln County v. Luning from this Court in 1896 or 1898 --

QUESTION: This is not an Eleventh Amendment immunity.

MR. HELDMAN: It's not an Eleventh Amendment case. This is not the State of Georgia. It's the county. And the only immunity is the immunity asserted by a Georgia statute. Now, our opponents talk about this was constitutionalized in Georgia's constitution. That was after this, and it has no relevance to this case. We have here merely a Georgia statute, which says that a county will be immune from tort.

And the Eleventh Amendment does not require this Court in a Federal question case --

QUESTION: Isn't that Georgia statute entitled to some kind of credit?

MR. HELDMAN: Is your Honor suggesting full faith and credit?

QUESTION: No, I just said, some kind of credit?

MR. HELDMAN: I think if this was an Erie case, certainly so. But there's a whole line of cases starting with Parden from Alabama which holds that even the State itself, on the face of it, has Eleventh Amendment protection,

can waive immunity when it enters a Federal sphere of commerce. And it's my contention that --

QUESTION: Well, there's never been any question about the power to waive immunity, and many states have indeed waived it.

MR. HELDMAN: Parden and that line of cases, Mr. Chief Justice, were implied waivers, not --

QUESTION: You mean, running the airport, in and of itself?

MR. HELDMAN: That's right.

QUESTION: As in Parden running a railroad?

MR. HELDMAN: That's exactly right, Mr. Justice Brennan. But there are many cases -- the recent 7th Circuit case, Cohr C-o-h-r, involving an air crash, found that Federal common law ought to control with respect to the very substantive issues. There the issues were contribution and indemnity. And they didn't even have a contract, as we do here. And so I would say that a fortiori here, where we're interpreting a Federal contract, and the rights of parties under that Federal contract, that Federal common law ought to --

QUESTION: You said the United States also?

MR. HELDMAN: Yes, your Honor.

QUESTION: And is that suit still pending?

MR. HELDMAN: Yes, your Honor.

QUESTION: And you sued there under the $10,000 limit of the --

MR. HELDMAN: They're a defendant, the United States is a defendant in this action.

QUESTION: Yes.

MR. HELDMAN: And --

QUESTION: Federal Tort Claims Act?

MR. HELDMAN: Yes, sir. The United States also made cross-claims against DeKalb County.

QUESTION: So -- and was your -- did you make any assertions in the District Court or lower courts as to what the controlling law was in that action?

MR. HELDMAN: Oh, we recited compliance with the conditions precedent to the Federal Tort Claims Act, and then recited the appropriate section of Title XXVIII with respect thereto. And I think generally then incorporated all of our allegations.

The original complaint was lengthy, and very shortly after the complaint was filed, a very lengthy amendment was filed, which is in the record.

QUESTION: But your -- the complaint -- am I reading the wrong complaint? It enlarges the joint Appendix, page 9. Is that where the complaint begins?

MR. HELDMAN: That's our complaint, yes, sir.

QUESTION: Jurisdiction is based on 1346(b), is that

it? Is that the Tort Claims Act?

MR. HELDMAN: Yes, your Honor.

I might say, just by way of an aside, that the question came up just during briefing whether the United States has been dismissed from the action. And I won't belabor it here. But I think it's very clear. And I did in my reply brief, I think, adequately support the contention that the claims against the United States was still alive.

QUESTION: Is there any reason, do you know, why the United States isn't here?

MR. HELDMAN: The United States determined early on in this litigation that its interests would not be affected here because the motion to dismiss had never been -- the County's motion to dismiss the United States' cross claims had never been ruled upon. And I understand that's still the United States --

QUESTION: But the breadth -- at least the potential of this issue, these issues, is such that I wonder that the United States is not in as a friend of the Court to give their views of the matter?

MR. HELDMAN: I think, Mr. Chief Justice, the United States was simply relying upon the fact that it's -- the motion to dismiss its cross claims was not granted, and that as a matter of clear law -- the United STates filed a memorandum, and I think that's -- those cases are in my reply brief. And

they make it perfectly clear that the county can't assert sovereign immunity or governmental uimmunity vis a vis the United States. So while there may be perhaps some confusion in the record, I think the United States is under no fear that its claims here have been jeopardized.

QUESTION: Yes, but you're asserting a liability against them. I mean, your assertion --

MR. HELDMAN: Well, that issue -- that issue is not before us today. The motion to dismiss that the United States filed against our claims are not before your Honors today.

QUESTION: But even if you lost, you'd still have your suit against the United States?

MR. HELDMAN: It's one lawsuit. But the only thing that's before you today is the County's motion to dismiss the various petitioners original complaints.

QUESTION: But your theory of an implied cause of action under the Federal Airport Act certainly might develop principles that could involve the United States as a defendant, couldn't it?

MR. HELDMAN: That, Mr. Justice Rehnquist, is something that hasn't come up, and I'm not sure I can answer it adequately. But off the top of my head, I don't see why. We feel that we have an adequate remedy against the United States under the Tort Claims Act. The fault of the United

States would be with respect to the operation of the tower and the failure to report to this pilot that there had been bird sightings.

QUESTION: Would it include the failure of the United States to close this airport down as a hazardous place, on your theory of the case?

MR. HELDMAN: It could.

QUESTION: Mr. Heldman, I hate to ask this question, but is there a case still pending in the District Court against the United States? And if there is, was there a rule -- order entered pursuant to Rule 54(b) making this a proper appeal?

MR. HELDMAN: Your Honor, the claims against the United States are still pending. The claims of the petitioners against DeKalb County went up under 1292(b) on that, as a certified interlocutory matter.

I'd like to close by bringing back my emphasis to the middle of this spectrum, away from an implied Federal remedy on the one hand, and away from the contract concept on the other hand, into the notion that the Court can resolve this matter by applying proper principles of Federal common law here. Both a proper principle of Federal common law with respect to the rights of thirdparty beneficiaries, and also a principle of Federal common law will not embrace an archaic doctrine of immunity for a party which contracts with the

United States in a pre-empted area of commerce, specifically aviation, where the whole thrust of the statutory scheme, and the whole thrust of the contract, is safety. If you read this record, you'll see that it's not a philosophical statement to say that immunity caused this air crash.

I see that my time is up. Thank you.

QUESTION: Just one question: you mentioned the Parden case. Do you consider the operation of a railroad in Parden as a complete parallel to the Federal regulation of all airports?

MR. HELDMAN: In Parden, on the one hand, you had the State itself deemed to have waived its immunity by entering -- our case is a fortiori from that. On the other hand, that was an FELA question in Parden, and I think in that phase of the case -- was easier, then.

QUESTION: But that was on the old concept of the proprietary aspect of the railroad, was it not, in part?

MR. HELDMAN: I don't recall that it went on a proprietary, governmental distinction; in any event, the operation of the airport --

QUESTION: Well, I'm quite sure it did not.

MR. HELDMAN: I believe you wrote that opinion, Justice Brennan.

QUESTION: I did.

MR. HELDMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bush.

ORAL ARGUMENT OF F. CLAY BUSH, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BUSH: Mr. Chief Justice, may it please the Court:

I'm here on behalf of DeKalb County. And there are a multitude of questions that this Court has presented. But let me go ahead with what I've prepared. And it will probably bring in some of the questions that you all have raised to the various opposing counsel.

Let me dwell --

QUESTION: You do well if you can avoid questions by a statement like that.

MR. BUSH: Let me point out that in the initial panel opinion, as raised by the dissent by Circuit Judge Dyer, he stated in a footnote that if Georgia law applied to this case, it would not change the result. And that footnote along with the dissenting opinion was adopted by eight judges of the Fifth Circuit.

Now, we are here before this Court today not on any 54(b) certification; we're here because a judgment was entered for DeKalb County, and appeal was taken from that judgment in approximately late September, 1974. Two opinions were entered by District Judge William C. O'Kelley, the first one in June of '74, and in that first one, he basically stated his opinion that

DeKalb County was immune from suit if the diversity law applied.

QUESTION: But the case was still pending against somee other parties?

MR. BUSH: It was, and Mr. Mozley, who is here to argue, filed on behalf of Fireman's Fund, Southeast Machinery and Machinery Buyers, the various defendants and plaintiffs he represents in dual positions, a motion for reconsideration. The court reconsidered, and entered its opinion on I believe September 25th, 1974; then entered judgment for DeKalb County, by which an appeal was taken.

There are no cross-claims, we contend, pending against us right now. The suit is here upon a proper judgment entered on behalf of DeKalb County.

QUESTION: You don't think 54(b) has anything to do with that?

MR. BUSH: He did enter, pursuant to 54(b) -- but he directed the clerk to enter judgment on behalf of DeKalb County, and judgment was entered, and it's in the Appendix, your Honor.

Now, if I may proceed --

QUESTION: And did the District Courts say there wasn't any reason for delay?

MR. BUSH: I believe he may have, your Honor. But the judgment was entered. It is our opinion. It was amended

subsequently to delete one individual that had been included in it which should not have been.

If this Court should consider Georgia law, we would direct this Court's attention to particularly the decisions that have occurred since Judge William C. O'Kelley, who we contend had his pulse upon Georgia Law. And we would show this Court that in January of 1975, the Supreme Court of Georgia in Azizi and in Sheley had before it the situation where they were going to review the constitutional immunity doctrine again. And there, they had situations and occurrences, anaccident occurred before the constitutionalization of this immunity rule.

And here they said that it is no longer open to abrogation by the Supreme Court of Georgia, because it is a matter that has become part of the constitution of Georgia; it has been ratified by thepeople; it has been passed by the legislature of Georgia; it has been signed by the Executive Branch of the STate Government of Georgia. Therefore, it is no longer open to judicial abrogation by Georgia courts or by a court construing Georgia law.

Now, in the later part of January in 1975, in Williams v. Georgia Power, it was a matter involving Hancock County. And in that case there had been allegations of nuisance and allegations of third-party intended beneficiary to an agreement between Georgia Power and Hancock County. And

the plaintiffs said that they were third party beneficiaries. The Supreme Court of Georgia said, no; immunity to both third party beneficiary and to theories of nuisance.

In October of '75, in Revels v. Tift County, we had a slip and fall, a simple negligence action, in a County Courthouse of Tift County. No; immunity.

In March of 1976 -- now, this was after the panel opinion, where we strenuously disagreed with what Judge Morgan stated as to what he considered to be the law of Georgia on third party beneficiary; approximately two months after that panel opinion, in March of 1976, in a case of Backus v. Chilivis, there was a situation where a person had contracted with Glen County, Georgia, which is down near Brunswick, and in that case, the plaintiff said, well, I'm a third party beneficiary of that contract. The Supreme Court said no; that person was not an intended beneficiary. And it said that no citizen is a third party beneficiary of a government contract.

Then, more recently, in February of this year, the Supreme Court of Georgia had a State Department of the State government of Georgia, contracting with the health facilities services on Medicaid Payments. They promulgated certain regulations wherein they said that there are maximum reimbursement ceilings, and these maximun reimbursement ceilings cost them some money. And a plaintiff sued, and the Supreme Court of Georgia said, I'm sorry, we have immunity. You sued

the state in that particular instance; the State has not agreed to pay you damages or waive its immunity. And since it stands before us with immunity, we must apply it.

QUESTION: Well, are you arguing that if we should conclude that Georgia law controls, that we should decide the Georgia law question, or should we send it back to the Court of Appeals to decide?

MR. BUSH: I don't really seek to advise the Court on which position it should take. It is clear to me, your Honor, that Georgia law, if it is applied by this Court or by the 5th Circuit, would clearly hold DeKalb County immune from this suit, and -- as well as the third party beneficiary arguments, would find that the County --

QUESTION: Of course, it wasn't clear to the majority of the panel on the Court of Appeals.

MR. BUSH: Therewas some disagreement, and it was --

QUESTION: Well, not disagreement; they squarely held against you.

MR. BUSH: Well, they squarely held, on the theory of applying two cases, which those two cases were subsequently, two months later, in Backus v. Chilivis, distinguished. They applied a case called Smith v. Ledbetter Brothers, which was a case where they sued a person who had done some roadway construction, and a highway traveller, as a suggestion of the Chief Justice, was injured. And they sued the individual who

had actually done the work. And the Court of Appeals of Georgia said, that was a proper theory of recovery.

Now, the Supreme Court of Georgia -- that was a fairly old case -- the Supreme Court of Georgia, in March of '76, said that case simply does not apply to citizens suing people who have contracted with the government or the government itself.

QUESTION: That may be a third party -- those cases may relate to a third party beneficiary matter, but is that the same question as immunity?

MR. BUSH: We contend it's twofold, your Honor.

QUESTION: Yes, I would think so. And what about the Georgia law on immunity of the County?

MR. BUSH: We contend, your Honor, that we're still immune, particularly because of the constitutionalization of the immunity rule that we've referred to in our brief. It is now a situation, and as expressed in October, '75, by the Supreme Court of Georgia, in Revels v. Tift County. That was a specific case where there was a slip and fall in the County courthouse, and a simple negligence action against Tift County. And they said, the County is now immune from suit, and it's been constitutionalized.

QUESTION: The 5th circuit doesn't seem to agree with you.

MR. BUSH: Again, I'm not -- there was also a

member of the majority opinion who adopted that footnote of Judge Dyer that -- Judge Hill was also a Georgia judge. So we have a situation where one Georgia judge from the 5th Circuit was saying one thing, and one Georgia judge was saying another.

But I will state to you, your Honor, that that panel opinion --

QUESTION: Well, what do we non-Georgia judges think?

MR. BUSH: I would suggest to your Honor that the panel opinion failed to take cognizance, and failed to realize, after the panel opinion, and at the time the en banc opinion was written, of the Backus v. Chilivis decision. I simply commend that to your Honors attention.

QUESTION: Well, what if we decide that Federal law applies? Then what about immunity?

MR. BUSH: We would contend, your Honor, that there is no case I have seen from this Court that deals with that issue. There is a 5th Circuit case called McCord v. Dixie Aviation, which says that State sovereignty is unimpaired in the aviation area.

At this point, I would like to call your Honors attention to a decision of this --

QUESTION: That's state sovereignty; what about this county immunity? That's not state.

MR. BUSH: Well, your Honor, it is our contention that itis not only a state statutory immunity but it is a state constitutional immunity.

QUESTION: It may be, but it's still a state; it's not Eleventh Amendment.

MR. BUSH: Well, it was our position in the brief, and it's still our position, that the --

QUESTION: Well, it's not an Eleventh Amendment.

MR. BUSH: Well, we're not suggesting that the State of Georgia is involved in this case. We are suggesting that the multitude --

QUESTION: But the county immunity is certainly an Eleventh Amendment --

MR. BUSH: Well, we would not completely agree that the Lincoln County v. Luning case is dispositive of that issue. In that particular case -- and I have reviewed that Lincoln County -- it was a particular county in Nevada, I believe, your Honor. And that was a county that was apparently drafted as a municipality as in Georgia. In Georgia, counties are considered arms of the state. We've cited the Supreme Court of Georgia decisions on that particular point.

QUESTION: Well, California made that argument in Moore v. Alameda County, too, and we rejected it.

MR. BUSH: All right, your Honor. Well, it is my

position also, as well, that these are situations where the allegations multiply, even of these present petitioners, into the tens of millions of dollars, as far as damage suits. And this is simply a situation where the county has no capability, and would have no capability, under governmental immunity, to pay for such judgments. And a plea would have to be made to the General Assembly of Georgia to pay these judgments. And there, on the Edelman v. Jordan, in your Honors' opinions, we may come into the Eleventh Amendment. Because the State may be called upon, through its general treasury, to pay for these particular judgments.

QUESTION: Well, but the State could surely just decline to appropriate the money.

MR. BUSH: They certainly could, your Honor. But that would be their decision in that regard. But I am not completely agreeing that the Eleventh Amendment does not apply. Let me --

QUESTION: Is the McCord case cited in your brief. You may not have mine; mine is red colored, your Honor.

QUESTION: How can anybody get rid of that nuisance at this airport, if the county is immune?

MR. BUSH: I do not agree with Mr. Heldman said that -- the suggestion is that the County refused to do anything about it because they were immune. The County, all during this time, was trying to find a place to put its

county garbage. It is a semi-urban county, and it's a situation where no one in the County wants a garbage dump next door to them. It's a situation of placement, disposal of garbage.

QUESTION: Well, if the County had to pay a few million dollars in damages, they might get interested.

MR. BUSH: They certainly might, your Honor. It has already been alleviated.

Let me point out to the Court as to the Federal question that's presented. This Court, through Justice Stewart, unanimously held in a case that I, by my own mistake, have not directed this Court's attention to, a case called Executive Jet Aviation v. City of Cleveland. That's at 409 U.S. 249, and 34 Lawyers' Edition, 454. That case also was a bird ingestion case. That case was a charter flight arising out of Cleveland,Ohio. And it took off and started toward Lake Erie and it ingested some gulls; crashed in Lake Erie.

A suit was filed in Ohio Federal Court, not alleging diversity because there was no diversity. They filed suit based upon the theory of admiralty and upon the theory of the Death of the High Seas Act. For obvious reasons, there is no Federal wrongful death action explicit in any of the aviation statutes. This Court dealt greatly with the admiralty questions. But at the conclusion of dealing with

the admiralty questions, I think Justice Stewart, for a unanimous Court, made an expression that is completely applicable to this case and to the Federal issues that are being raised. In the situation that is before us, which is only fortuitously and incidentally connected to navigable waters, and which bears no relationship to traditional maritime activities, the Ohio Courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors.

It may be, as petitioners argue, that aviation tort cases should be governed by uniform, substantive and procedural laws, and that such actions should be heard in the Federal courts, so as to avoid divergent results and duplicitous litigation in multi-party cases. If Federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free, under the Commerce Clause, to enact legislation applicable to all such accidents whether occuring on land or water, and adapted to the specific circumstances of air commerce.

I cite also with regards to that a bill that was introduced by Senator Tydings in 1969. I have cited it in my brief; Senator Tydings suggested, and in his bill, thought that there should be exclusive Federal jurisdiction, a Federal cause of action, and a Federal remedy for aviation

accidents.

The case, though, had substantial testimony and hearings; was never reported out of committee. They never got anywhere. The reason is, is because there is a body of state law to apply. And we contend that this state law protects us in this respect.

Now, if -- again, the suggestion that there are safety requirements; that these safety requirements should be recognized by this Court, and thus create a private cause of action: Congress has that right. Congress has that ability. And Congress has not created a private cause of action, a private remedy. Private remedy for wrongful death, which is not recognized.

And we contend this Court should not imply such a remedy from silent legislation. And in the Executive Jet Aviation case, they refused to, in a bird ingestion case.

The citation of the City of Ingelwood scas , we contend, is out of the 9th Circuit, and the alleged conflict in the Federal circuits between the 5th Circuit and the 9th Circuit; that City of Ingelwood case is an eminent domain case. They recite particular facts. There were no injuries involved, no wrongful death, nothing such as that. And they also distinguish because they say that non-aeronautical users were involved.

Here, these people contend they are aeronautical

users. And so they recite as authorities cases that don't even have the factual basis, really.

Are there any other questions? We're nearing 12, and I will -- but I am concluded with my argument, if the Court has any other questions.

Thank you, your Honors, very much.

MR. CHIEF JUSTICE BURGER: Apparently not.

MR. MOZLEY: May it please the Court, I would like to respond briefly to counsel's arguments that the County has immunity for contract claims.

MR. CHIEF JUSTICE BURGER: Mr. Mozley, your time is actually expired. But we will give you until 12:00 o'clock.

MR. MOZLEY: All right. Thank you very much, your Honor.

MR. CHIEF JUSTICE BURGER: Out of your friend's time.

MR. MOZLEY: Thank you.

REBUTTAL ARGUMENT OF J. ARTHUR MOZLEY, ESQ.,

ON BEHALF OF THE PETITIONERS MIREE ET AL.

MR. MOZLEY: On page 22A of our petition for cert, we incorporated the decisions in the courts below. And I want to call attention of this Court to the fact that in the initial panel opinion, Judge Morgan, of the 5th Circuit, said, in talking about the Southern Airways v. DeKalb County case involving this precise airport, the court ruled that since

the Georgia Uniform Airport law expressly authorizes a county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions, which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach.

QUESTION: What contract was hereferring to, do you think?

MR. MOZLEY: The contract in this case was a contract authorized by the Uniform Airports law which is the same type of contract we have here, your Honor, FAA grant agreement. So the Georgia law on immunity is that immunity for a county does not extend to suits based upon contractual obligations. And as Justice Brennan pointed out --

QUESTION: Well, didn't the majority, in a footnote, disagree with that?

MR. MOZLEY: No, sir, the majority in the footnote simply said: we believe that under Georgia law, the result would be the same. Because under Georgia law, these petitioners are not intended beneficiaries. It was a question of whether we were intended beneficiaries; not an immunity question.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 12:00 noon the case in the above-entitled matter was submitted.]

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