No. 12-_____

In The
Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,

Petitioner,

v.

WILLIAM L. HOEPER,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Aviation and Transportation Security Act (ATSA) requires airlines and their employees to report to the Transportation Security Administration (TSA) any and all potential security threats to the Nation's air transportation system. To encourage such reports, the ATSA provides a broad grant of immunity from suit, shielding airlines and their employees from all liability, including liability for state-law defamation. 49 U.S.C. § 44941. The only exception to this immunity is for reports made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." *Id.* § 44941(b).

The questions presented are:

1. Whether a court can deny ATSA immunity without deciding whether the airline's report was true.

2. Whether the First Amendment requires a reviewing court in a defamation case to make an independent examination of the record before affirming that a plaintiff met its burden of proving a statement was false.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Air Wisconsin Airlines Corporation and William L. Hoeper.

RULE 29.6 STATEMENT

Air Wisconsin Airlines Corporation is a subsidiary of AWAC Aviation, Inc., which is a subsidiary of Harbor Diversified, Inc. No publicly held companies hold any of Air Wisconsin's stock.

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PETITION FOR A WRIT OF CERTIORARI

Air Wisconsin Airlines Corporation ("Air Wisconsin") respectfully petitions for a writ of certiorari to review the decision of the Colorado Supreme Court.

OPINIONS BELOW

The Colorado Supreme Court's opinion is not yet published (2012 WL 907764) and is reproduced at Pet. App. 1a-43a. The Colorado Supreme Court's unpublished order denying rehearing is reproduced at Pet. App. 117a. The decision of the Colorado Court of Appeals is reported at 232 P.3d 230 and reproduced at Pet. App. 44a-87a. The opinions and rulings of the Colorado District Court are unpublished and reproduced at Pet. App. 88a-109a.

JURISDICTION

The Colorado Supreme Court filed its decision on March 19, 2012 and denied the petition for rehearing on April 23, 2012. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 125 of the ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified principally in scattered sections of 49 U.S.C.), provides, in relevant part:

> Immunity for reporting suspicious activities
>
> (a) IN GENERAL. – Any air carrier or foreign air carrier or any employee of an air carrier or foreign air carrier who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism, as defined by section 3077 of title 18, United States Code, to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure.
>
> (b) APPLICATION. – Subsection (a) shall not apply to –
>
> (1) any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading; or

(2) any disclosure made with reckless disregard as to the truth or falsity of that disclosure.

49 U.S.C. § 44941.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. Const. amend. I, and applies to the States through the Due Process Clause of the Fourteenth Amendment, *e.g.*, *Gitlow* v. *New York*, 268 U.S. 652 (1925).

STATEMENT OF THE CASE

In the wake of the September 11, 2001 terrorist attacks, Congress enacted the ATSA to overhaul and improve the security of the Nation's aviation system. Among other changes, the Act transferred responsibility for assessing and investigating security threats from airlines to the federal government. At the same time, however, Congress recognized that airlines and their employees are uniquely positioned to acquire some of the most useful threat information. Pet. App. 14a. Accordingly – as the government stressed in explaining its "strong interest in this litigation" – "air carriers are encouraged and required to promptly report relevant threat information to TSA." Br. of the United States as Amicus Curiae in Supp. of Neither Party, at 2-3 (Sept. 13, 2010) ("U.S. Br.").

To help ensure disclosure of all relevant threat information, Congress provided airlines and their

employees with broad immunity from suit. Borrowing considerably from this Court's language in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the statute strips immunity only for statements made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941. As the provision's sponsor explained, these exceptions were intended to exclude only "bad actors." 147 Cong. Rec. S10432, S10440 (Oct. 10, 2001).

Despite all of this, the decision below upholds a $1.4 million defamation verdict against an airline that did exactly what Congress would have wanted it to do. Petitioner Air Wisconsin truthfully reported its concerns about the mental state of a pilot who was about to board an airplane at Dulles Airport, and who knew that he would be terminated after failing three proficiency check exams and abandoning the fourth. Just hours earlier, the pilot "blew up" at his instructors and was acting irrationally, yelling and cursing at them. Moreover, the pilot had previously been issued a firearm as a federal law enforcement officer, and the airline could not confirm whether he had the gun with him. The airline was also aware of previous incidents in which terminated employees for other carriers boarded aircraft with the intent to crash them – one successfully, killing everyone on board. After carefully discussing these and other factors at length, four Air Wisconsin employees decided that the best and safest course was to follow Congress's direction and report what they knew to TSA.

The Colorado Supreme Court, however, denied Air Wisconsin the immunity to which it was entitled, even though the court recognized that "the events at the training may have warranted a report to TSA," and even though the airline's statements were true in every single relevant respect. Pet. App. 18a-21a. According to the court, it "need not, and therefore do[es] not, decide whether [the airline's] statements were true or false." *Id*. at 17a n.6. Instead, the court picked apart Air Wisconsin's report phrase-by-phrase and concluded that the airline had "overstated" events by, for example, saying it was "concerned about [the pilot's] mental stability" instead of saying that "he had acted irrationally at the training three hours earlier and 'blew up' at test administrators." *Id.* at 18a-21a. The difference between the two is indiscernible, and yet, for the court, such purported overstatements (even if true) manifested a reckless disregard for the report's truth or falsity.

Compounding its errors, the court then disregarded this Court's First Amendment precedents, which require an independent review of the record in defamation cases to confirm that the plaintiff met his burden of proving falsity. In refusing to conduct a *de novo* review of truth or falsity, and instead deferring to an erroneous jury finding, the Colorado Supreme Court joined the wrong side of a well-entrenched split, which only this Court can resolve.

The implications of this case are "vitally important." U.S. Br. 3. It is essential that "defamation damages awards not chill air carrier reports." *Id.*

Indeed, the United States intervened twice below to stress exactly that point. See, *e.g.*, *id.* at 1 ("emphasiz[ing] the importance of the relevant federal statutes and policies designed to serve the critical national goal of air transportation security"); *id.* at 6 (describing the "United States' substantial interest in 'improving aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities,'" which is reflected in TSA's protocols requiring that airlines "immediately report to TSA all threat information that might affect the security of air transportation"); *id.* at 3 (stressing the "substantial federal interest in providing immunity from liability for air carriers and their employees" who make such reports). For all of these reasons, the Court should grant certiorari and reverse.

A. Statutory and Regulatory Background.

The September 11 terrorist attacks prompted Congress to seek "a fundamental change in the way it approache[d] the task of ensuring the safety and security of the civil air transportation system." H.R. Rep. No. 107-296, at 53 (2001) (Conf. Rep.). Just two short months after the tragedy, Congress passed the ATSA, an extensive bill that "'broadly expand[ed] the government's control over, and active role in, aviation security.'" *Conyers* v. *Rossides*, 558 F.3d 137, 139 (2d Cir. 2009) (alteration in original). Among the Act's many features was the creation of TSA, a new agency

charged with responsibility for all "civil aviation security" matters. 49 U.S.C. § 114(d)(1).

Handling potential security threats was a particularly important aspect of the ATSA and of TSA's jurisdiction. Previously, airlines were largely responsible for security issues such as assessing and investigating suspicious incidents. Pet. App. 38a. Dissatisfied with that regime in light of the September 11 attacks, Congress designated TSA to oversee airline security and required that the agency, rather than airlines, perform threat assessments going forward. *Id.* But Congress also realized that TSA would need to lean heavily on the airlines for help.

This shift is embodied in both statute and agency protocol. The ATSA directs that air carriers and their employees with "information . . . about a threat to civil aviation shall provide the information promptly to [TSA]." 49 U.S.C. § 44905(a). The failure to report can result in civil penalties, *id.* § 46301(a)(1)(A), and TSA initiated "at least 16" such civil penalty cases between 2003 and 2006 alone. U.S. Br. 12 n.6. TSA has reiterated the same message in its classified Aircraft Operation Standard Security Program protocols. *Id.* at 6. Its procedures "require that an aircraft operator . . . immediately report to TSA all threat information that *might* affect the security of air transportation." *Id.* (emphasis added). The policy has been aptly dubbed "'when in doubt, report.'" Pet. App. 38a.

To ensure that such reports are adequately "encourag[ed]," Congress went a step further. 147 Cong. Rec. at S10439. It recognized that "[a]ir carriers are perhaps the most obvious source of useful threat information for TSA" but also that threats often materialize with "imperfect information and with limited time and ability to investigate." U.S. Br. 2. Accordingly, Congress promised that federal law would "protect[ ] air carriers and their employees who disclose suspicious activity" by providing them with broad immunity from suits arising out of reports made to TSA. *Id.*; 49 U.S.C. § 44941(a).

Congress also appreciated that TSA has "no desire to receive knowingly false information," U.S. Br. 3, and thus exempted from its grant of immunity any disclosure made "with actual knowledge that [it] was false, inaccurate, or misleading" or "with reckless disregard as to [its] truth or falsity." 49 U.S.C. § 44941(b). But this exception was intended to be narrow: As the United States explained below, only in "highly unusual situation[s]" should immunity fail to attach. U.S. Br. 8.

B. Factual Background.

This case concerns a $1.4 million state-law defamation judgment against Air Wisconsin, whose employees reported threat information, as required by the ATSA.

1. Respondent William Hoeper was employed as a pilot for Air Wisconsin from 1998 to 2004. Pet. App.

46a. He was also a federal flight deck officer ("FFDO"), which meant that TSA had issued him a firearm "to defend the flight decks of aircraft . . . against acts of criminal violence or air piracy." 49 U.S.C. § 44921(a); Pet. App. 3a.

By late 2004, Air Wisconsin no longer flew the type of aircraft that Hoeper had previously piloted out of his home base. Pet. App. 3a-4a. As a result, he began training to upgrade to a different aircraft, the British Aerospace 146 ("BAe-146"). Tr. 1288:4-11. Ultimate approval, however, required that he pass a proficiency check. Pet. App. 3a-4a.

Hoeper took the test three times but failed each time. *Id.* at 4a. Following his third attempt, Air Wisconsin could have terminated Hoeper pursuant to a collective bargaining agreement, but Hoeper requested and received a fourth opportunity pursuant to a "Last Chance Agreement." *Id.* at 46a. As its title suggests, this agreement meant that Hoeper's termination was guaranteed unless he passed. *Id.* at 33a-34a.

2. In early December 2004, Hoeper flew from Denver to Virginia for mandatory training as a part of his final proficiency check. *Id.* at 46a-47a. Before he could take the test, he had to complete this training and receive a recommendation from an Air Wisconsin instructor, without which he would be terminated. *Id.*; see also Tr. 1197:7-21. On the final day, he was paired with instructor Mark Schuerman. Pet. App. 47a. The training flight did not go well.

Approximately ninety minutes into it, Hoeper ran the simulator out of fuel, flamed out the engines, and nearly crashed. *Id.* at 32a. When Schuerman froze the program, Hoeper slid his seat back and threw his headset. *Id.* Angrily raising his voice, he exclaimed "this is a bunch of shit," accused Schuerman of "railroading the situation," and claimed "it's not realistic." *Id.* Hoeper stopped the session, dramatically announcing "you win." *Id.* Schuerman thought that Hoeper was going to strike him. *Id.* Other witnesses similarly testified they had never seen or heard of a professional pilot acting in that manner. Tr. 3107:1-3108:18.

After the outburst, Schuerman left the simulator to call Air Wisconsin's BAe-146 fleet manager, Patrick Doyle. Schuerman was "very upset" and relayed that Hoeper "had blown up and was very angry at [him]." Doyle told Schuerman to leave. Pet. App. 47a; Tr. 424:22-425:12. Around the same time, another Air Wisconsin pilot saw Hoeper in the lobby talking in a raised voice and using profanity. Pet. App. 33a. And, as Schuerman exited the building, Hoeper followed him to the parking lot, screaming at him. *Id.*

3. After receiving Schuerman's call, Doyle briefly discussed the situation with Air Wisconsin's Managing Director of Flight Operations, Scott Orozco. *Id.* at 48a. Orozco then left for another meeting and, before returning, received a call from Hoeper who was "[not] exactly calm." *Id.* at 33a.

Orozco and Doyle, joined by two others, subsequently reconvened to discuss the situation. Over the course of a detailed conversation, the group spoke about Hoeper's latest outburst, his previous blow-ups, and his imminent termination. *Id.* at 48a-49a. They also weighed the fact that Hoeper was an FFDO. *Id.* at 31a, 48a-49a. Although they knew that FFDO protocols did not permit Hoeper to bring his firearm to training, Air Wisconsin could not confirm whether Hoeper had his gun with him. *Id.* at 48a-49a. The group knew, moreover, that Hoeper had departed from a Denver airport where FFDOs could bypass security without logging their weapons and that FFDOs had, on occasion, attended training sessions with their firearms in violation of protocol. *Id.*; Tr. 774:12-19, 1065:25-1066:7, 2685:4-2686:20.

The Air Wisconsin employees also discussed two particularly alarming incidents. In one, a terminated employee for another airline had boarded a BAe-146 with a gun and shot the pilots, causing the aircraft to crash, killing everyone on board. In the second, an employee facing termination boarded an aircraft with a weapon intending to crash it into company headquarters. Pet. App. 31a.

Based upon these discussions, the employees concluded that Air Wisconsin should report its concerns to TSA. *Id.* They consulted Air Wisconsin's TSA-ordered Aircraft Operator Standard Security Program and their obligations under it. Tr. 1060:24-1061:19, 1064:2-5; 49 C.F.R. § 1544.101. Fearing the potential consequences of not reporting – in violation of the

"when in doubt, report" mandate – the group decided it was better to be safe than sorry. Tr. 793:1-10.

4. Doyle called TSA on behalf of Air Wisconsin. His notes state: "TSA was notified that William Hoeper, a disgruntled company employee (an FFDO who may be armed), was traveling from IAD-DEN later that day, as we were concerned about the whereabouts of his firearm, and his mental stability at the time." Pet. App. 6a; Trial Ex. 12.

A TSA email with the subject "Unstable pilot in FFDO program was terminated today" also summarizes, in considerable detail, Doyle's "call[ ] to advise of an Air Wisconsin pilot in FFDO program who was terminated today." Pet. App. 62a. It states that Hoeper "has been very upset and angry with Air Wisconsin simulator technicians and other personnel[,] has been displaying unstable tendencies and deflecting responsibility to others for failures recently[, and] has just failed his fourth (4th) proficiency check since October to become a Captain." Trial Ex. 25. With respect to Hoeper's weapon, the email notes that Doyle was "attempting to notify the proper authorities about the termination to ensure [the] weapon is secured" and "does not believe [Hoeper] is in possession of a firearm at this time." *Id.*[1]

[1] The Washington Dulles Daily Operations Report describes the report similarly. Its subject line is "Suspicious FFDO on UA-921 IAD to DEN" and references a "[p]ilot participating in the FFDO program [who] may have had his right to carry a firearm

(Continued on following page)

As confirmed by TSA's former Chief Support Systems Operator, who was responsible for informing airlines about the "when in doubt, report" policy, Air Wisconsin was not supposed to investigate the situation itself, should have reported it, and thus responded "precisely as [TSA] would have wanted them to." Tr. 3281:14-3282:10, 3314:3-16, 3335:12-20.

5. Following Doyle's call, Hoeper's flight returned to the gate, where he was removed from the aircraft and searched. Pet. App. 51a-52a. A TSA official questioned him about his firearm and, learning it was at his house in Denver, arranged to have it picked up there. Hoeper was then released and returned home that evening. *Id.*; Tr. 1404:5-1406:11, 1406:22-1407:3, 1409:8-13. The next day he received formal notification of the termination that both he and the other Air Wisconsin personnel had understood would be the necessary consequence of his failure in the training. Pet. App. 52a.

C. Proceedings Below.

1. Hoeper brought suit claiming, among other things, that he had been defamed by Air Wisconsin's

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terminated." Trial Ex. 24. It continues: "[H]e was attending flight simulator training . . . and had failed the training on three previous occasions which is grounds for termination. . . . He was given an additional chance and walked out of the training session today which will almost certainly result in termination of his employment." *Id.*

report to TSA.[2] Air Wisconsin moved for summary judgment, arguing that the claim was barred by the ATSA's immunity provision. Def. Air Wisconsin Airlines Corp.'s Mot. for Summ. J., at 18-23 (Dist. Ct. May 7, 2007). In the alternative, Air Wisconsin maintained, Hoeper's defamation claim failed because he could not prove actual malice and the report to TSA was substantially true.[3] *Id.* at 15-23, 25-26. The trial court denied the motion without explanation. Pet. App. 88a.

Following the close of evidence, Air Wisconsin moved for a directed verdict, reiterating the same arguments. See Def. Air Wisconsin Corp.'s Mot. for Directed Verdict, at 5-6 (Dist. Ct. Feb. 18, 2008) (arguing for immunity under the ATSA and that "the allegedly defamatory statements . . . were true"). The trial court again denied the motion, reasoning that the ATSA presented jury questions because "reckless disregard" should be determined by a jury. Pet. App. 100a-05a. The trial court also found that the defamation claim was viable and submitted it to the jury with minimal explanation. *Id.*

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[2] Hoeper also brought claims for false imprisonment and intentional infliction of emotional distress. The jury found for Air Wisconsin on the false imprisonment claim and hung on the emotional distress claim. Pet. App. 113a-16a.

[3] Air Wisconsin argued in the alternative that the statement was an inactionable expression of opinion. Def. Air Wisconsin Airlines Corp.'s Mot. for Summ. J., at 15-18 (Dist. Ct. May 7, 2007).

The jury returned a verdict for Hoeper. *Id.* at 110a-12a. It found that Air Wisconsin made two defamatory statements: (1) "Plaintiff was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm"; and (2) "Unstable pilot in FFDO program was terminated today." *Id.* at 6a. The jury awarded $849,625 in compensatory damages and $391,875 in punitive damages. *Id.* at 28a & n.1, 111a. After reducing punitive damages to $350,000 and awarding costs, the trial court entered judgment for Hoeper in the amount of $1,421,748.09. *Id.*[4]

2. The Colorado Court of Appeals affirmed. Pet. App. 44a-87a. It first held that Air Wisconsin was not entitled to immunity under the ATSA because, under Colorado law, ATSA immunity presented a question of fact for the jury and "review of a jury's verdict is highly deferential." *Id.* at 53a-61a; see also Opening Br., at 20-24 (Ct. App. Dec. 23, 2008); Answer-Reply Br., at 21-29 (Ct. App. Apr. 23, 2009) (arguing that ATSA immunity was a question of law for the court). Reaching the merits, the Court of Appeals limited its

[4] Air Wisconsin also filed a motion for judgment notwithstanding the verdict, arguing, among other things, that its statements were not actionable and that the First Amendment requires the court to conduct an independent review of the record to determine whether Hoeper met his burden of proof. *See* Def. Air Wisconsin Corp.'s Mot. for J. Notwithstanding the Verdict or, Alternatively, for New Trial, at 5-15 (Dist. Ct. Mar. 26, 2008). The trial court denied the motion. Pet. App. 106a-09a.

independent review of the record to the fault, or state of mind, aspect of actual malice. *Id.* at 63a-64a, 78a-85a. As to the alleged falsity of Air Wisconsin's statements, the court deferred to the jury's determination that they were not substantially true. According to the court, "proof of falsity is a question for the jury and our review is limited to whether sufficient evidence supports the jury's decision." *Id.* at 77a; see also Opening Br., at 24, 30-31, 34-42 (Ct. App. Dec. 23, 2008); Answer-Reply Br., at 32-33 (Ct. App. Apr. 23, 2009) (arguing for independent review on appeal).[5]

3. A sharply divided Colorado Supreme Court affirmed, four votes to three. Pet. App. 1a-43a. The majority began by recognizing, contrary to the holdings of the Colorado Court of Appeals, that federal law governs ATSA immunity and that immunity is a question of law for the court to determine before trial. *Id.* at 9a-15a. The court also acknowledged "the importance to our national security of the threat disclosure encouraged by the ATSA and the unique position of air carriers to obtain information about those threats." *Id.* at 14a. And the court even conceded that "Congress intended to confer upon air carriers

[5] The Regional Airline Association (RAA) also submitted an amicus brief to stress this case's "significance for RAA and its member airlines" and to highlight the fact that "[u]pholding the jury's verdict . . . will have a chilling effect o[n] future reports of suspicious incidents and thereby adversely affect passenger and aviation safety." Amicus Curiae Br. of the Reg'l Airline Ass'n, at 9, 13-15 (Ct. App. Dec. 19, 2008).

the greatest possible degree of protection by enacting the immunity provision" and that the events here "may have warranted a report to TSA." *Id.* at 14a, 18a. The United States made similar statements in its brief. See *supra* at 3-5.[6]

Nevertheless, the majority found that the lower courts' errors were harmless because immunity did not attach. Pet. App. 15a-21a. At the outset, the majority declined to review whether Air Wisconsin's report was true or false, holding instead that falsity was irrelevant to the immunity question. *Id.* at 17a n.6. The majority then found that Air Wisconsin was not entitled to statutory immunity because it had

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[6] The United States also indicated that Hoeper's "conduct following a training session could have raised concerns about his future behavior in connection with an upcoming flight," that "[i]nformation about such a pilot *clearly* relates to 'a threat to aircraft or passenger safety,'" and that "Air Wisconsin *might very well have been subject to regulatory action for failing to report* any sincerely-held concerns regarding plaintiff." U.S. Br. 9, 11-12 (emphasis added). Although Hoeper disagreed with the United States, Answer Br. of Resp't William Hoeper, at 82-83 (Nov. 15, 2010), there should be no question as to who is in a better position to assess security risks and to attest to the possibility of regulatory action.

Indeed, not even the Colorado Supreme Court suggested that it subscribed to Hoeper's view that Air Wisconsin had no basis or obligation to make a report and that the report was simply part of a "hatred conspiracy to get rid of Hoeper." *Id.* at 6-9. As noted, the court concluded that the events "may have warranted a report to TSA," and denied immunity only on the basis of the hair-splitting "overstatements" discussed below. Pet. App. 18a; *infra* at 22-25.

"overstated . . . events to such a degree that they were made with reckless disregard for their truth or falsity." *Id.* at 18a. Parsing the statements one-by-one, the court determined that, for each, Doyle had deviated too far from what the majority viewed as an ideal script for the report. *Id.* at 18a-21a. According to the court, the following distinctions represented the difference between immunity and being subject to suit:

What Air Wisconsin Said	*What Air Wisconsin Needed to Say to Obtain Immunity*
"[Hoeper] was terminated today"	"[Hoeper] knew he would be terminated soon"
"[Hoeper] was an FFDO who may be armed"	"[Hoeper] was an FFDO pilot"
"[W]e were concerned about his mental stability"	"[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators"

Id. at 6a, 18a-21a.

After denying immunity, the court proceeded to address the merits of the defamation claim and determined, "[f]or the same reasons," that Air Wisconsin had acted with actual malice. *Id.* at 23a. The court deferred to the jury's finding on falsity. According to the court, whereas the First Amendment requires it to undertake "an independent review of the entire record to ensure that clear and convincing

evidence supports a finding of actual malice," *id.*, "the jury decides whether a statement was true or false, and we limit our review to whether sufficient evidence supports the jury's determination," *id.* at 26a. The court then concluded that sufficient evidence supported "the jury's determination that Hoeper was not mentally unstable," even though "Hoeper lost his temper and 'blew up' at one test administrator." *Id.* at 26a-27a.[7]

Justice Eid, joined by two justices, dissented in part and concurred in part. *Id.* at 28a-43a. The dissent agreed with the majority that the question of ATSA immunity should have been decided by the court prior to trial but vigorously disagreed with the conclusion that this error was harmless. *Id.* at 28a. On the contrary, the dissent explained, "Air Wisconsin was entitled to immunity under the [ATSA] because the statements it made to the TSA were substantially true." *Id.*

The dissent, like the majority, understood that the "federal reporting system rests on the assumption that airlines should report possible threats to airline safety to the TSA even when the report is based on tentative information and evolving circumstances."

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[7] The Colorado Press Association submitted an amicus brief arguing against such an approach and explaining that, because "truth is constitutionally protected such that plaintiff must bear the burden of proving falsity, that issue is necessarily one of constitutional fact for which independent review is required." Br. of Amicus Curiae the Colo. Press Ass'n, at 15-23 (Sept. 13, 2010).

Id. at 37a. But, unlike the majority, the dissent also recognized that this scheme protected Air Wisconsin's statements here. Under TSA's "when in doubt, report" policy, the airline properly and accurately relayed that it was concerned that one of its pilots, who was facing imminent termination and was authorized to carry a firearm, was acting erratically and was possibly armed. *Id.* at 30a-40a. The majority's focus on "hair-splitting distinctions," by contrast, would "expose[ ] [airlines] to a defamation judgment whenever [a] possible threat turned out to be a false alarm" and would "turn[ ] the TSA's 'when in doubt, report' policy on its head." *Id.* at 34a-38a.

The dissent also identified two of the majority's legal errors regarding falsity. First, contrary to the majority's decision, the ATSA requires a court to assess truth or falsity. *Id.* at 29a n.2. Second, the majority committed a "significant procedural error in deferring to the jury . . . to conclude the statements were false" when, in fact, "[n]o deference should [have] been paid to any portion of the jury's liability determination." *Id.* at 40a-42a & n.7.

Finally, throughout its opinion, the dissent expressed considerable apprehension about the potential consequences of the majority's decision. The end result and the analytic approach used to reach it, the dissent feared, "threaten[ ] to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA." *Id.* at 37a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and reverse the Colorado Supreme Court's erroneous decision for three reasons.

First, the decision below committed serious error in interpreting and applying the ATSA's immunity provision. The majority held that the truth or falsity of a report to TSA has no bearing on the immunity inquiry. But the idea that a true report could subject an airline to suit is inimical to the ATSA's goal of encouraging prompt disclosure of threat information; it is also the sort of absurd result that statutory interpretation must avoid. Moreover, the quibbling "overstatements" on which the court below relied simply cannot mark the difference between immunity and trial. When immunity depends on a persnickety Monday-morning quarterback willing to second-guess inconsequential word choices, the public policy benefits of statutory immunity are lost, because airlines will have no comfort that they are shielded from suit when deciding whether to report threats to TSA.

Second, the Colorado Supreme Court's failure to independently review the jury's finding of falsity violates the First Amendment. That holding joins a deep split in the lower courts over the extent of appellate courts' constitutional duty to undertake a searching review of the record on falsity, which has been percolating for over 25 years. It is also squarely at odds with this Court's precedents. Because falsity is a prerequisite to proving actual malice, falsity

likewise must be subject to *de novo* review on appeal in order to "preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984).

Third, the questions presented concern significant issues of national security. Under both the ATSA and the First Amendment, requiring a plaintiff to establish that a statement is false fosters the breathing space needed to ensure that speech is encouraged rather than chilled. By removing any consideration of falsity from the ATSA's immunity protection and then deferring to a jury's finding of falsity on appeal, the decision below threatens these principles. It creates a substantial risk that airlines contemplating security threats will decline to call TSA unless absolutely sure about a threat and only after rigorously scrubbing the wording of a report with their attorneys. The decision below should not stand.

I. THE IMMUNITY PROVISION OF THE ATSA REQUIRES THAT TRUTH OR FALSITY BE DECIDED BY THE COURT.

The Colorado Supreme Court's interpretation of the ATSA immunity provision is severely misguided because it eliminates falsity from the inquiry and, after doing so, engages in a nit-picking analysis that cannot be squared with the statute's design. The Court should grant certiorari and reverse.

1. By its terms, the ATSA extends a broad grant of immunity, excepting only those statements made "with actual knowledge that [they were] false, inaccurate, or misleading" or "with reckless disregard as to [their] truth or falsity." 49 U.S.C. § 44941(b). With this narrow exception, Congress "left room for the operation of state defamation law when an air carrier has made *false statements* knowing they are false or with reckless disregard for their truth or falsity." U.S. Br. 7 (emphasis added); see *id.* at 3 (noting TSA has "no desire to receive knowingly false information" nor any interest in "being sidetracked by false information"). It did not leave open the specter of liability for truthful statements.

The contrary construction is simply absurd. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Congress "'could not have intended'" subjecting airlines to suit for abiding by federal law and reporting an actual national security threat to TSA. *Clinton* v. *City of N.Y.*, 524 U.S. 417, 429 (1998); see also Pet. App. 29a n.2.

Indeed, the immunity provision's chief objective was to encourage reports and then leave the task of assessing them to TSA's expertise. See, *e.g.*, 147 Cong. Rec. at S10439; Pet. App. 37a-38a. The statute and TSA protocol expressly mandate that airlines "promptly" report suspicious activity to TSA and do so even "when in doubt." 49 U.S.C. § 44905(a); Pet. App. 37a-38a; see also U.S. Br. 6. Because such reports are often by their nature based on imperfect information, U.S. Br. 2, the ATSA even shields

tentative transmissions of "possible violation[s]" and "threat[s]" from liability, 49 U.S.C. § 44941(a). Only "bad actors" are excluded from the scope of immunity. 147 Cong. Rec. at S10440 Truthful reporters are not.[8]

Construing the ATSA to permit liability only for false statements also aligns the statute with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, whose "actual malice" language the immunity provision tracks. Pet. App. 16a-17a. As those cases hold, falsity is a necessary component of the actual malice test; a plaintiff "must show the falsity of the statements at issue in order to prevail." *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775-76 (1986).[9] "It is anything but clear how a statement

[8] This view also finds support in the "rudimentary principle[ ] of construction that . . . , where text permits, statutes dealing with similar subjects should be interpreted harmoniously." *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in the judgment); *see also Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) (citing *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845)). Another provision of the United States Code similarly grants "[i]mmunity for reports of suspected terrorist activity or suspicious behavior," 6 U.S.C § 1104(a), and, in language paralleling the ATSA, does not "apply to any report that the person knew to be false or was made with reckless disregard for the truth at the time that person made that report," *id.* § 1104(a)(2). Importantly, that provision expressly acknowledges that it is only aimed at "[f]alse reports," not truthful ones. *Id*. Because the ATSA's immunity provision is substantively identical, it should be read the same way.

[9] Although *Hepps* was limited to media defendants, 475 U.S. at 779 n.4, its holding should apply with equal force here. *See*, *e.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 905 (2010)

(Continued on following page)

that is 'true' can be published with 'actual malice. . . .'" Robert D. Sack, *Sack on Defamation* § 3:3.2 n.19 (2012) ("*Sack on Defamation*") (citations omitted); see also *Hepps*, 475 U.S. at 778.

So too under the ATSA: It is simply impossible to consider an airline to be a "bad actor" or to discuss whether a report is of the type Congress sought to encourage without addressing the truth or falsity of the disclosure. Here, there can be no dispute that Air Wisconsin's report "relates to 'a threat to aircraft or passenger safety,'" U.S. Br. 9 (citing 49 U.S.C. § 44941(a)), which means that Air Wisconsin should have reported it to TSA, as even the majority below recognized, Pet. App. 18a. To construe the statute otherwise, as the Colorado Supreme Court did, such that a true report can lead to trial, guts the scheme that Congress established.

2. After purporting to set the question of falsity aside, the Colorado Supreme Court only confirmed its deep error when it analyzed Air Wisconsin's alleged overstatements. Pet. App. 18a-21a. The court dissected each of Air Wisconsin's statements bit by bit, finding fault with minor details and insinuations that were simply not there, and then comparing the

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(rejecting the "'proposition that the institutional press has any constitutional privilege beyond that of other speakers'"); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 783-84 (1985) (plurality opinion) (Brennan, J., dissenting) ("at least six Members of this Court . . . agree"); *Sack on Defamation* § 4:2.4.

disclosure to the court's own preferred script for a report to TSA, which the court had 11 months to prepare. *Id.*

This approach commits two significant missteps. *First*, it is internally incoherent. Without determining what the truth is, the majority was in no position to assess whether a disclosure overstated the truth.

Second, the analysis is untenable on its face. Looking again to *Sullivan* and its progeny, reports under the ATSA do not demand flawlessness; rather, "substantially tru[e]" statements warrant protection. *Masson* v. *New Yorker Magazine, Inc.,* 501 U.S. 496, 517 (1991). Such reports give TSA enough to work with in order to make its own assessment of a potential security risk. Indeed, the fact that threat reports, unlike journalistic endeavors of the kind at issue in *Masson*, often arise with little or no time to act and under significant stress is every reason to be more forgiving of inconsequential inaccuracies. See *Cordero* v. *CIA. Mexicana De Aviacion, S.A.*, 512 F. Supp. 205, 206-07 (C.D. Cal. 1981) ("airline safety is too important to permit a safety judgment . . . to be second-guessed months later in the calm of a courtroom by a judge or jury, having no responsibility for the physical safety of anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the decision was made"), *rev'd in part and aff'd in part by* 681 F.2d 669 (9th Cir. 1982).

Air Wisconsin's report plainly meets this test because it was substantially true. Consider the statements in turn:

Hoeper's termination. The Colorado Supreme Court would have approved a report that "[Hoeper] knew he would be terminated soon," but found impermissible the statement that "[Hoeper] was terminated today." Pet. App. 6a, 18a-21a. There is no substantive difference between the two. The "gist" is the same, and both have the same effect on the listener (TSA) because security concerns would be identical for a pilot who knew termination was imminent and one just terminated. See *Masson*, 501 U.S. at 517. It is simply inconceivable that TSA would have been interested in one version but not the other.

Hoeper's FFDO status and firearm. The Colorado Supreme Court would have approved a report that "[Hoeper] was an FFDO pilot," but found impermissible the statement that he "was an FFDO who may be armed." Pet. App. 6a, 18a-21a. Even setting aside the fact that TSA's account states that Air Wisconsin "d[id] not believe [Hoeper] [wa]s in possession of a firearm at th[e] time," *supra* at 10, there is again no meaningful difference between the two. An FFDO, by definition, can carry a firearm aboard an aircraft, and, in the context of a threat report, there would be little reason to identify the suspect as an FFDO unless the reporter meant to convey the possibility that the suspect could be armed. Further, as the United States has confirmed, "TSA's need to receive prompt and accurate reporting of threats to aircraft

or passenger safety is especially acute when the individual involved is a [FFDO] who may be in possession of a TSA-issued firearm." U.S. Br. 2. Air Wisconsin's statement was true and, in fact, commendable. Pet. App. 30a-31a.[10]

Hoeper's mental state. The Colorado Supreme Court would have approved a report that "[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators," but found impermissible the statement that "we were concerned about his mental stability." Pet. App. 6a, 18a-21a. These are distinctions without a difference. The record makes plain that Air Wisconsin *was* concerned about his mental state, *supra* at 8-10, and in any event, from TSA's perspective, either version conveys the same basic message – a security threat suspect was upset and acting aggressively. See *Masson*, 501 U.S. at 517 (false statement must have a different effect on the listener). The statement was therefore true.

At bottom, as the dissent cogently explains, the majority's "hair-splitting distinctions" find differences

[10] Nor was it appropriate to try to read "implications" into this statement or others about just how much Air Wisconsin knew. The statement, which is demonstrably true, speaks for itself, and the majority's effort to "toss[ ] up . . . overblown 'implication[s]' just to have something to swat down as false" should be rejected out of hand. Pet. App. 36a. Any implications to be drawn, moreover, are for TSA to make. The only question before the Colorado courts should have been whether the statements were substantially true, and they plainly were.

where none exist and fail to appreciate that national security threats often require prompt action without the ability to wordsmith and perfectly refine a threat report. Pet. App. 34a-40a. Moreover, the majority's acknowledgement that the report to TSA should have been made, *id.* at 18a, renders these distinctions particularly meaningless: The whole point of a report to TSA is to convey a potential threat, and that message is the same whether Air Wisconsin used its own words or the majority's slightly more sterilized version. Either way, the implication is that TSA should investigate. Because only this Court can correct this wayward approach, certiorari is necessary.

II. THE DECISION BELOW IMPLICATES A DEEP SPLIT AND CONTRAVENES THIS COURT'S FIRST AMENDMENT PRECEDENTS REGARDING INDEPENDENT APPELLATE REVIEW OF FALSITY.

Reaching the merits of Hoeper's defamation claim, the Colorado Supreme Court further erred by failing to engage in searching, independent review of the finding that Air Wisconsin's threat report was false. That, too, warrants this Court's review because it implicates a deep and enduring split in the lower courts and because it is flatly inconsistent with this Court's First Amendment precedents.

1. Review should be granted to resolve a conflict among federal and state courts as to whether the finding that a statement is false must undergo

independent review on appeal. It is beyond dispute that appellate courts must independently review a finding of actual malice in defamation actions. *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984). Whether the same standard applies to falsity, however, has divided the lower courts.

The decision below joins a host of others to conclude that appellate review of the substantial truth or falsity of an allegedly defamatory statement need not be independent and searching. Pet. App. 26a-27a. The Kentucky and Connecticut Supreme Courts, for example, have held that *Bose* "did not disturb the use of the clearly erroneous standard of review on a finding of falsity." *Ky. Kingdom Amusement* v. *Belo Ky., Inc.*, 179 S.W.3d 785, 789 (Ky. 2005); *Holbrook* v. *Casazza*, 528 A.2d 774, 778-79 (Conn. 1987). The Sixth and Eighth Circuits have indicated that they agree. *See Lundell Mfg. Co.* v. *Am. Broad. Cos.*, 98 F.3d 351, 359 (8th Cir. 1996) (falsity subject to "sufficiency of the evidence" review); *Connaughton* v. *Harte Hanks Commc'ns, Inc.*, 842 F.2d 825, 841-42 (6th Cir. 1988) ("[T]his court concludes that the jury's determinations of the operational facts bearing upon the falsity of the article in issue were not clearly erroneous."), *aff'd on other grounds*, 491 U.S. 657 (1989); see also *Bressler* v. *Fortune Magazine*, 971 F.2d 1226, 1242 (6th Cir. 1992) (Batchelder, J., dissenting) (*Connaughton* "implicitly sanctioned the clearly erroneous standard of review for the jury's finding of falsity"). And, the highest courts of Massachusetts, New York, and South Carolina have similarly

declined to "conduct an independent *de novo* review" in order to determine "if there is clear and convincing evidence to support finding[ ] of . . . falsity," *Peeler* v. *Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996) (per curiam), and have instead deferred to the jury on whether a statement is false, *e.g.*, *McAvoy* v. *Shufrin*, 518 N.E.2d 513, 517 & n.4 (Mass. 1988); *Mahoney* v. *Adirondack Publ'g Co.*, 517 N.E.2d 1365, 1368-69 (N.Y. 1987); *Prozeralik* v. *Capital Cities Commc'ns, Inc.*, 626 N.E.2d 34, 37-41 (N.Y. 1993).

A different set of courts has embraced the opposite approach. The First Circuit, for example, holds that the "constitutional burden to show the falsity of each statement" brings with it a "duty, on appeal, [for appellate courts] to independently verify that this burden was met." *Veilleux* v. *NBC*, 206 F.3d 92, 108 (1st Cir. 2000). The Second and D.C. Circuits, along with the Supreme Courts of Michigan, Nebraska, and Rhode Island, all agree. See *Celle* v. *Filipino Reporter Enters. Inc.*, 209 F.3d 163, 182 (2d Cir. 2000) ("trial and appellate judges have a constitutional duty to carefully scrutinize the record" and "determin[e] whether plaintiffs have established falsity"); *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988); *Locricchio* v. *Evening News Ass'n*, 476 N.W.2d 112, 124-25 (Mich. 1991); *Lyons* v. *R.I.*

Pub. Employees Council 94, 559 A.2d 130, 134-35 (R.I. 1989); *Deaver* v. *Hinel*, 391 N.W.2d 128 (Neb. 1986).[11]

These authorities cannot be reconciled, and they evince a deep and enduring split that has been recognized by courts and commentators alike. See, *e.g.*, *Newton* v. *NBC*, 930 F.2d 662, 669 n.7 (9th Cir. 1990) ("standard of review for the falsity element is . . . unresolved."); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987); *Sack on Defamation* § 16:5.2; Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1772 n.70 (1998) ("lower courts are divided"). Only this Court can bring uniformity to this important constitutional issue.

2. By joining the wrong side of the split, the decision below ran afoul of this Court's First Amendment precedents. *Bose* reaffirmed the independent review requirement in all cases resting on a finding of actual malice, stressing that "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip [an] utterance of First Amendment protection is not

[11] The Eleventh Circuit has impliedly joined this side of the split in at least some circumstances. *See Levan* v. *Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240 n.29 (11th Cir. 1999) (holding that while "the 'gist' or 'sting' of an alleged defamatory statement is a factual question," it is subject to independent review when "the gist of the report is intertwined with . . . allegations of actual malice").

merely a question for the trier of fact." 466 U.S. at 511. At the core of the requirement lies the "deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution" and therefore all "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508-11 & n.27.

Because falsity is at the very heart of defamation and itself a prerequisite to finding actual malice, *e.g.*, *Hepps*, 475 U.S. at 775-76, it necessarily follows that proper fulfillment of a court's constitutional duty is impossible without a thorough reevaluation of any finding of falsity. Otherwise, an appellate court cannot certify that it has "examine[d] . . . the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Harte-Hanks Commn'cs, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (internal quotation marks omitted) (second and third omissions in original). Indeed, to examine closely a finding of actual malice without similarly scrutinizing falsity is to check the math on only half of a formula. That hardly befits the "vitally important" role envisioned for appellate judges. *Bose*, 466 U.S. at 503.

The decision below, however, refused to follow this Court's lead and to engage in an independent review of falsity, concluding instead that "the jury decides whether a statement was true or false." Pet. App. 26a. The lower court then "limit[ed] [its] review

to whether sufficient evidence supports the jury's determination." *Id*.

The problems with this approach are rampant. For starters, many of the same concerns that underlie the court's analysis of ATSA immunity are exacerbated in this context. Even if immunity did not apply – and it does – the First Amendment still has a role to play in protecting speech on matters of public concern like potential threats to aviation security. In order to do so, however, appellate courts must independently review the record and come to their own conclusion about whether the plaintiff proved falsity or the statements were substantially true. Deferring to the jury, as the Colorado Supreme Court did, jettisons this constitutional duty.

Such an approach also invites outcome-determinative missteps. This case is illustrative. Had it undertaken a proper analysis, the Colorado Supreme Court would have had to reach the inevitable conclusion that Air Wisconsin's statements were substantially true. See *supra* 22-25. After all, Air Wisconsin's report was substantively identical to the Court's own preferred script, differing only in inconsequential ways. And, just as substantial truth assures ATSA immunity, it also means that the First Amendment should have provided a final backstop against Hoeper's defamation claim. But, by separating falsity from actual malice, the court committed precisely the mistake this Court has sought to avoid: liability for true statements. See *Bose*, 466 U.S. at 508. First Amendment protections should not turn on

the trivial distinctions credited below, but, by deferring to the jury's erroneous finding of falsity, the Colorado Supreme Court sanctioned liability based upon exactly that.

As this case amply demonstrates, an erroneous finding of falsity, deferred to on appeal, wipes out the protection that independent review of other constitutional requirements provides. The Court should grant certiorari to restore appellate courts' proper role in safeguarding First Amendment values.

III. THE DECISION BELOW POSES A SIGNIFICANT RISK TO NATIONAL SECURITY BY CHILLING REPORTS OF SUSPICIOUS ACTIVITY.

The decision below has profound implications for the Nation's aviation security and national defense. Indeed, on this score, everyone is in agreement: The majority recognized that "important policy considerations underlie the grant of immunity contained in the ATSA" and acknowledged "the importance to our national security of the threat disclosure encouraged by the ATSA and the unique position of air carriers to obtain information about those threats," Pet. App. 14a, 21a; the dissent was certainly not blind to these same considerations, *id.* at 28a-43a; and the United States "emphasize[d] the importance of the relevant federal statutes and policies designed to serve the critical national goal of air transportation security" as well as the "vital[ ] importan[ce] that defamation

damages awards not chill air carrier reports," U.S. Br. 1, 3; see also *id.* at 3 (highlighting the "substantial federal interest in providing immunity from liability for air carriers and their employees" who make reports); *id.* at 6 (describing the "United States' substantial interest in 'improving aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities'").

By eviscerating these policies, however, the Colorado Supreme Court's analysis significantly risks chilling airline reports with potentially catastrophic consequences. Precisely what Congress did *not* want was to place airlines and their employees, considering threats under the stress of time and information constraints, in the impossible position of predicting what an overly fastidious court might fault them for later. But the specter of a $1.4 million defamation judgment for a failure to speak perfectly – saying, for instance, that someone will be formally fired tomorrow as opposed to today – does just that. Pet. App. 33a-39a.

The Colorado Supreme Court's overt disinterest in the truth or falsity of Air Wisconsin's report underscores these concerns. As for the ATSA, separating falsity from the immunity inquiry undermines the United States' belief that "[a]ir carriers cannot be exposed to substantial civil liability for taking those actions that TSA requires and Congress sought to encourage." U.S. Br. 10; see also 153 Cong. Rec. S6018, S6018 (May 11, 2007); 153 Cong. Rec. H3099,

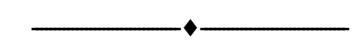
H3147 (Mar. 27, 2007) (explaining "chilling effect on the future of American security" that requires immunity from lawsuits like this). Or, as one of the bill's sponsors put it: "Imagine if TSA had to wait while regulated parties asked their attorneys to review suspicious incident reports before submitting them to the TSA. Such a delay in reporting could make the difference between life and death for the traveling public." Pet. App. 118a-20a.

The First Amendment cushion of independent appellate review – bypassed below – is similarly designed to promote rather than chill speech. The benefits of not deterring "true speech," this Court has held, far outweigh the cost of inadvertently "insulat[ing] from liability some speech that is false." *Hepps*, 475 U.S. at 777-78. Independent judicial review protects that judgment. It fosters an "elucidation [that] is particularly important in the area of free speech[:] Uncertainty as to the scope of the constitutional protection can only dissuade protected speech." *Harte-Hanks*, 491 U.S. at 686. Indeed, although First Amendment and national security interests often compete in other contexts, here they join forces: More speech helps to guarantee greater aviation security. Independent review of falsity is critical to ensuring that this happens.

The risk of chilling reports of suspicious activity is even more problematic in this context because it threatens those in the best position to provide critical information. For all of its commitment and expertise, TSA is not omniscient; it depends on the eyes and

ears of others. Cf. Eric Holder, Janet Napolitano & James Clapper, *We're Safer Post-9/11*, USAToday, Sept. 8, 2011 (outlining the success of reporting initiatives that "have helped us thwart numerous terrorist plots, from the attempt to bomb New York City subways to the foiled attacks against air cargo"). Indeed, a core justification for providing immunity in the ATSA was Congress's recognition of the airlines' critical role. That their employees may sometimes be wrong about potential threats does nothing to diminish their essential part in this process. But when the fear of liability forces them to self-censor, hesitate, and hedge, everyone's security is diminished. The protections of the ATSA and the First Amendment thus ensure not only the vitality of the Nation's values, but also the safety of its citizens.

Both the ATSA and the First Amendment seek to encourage reports on matters of public concern like suspicious activity at airports. The best way to foster that objective is to vigorously enforce the protections that the statute and the Constitution provide. By subjecting Air Wisconsin to substantial liability for a true report, however, the decision below tramples those protections for no good reason. The magnitude and reach of its error merits this Court's immediate review.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court Case No. 09SC1050
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 08CA1358

Petitioner:
Air Wisconsin Airlines Corporation,
a Delaware corporation,

v.

Respondent:
William L. Hoeper.

Judgment Affirmed
en banc
March 19, 2012

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JUSTICE RICE delivered the Opinion of the Court.

JUSTICE EID concurs in part and dissents in part, and **JUSTICE COATS** and **JUSTICE BOATRIGHT** join in the concurrence in part and dissent in part.

¶1 In this defamation action, we address whether a trial court must decide before trial if a party is

immune from liability pursuant to the Aviation and Transportation Security Act (ATSA), 49 U.S.C. section 44941 (2006). Applying the principles of federal qualified immunity to the immunity conferred by the ATSA, we conclude that the trial court in this case erred by submitting to the jury the question of whether Air Wisconsin was immune from suit. This error, however, is harmless because we conclude that Air Wisconsin is not entitled to immunity. In addition, our independent review of the record reveals clear and convincing evidence to support a finding of actual malice. We also hold that Air Wisconsin's statements are not protected as opinion and that the evidence is sufficient to support the jury's determination that the statements were false. Accordingly, we affirm the judgment of the court of appeals.

I. Background

¶2 Air Wisconsin, a commercial airline, employed William Hoeper as a pilot. The Transportation Security Administration (TSA) had issued Hoeper a firearm under a federal statute that authorizes TSA to deputize volunteer pilots as federal law enforcement officers "to defend the flight decks of aircraft . . . against acts of criminal violence or air piracy." 49 U.S.C. § 44921(a) (2006). Such a pilot is known as a federal flight deck officer (FFDO). *Id.*

¶3 After discontinuing its use of the type of aircraft that Hoeper had piloted for many years, Air Wisconsin required Hoeper to undertake training and pass a

test certifying his proficiency in piloting another type of aircraft. Hoeper failed three such tests. Patrick Doyle, a manager at Air Wisconsin involved in Hoeper's testing, testified that after the second failed test, Hoeper lost his temper with Doyle. Doyle's contemporaneous notes of the second test day, however, did not mention the confrontation.[1] In addition, testimony established that Doyle and Hoeper drove together to their hotel after the meeting and had a drink together at the hotel bar. Also, another test administrator testified that, after the third failed test, Hoeper confronted him, but Hoeper's demeanor was not threatening.

¶4 After the three failed tests, Air Wisconsin gave Hoeper one last opportunity to pass the test. Hoeper knew that he would likely lose his job if he failed this fourth test. He flew from his home in Denver to Virginia to take the fourth test.

¶5 During the test, Hoeper became angry with the test administrators because he believed that the test administrators were deliberately sabotaging his testing. One administrator, Mark Schuerman, testified at trial that Hoeper ended the test abruptly, raised his voice at Schuerman, and used profanity. Schuerman testified that Hoeper's outburst startled him and that

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[1] As discussed below, after Hoeper's fourth failed test, Doyle finally made notes of this confrontation, stating that Hoeper's actions after this second test caused Doyle to fear for his own safety and that of others at the testing facility.

he feared for his physical safety during the confrontation, but not after the confrontation ended. Testimony also established that Hoeper told Schuerman that Hoeper intended to call the legal representative of the airline pilots' union to which he belonged.

¶6 After Hoeper left the testing facility, Schuerman told Doyle about the confrontation. Specifically, Schuerman testified that he told Doyle only that Hoeper blew up at him and was "very angry with [him]." Schuerman did not tell Doyle that he or anyone else at the testing center believed Hoeper would harm them or others. Doyle then instructed another Air Wisconsin employee who participated in the failed test to drive Hoeper to the airport and Doyle booked Hoeper on a flight from Virginia back to Denver. Doyle never sought nor received any additional information about the confrontation from others who were at the testing center that day or about Hoeper's demeanor after the confrontation.

¶7 Doyle knew that Hoeper was an FFDO pilot. He did not know if Hoeper had his government-issued firearm with him on the trip to Virginia, but he knew that Hoeper would have violated FFDO rules by carrying the firearm as a passenger on the airplane from Denver to Virginia. He also never sought nor received any additional information about whether Hoeper actually brought his firearm to Virginia.

¶8 Based upon this information, Doyle called TSA to report Hoeper as a possible threat.[2] By the time Doyle called TSA, Hoeper had been at the airport for about two hours waiting for his flight. After the call, Doyle wrote in his personal notes that he had told TSA that Hoeper was "a disgruntled employee (an FFDO who may be armed)" and that he was "concerned about the whereabouts of [Hoeper's] firearm, and [Hoeper's] mental stability at that time." At trial, Doyle denied having told TSA anything about Hoeper's mental stability. He added that he did not have the ability to assess Hoeper's mental stability.

¶9 The jury found that Doyle made two statements to TSA:

> (a) [Hoeper] was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm.
>
> (b) Unstable pilot in FFDO program was terminated today.

¶10 In response, TSA officials arrested Hoeper and searched him.

¶11 The day after this incident, Doyle made notes about the meeting with Hoeper that occurred immediately after the second failed test. Doyle wrote that,

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[2] The parties agree that Air Wisconsin is legally responsible for Doyle's statements.

after Hoeper lost his temper, Doyle ended the meeting "for fear of [his] own physical harm." He also noted that "[a]fter heated discussion with [Hoeper], and due to my concerns for my safety," Doyle did not fully fill out a certain FFA form regarding the failed test. Doyle later changed these notes to read "due to my concerns for my safety and the safety of others at the [testing facility]."

¶12 Hoeper brought this action in Colorado against Air Wisconsin for defamation under Virginia law, among other claims. The parties agree that Virginia law applies to the substance of Hoeper's claims in this case.

¶13 Air Wisconsin moved for summary judgment,[3] asserting that it was entitled to immunity as a matter of law under the ATSA. The trial court denied the motion because it determined that the jury was entitled to resolve disputed issues of fact that controlled the determination of immunity. Air Wisconsin also moved for a directed verdict under the same theory after the close of evidence, which the trial court also denied.

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[3] We recognize that the common method for raising the issue of immunity from suit is to file a motion to dismiss pursuant to C.R.C.P. 12(b)(1). *See Moody v. Ungerer,* 885 P.2d 200, 201 (Colo. 1994). In this case, it would have been appropriate for the trial court to have treated the summary judgment motion as a 12(b)(1) motion. Nonetheless, the fact that Air Wisconsin raised the contention in a motion for summary judgment allowed the trial court to decide the immunity question before the trial.

¶14 The trial court instructed the jury on the components of ATSA immunity and instructed that the jury could not find for Hoeper on the defamation claim if it determined that Air Wisconsin was immune under the ATSA. The jury returned a verdict in favor of Hoeper. The jury found by clear and convincing evidence that the two statements were defamatory and that Air Wisconsin made one or more of the statements "knowing that they were false, or so recklessly as to amount to a willful disregard for the truth."

¶15 Air Wisconsin appealed and the court of appeals affirmed. The court of appeals determined that the question of whether the judge or jury decides immunity under the ATSA is a procedural issue governed by Colorado law. It concluded that, under Colorado law, the trial court properly allowed the jury to determine whether the ATSA granted Air Wisconsin immunity in this case. The court of appeals also determined that clear and convincing evidence supported the jury's finding of actual malice and that the statements Doyle made were not protected as opinion or as substantially true. Air Wisconsin petitioned for certiorari, which we granted.[4]

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[4] We granted certiorari on the following issues:

1. Whether the court of appeals erred in finding that the trial court properly submitted the issue of Air Wisconsin's qualified immunity under the Aviation Transportation Security Act to the jury under Colorado law where federal

(Continued on following page)

II. ATSA Immunity

¶16 Federal law, not Colorado law, controls our determination of whether the judge or jury decides the issue of immunity under the ATSA. Applying the federal law of qualified immunity, we conclude that the immunity conferred by the ATSA is immunity from suit, not merely immunity from liability for damages. The trial court must therefore determine before trial whether an air carrier is immune from suit. Although the trial court in this case erred by submitting the question to the jury, the error is harmless because we conclude that Air Wisconsin is not entitled to immunity under the ATSA.

A. Federal Law Controls

¶17 The court of appeals determined that the right to a civil jury trial in Colorado is procedural and therefore "the allocation of decision-making between judge and jury is a procedural question to be governed by

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courts generally require resolution of qualified immunity as a matter of law early in the proceedings.

2. Whether the court of appeals properly found that a de novo review of the record demonstrated clear and convincing evidence of actual malice.

3. Whether the court of appeals erred in finding that Air Wisconsin's statements were not substantially true and not non-actionable statements of opinion.

Colorado law." *Hoeper v. Air Wis. Airlines Corp.,* 232 P.3d 230, 237 (Colo. App. 2009). We disagree.

¶18 Colorado courts follow federal procedure when deciding immunity under federal law. For example, we look to federal procedures in determining whether a denial of summary judgment in a federal qualified immunity case is immediately appealable. *Furlong v. Gardner,* 956 P.2d 545, 552 (Colo. 1998); *see also Awad v. Breeze,* 129 P.3d 1039, 1045 (Colo. App. 2005). In addition, we have consulted federal law in determining whether immunity under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. section 11111 (2006), is a question of law for the court to decide. *N. Colo. Med. Ctr., Inc. v. Nicholas,* 27 P.3d 828, 838 (Colo. 2001). We therefore consult federal law to determine whether the court must decide the question of immunity under the ATSA before trial.

¶19 Moreover, we must presume that, "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 43 (1989) (quoting *Jerome v. United States,* 318 U.S. 101, 104 (1943)). Early resolution of federal qualified immunity is essential because it is "immunity from suit rather than a mere defense to liability [that] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). Congress did not intend for state law to govern the timing of the determination of immunity because the early resolution of that issue is an

important facet of the protection Congress enacted. We therefore apply federal law to determine whether immunity is a question of law for the trial court to decide.

B. Immunity Under the ATSA is Determined by the Court

¶20 Applying the purpose of federal qualified immunity law, we conclude that immunity under the ATSA is a question of law to be determined by the trial court before trial.

¶21 Federal law contains the judicially-created doctrine of qualified immunity, *see Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and other statutorily-granted immunities, *see, e.g.,* 42 U.S.C. section 11111 (immunity under HCQIA). Qualified immunity is based upon a conception that "where [a public] official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Mitchell,* 472 U.S. at 525 (quoting *Harlow,* 457 U.S. at 819). These consequences encompass not only liability for damages, but also "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 526 (quoting *Harlow,* 457 U.S. at 816). Federal qualified immunity is therefore immunity from suit, rather than merely a defense to liability.

Id. As a result, "[i]mmunity ordinarily should be decided by the court long before trial" in order to avoid the consequences of forcing officials to stand trial. *Hunter v. Bryant,* 502 U.S. 224, 228 (1991) (citing *Mitchell,* 472 U.S. at 527-29).

¶22 Because immunity under the ATSA is statutory, we also reference immunities conferred not by federal common law, but by federal statute. Immunity under the HCQIA, for example, only constitutes immunity from damages liability, not immunity from suit. *Singh v. Blue Cross/Blue Shield of Mass., Inc.,* 308 F.3d 25, 35 (1st Cir. 2002); *Imperial v. Suburban Hosp. Ass'n, Inc.,* 37 F.3d 1026, 1031 (4th Cir. 1994); *Manion v. Evans,* 986 F.2d 1036, 1039-42 (6th Cir. 1993); *Decker v. IHC Hosps., Inc.,* 982 F.2d 433, 436 (10th Cir. 1992). Federal courts reach this conclusion by analyzing the plain language of the HCQIA and its legislative history. *See Decker,* 982 F.2d at 436. The statute provides that certain medical review bodies "shall not be liable in damages" provided the review meets certain criteria. 42 U.S.C. § 11111(a)(1). Federal courts conclude that this plain language confers only immunity from liability for damages. *See Imperial,* 37 F.3d at 1031; *Decker,* 982 F.2d at 436. Furthermore, courts note that Congress chose this language over language in a previous version of the bill, which stated, "shall not be subject to an action." *See Manion,* 986 F.2d at 1039; *Decker,* 982 F.2d at 436; *see also Imperial,* 37 F.3d at 1031 (noting in the legislative history an intentional change from very broad protection to protection only from damages).

Federal courts therefore conclude that the HCQIA confers immunity only from damages liability. *Imperial,* 37 F.3d at 1031; *Manion,* 986 F.2d at 1039; *Decker,* 982 F.2d at 436.

¶23 We have interpreted HCQIA immunity as constituting a question of law for the court to decide. *Nicholas,* 27 P.3d at 838. Because the immunity is merely immunity from damages liability, however, a court may make this determination "whenever the record has been sufficiently developed" – even after trial. *Id.* (citing *Bryan v. James E. Holmes Reg'l Med. Ctr.,* 33 F.3d 1318, 1332 (11th Cir. 1994)).

¶24 Because no federal court has addressed the immunity conferred by the ATSA, we first analyze the ATSA as federal courts would, by applying common principles of statutory construction. The ATSA provides that an air carrier who voluntarily discloses any suspicious transaction relevant to certain aircraft security statutes "shall not be civilly liable" to any person. 49 U.S.C. § 44941(a). Unlike the HCQIA, the ATSA immunity provision does not specifically refer to damages liability. We therefore cannot determine by reference to its plain language the type of immunity the ATSA confers. Moreover, the legislative history does not provide guidance as to the type of immunity intended by Congress. No prior versions of the bill exist, and Congress engaged in no discussion of the immunity standard.

¶25 Looking at federal statutory immunity and qualified immunity together, we analyze ATSA immunity

according to the rationale underlying the distinction between immunity from suit and immunity from damages liability. Immunity from suit is a greater degree of protection than immunity from damages liability. Federal qualified immunity law includes this greater protection because it encourages public officials to undertake independent action on issues of public importance without fear of consequences. *Mitchell,* 472 U.S. at 525. Although the ATSA grants immunity to private air carriers, it does so to encourage those carriers to take action on issues of public importance, such as avoiding air piracy and other threats to national security, without fear of consequences. The members of Congress who enacted the ATSA undoubtedly believe that "the safety and security of the civil air transportation system is critical to the security of the United States and its national defense." H.R. Rep. No. 107-296, at 53 (2001) (Conf. Rep.). Also, air carriers are in an unparalleled position to provide useful threat information to the federal government because they directly interact with each passenger. Given the importance to our national security of the threat disclosure encouraged by the ATSA and the unique position of air carriers to obtain information about those threats, we must conclude that Congress intended to confer upon air carriers the greatest possible degree of protection by enacting the immunity provision of the ATSA. The immunity conferred by the ATSA is therefore immunity from suit.

¶26 Because the protection afforded by such immunity is lost if the air carrier is forced to proceed to trial, we conclude that the trial court must decide immunity under the ATSA as a matter of law before trial. If a factual dispute arises as a part of this inquiry, the trial court may hold a hearing and receive any competent evidence related to the matter. *See, e.g., Trinity Broad. of Denver, Inc. v. City of Westminster,* 848 P.2d 916, 924-25 (Colo. 1983) (where a factual dispute arises as to the application of the Colorado Governmental Immunity Act, a trial court should conduct an evidentiary hearing to make necessary findings of fact relevant to the determination). The trial court therefore erred in this case by submitting the immunity question to the jury.

C. Determination of Immunity

¶27 Even where we have found an error, we do not reverse the trial court's judgment if the error is harmless. C.A.R. 35(e); C.R.C.P. 61. Here, the error is harmless because Air Wisconsin is not entitled to immunity under the ATSA.

¶28 We have determined that immunity under the ATSA is a question of law to be determined by the trial court. We review questions of law de novo. *Colo. Dep't of Revenue v. Garner,* 66 P.3d 106, 109 (Colo. 2003). Where the determination of immunity turns upon a factual dispute, the trial court should ordinarily conduct a hearing on the matter and make appropriate factual findings. *See Trinity Broad.,* 848 P.2d at

925. Here, however, we are in essentially the same position as the trial court when Air Wisconsin renewed its argument at the close of evidence that it was entitled to immunity under the ATSA. We therefore need not remand the case to the trial court for an evidentiary hearing because we have sufficient evidence before us to conclude as a matter of law that Air Wisconsin is not entitled to immunity.[5]

¶29 The ATSA provides that "[a]ny air carrier . . . who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism" to certain officials including the TSA "shall not be civilly liable" under any law of any state. 49 U.S.C. § 44941(a). This provision, however, does not apply to "(1) any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading; or (2) any disclosure made with reckless disregard as to the truth or falsity of that disclosure." § 44941(b).

¶30 Assuming, without deciding, that Air Wisconsin's statements related to a "suspicious transaction" relevant to a threat to aircraft or passenger safety, we conclude based on the record evidence that the statements were made with reckless disregard as to their

[5] In making this determination, we give no weight to the jury's finding of any fact.

truth or falsity.[6] Although federal cases provide little guidance on the meaning of "reckless disregard" under section 44941(b), cases discussing actual malice pursuant to *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964), are instructive because the actual malice standard also includes the concept of reckless disregard.

¶31 Under *New York Times,* in certain circumstances a plaintiff must establish that a speaker published a statement with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* To establish reckless disregard under this rule, the statements must have been made despite the speaker having a "high degree of awareness of . . . probable falsity," or the speaker must have "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 667 (1989). We believe that reckless disregard under the ATSA encompasses this same standard and we therefore apply it to this case.

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[6] In our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false. Rather, we conclude that Air Wisconsin made the statements with reckless disregard as to their truth or falsity. Because we conclude that Air Wisconsin is not immune under the ATSA, the trial court properly submitted the case to the jury. Accordingly, the jury was entitled to determine the elements of the defamation claim, including whether the statements were false. We review that determination below in section V.

¶32 First, the evidence establishes that Doyle told TSA: (1) that he believed Hoeper to be mentally unstable; (2) that Hoeper had been terminated earlier that day; and (3) that Hoeper may have been armed. Although the events at the training may have warranted a report to TSA, as discussed below, we conclude these three statements overstated those events to such a degree that they were made with reckless disregard of their truth or falsity.

¶33 Testimony from the record demonstrates that, when he made the statements, Doyle knew that Hoeper expected to be fired for failing the test and that Hoeper had become very angry with Schuerman at the testing facility. Based on these minimal facts alone, Doyle could not form an opinion as to whether Hoeper was mentally unstable at the time that Doyle contacted TSA. In fact, Doyle admitted at trial that, based on the information he had when he contacted TSA, he could not determine if Hoeper was mentally unstable. He therefore made this statement with a high degree of awareness of its probable falsity.

¶34 In addition, the evidence establishes that Doyle's statement that Hoeper had been terminated that day was false and that Doyle knew it to be false. Although Hoeper likely would be terminated, no termination had yet occurred.

¶35 The record evidence also establishes reckless disregard as to Doyle's statement that Hoeper may have been armed. Hoeper could have brought his weapon on the airplane back to Denver only under

two factual scenarios. First, Hoeper could have gone through the security checkpoint and signed an FFDO logbook. But if Hoeper had done so, Doyle would have no reason to report that Hoeper may have been armed because TSA would already know that he was armed. Second, Hoeper could have attempted to sneak his weapon through the security checkpoint. Doyle's statement that Hoeper may have been armed implies the assertion of some fact which led him to conclude that Hoeper was armed. But the only fact in Doyle's possession was Hoeper's status as an FFDO pilot and there is no indication in the record that Doyle believed an FFDO pilot would be more likely than any other passenger to sneak a firearm through security. The tenor of the statement therefore suggests much more than FFDO status; the statement implies, for example, that Doyle knew that someone had seen Hoeper with his weapon or that Hoeper had told someone he had his weapon. Doyle's statement that Hoeper may have been armed was therefore made with reckless disregard of its truth or falsity.

¶36 Furthermore, the overall implication of Doyle's statements is that he believed that Hoeper was so unstable that he might pose a threat to the crew and passengers of the airplane on which he was scheduled to fly back to Denver. We find, based on our review of the record evidence, that Doyle's actions belie the claim that he believed Hoeper to be mentally unstable. When Doyle first heard about the confrontation at the fourth test, he booked Hoeper on the flight back to Denver and had another employee drive

Hoeper to the airport. If Doyle truly believed Hoeper posed a threat to employees of Air Wisconsin, he would not have directed an employee to drive Hoeper to the airport. Also, if Doyle believed that Hoeper posed a threat to the crew and passengers of the flight, he could have instructed Hoeper to return to his hotel room for the evening and booked him a flight only when his mental state improved. In addition, Hoeper spent over two hours at the airport waiting for his flight without incident before Doyle finally called TSA. We therefore conclude that, at a minimum, Doyle entertained serious doubts as to the truth of the statement's implication that Hoeper was so unstable that he might pose a threat to aircraft or passenger safety. We emphasize that our conclusion does not require Doyle to be *sure* that Hoeper *actually* posed a threat. Rather, our review of the record evidence leads us to conclude that Doyle did not believe Hoeper to be so unstable that he *might* pose such a threat.

¶37 Moreover, Doyle did not document his prior confrontation with Hoeper, which occurred at the second failed test, until after the incident at issue here. Further, the evidence shows that Doyle initially documented Hoeper as a threat only to himself, but later changed his notes to include Hoeper as a threat to others. We draw from these facts the conclusion that Doyle thought he needed additional support to justify the statement that he believed Hoeper to be mentally unstable. We therefore hold that Doyle entertained serious doubt that Hoeper was mentally unstable.

¶38 We recognize that important policy considerations underlie the grant of immunity contained in the ATSA. Specifically, evidence in the record indicates that the TSA instructs airlines to report "suspicious transactions" even if they are not sure that a true threat exists. That is, the TSA is the proper authority to assess potential security threats in air travel and early, tentative information from airlines is vital to this task.

¶39 Our analysis of ATSA immunity in this case, however, does not chill airlines from reporting to the TSA what they actually know about potential security threats and leaving the assessment of each potential threat to TSA officials. In this case, for example, Air Wisconsin would likely be immune under the ATSA if Doyle had reported that Hoeper was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and "blew up" at test administrators, and that he was an FFDO pilot. Doyle's statements in this case, however, went well beyond these facts and we conclude that the statements were made with reckless disregard as to their truth or falsity. Air Wisconsin is therefore not entitled to immunity under the ATSA.

III. Actual Malice

¶40 Having determined as a matter of law that Air Wisconsin is not entitled to immunity under the ATSA, we also must address the other issues upon

which we granted certiorari that Air Wisconsin contends require reversal of the jury's verdict. We granted certiorari to review the court of appeals' determination that a de novo review of the record demonstrated clear and convincing evidence of actual malice pursuant to *New York Times,* 376 U.S. at 280. We conclude that clear and convincing evidence supports a finding of actual malice.

¶41 Because First Amendment constitutional protections apply, where a private plaintiff brings a defamation suit based on statements involving a matter of "public concern," the plaintiff must demonstrate actual malice to recover presumed or punitive damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 756 (1985) (plurality opinion). The parties in this case dispute whether the statements involved a matter of public concern and whether the jury awarded presumed damages. We need not decide these questions, however, because we conclude that Hoeper sufficiently demonstrated actual malice.

¶42 As discussed above, a finding of actual malice is a finding that a speaker published a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 280. To establish reckless disregard, the statements must have been made despite the speaker having a "high degree of awareness of . . . probable falsity," or the speaker must have "entertained serious doubts as to the truth of his publication." *St. Amant,* 390 U.S. at 731; *see also Harte-Hanks,* 491 U.S. at 667.

¶43 The question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks,* 491 U.S. at 685. Although credibility determinations are reviewed under the clearly erroneous standard, a reviewing court must nonetheless "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* at 689-90 (quoting *New York Times,* 376 U.S. at 285). We must therefore undertake an independent review of the entire record to ensure that clear and convincing evidence supports a finding of actual malice. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 514 (1984); *see New York Times,* 376 U.S. at 286.

¶44 Under our de novo review of ATSA immunity above, we concluded that Air Wisconsin made statements to the TSA with reckless disregard of their truth or falsity. For the same reasons, we also conclude that our independent review of the record reveals clear and convincing evidence to support a finding that Air Wisconsin made the statements with reckless disregard as to their truth or falsity. Accordingly, we hold that no First Amendment protections bar Hoeper's recovery of presumed or punitive damages in this case.

IV. Opinion

¶45 Air Wisconsin contends that its statements were not actionable under the First Amendment because they were opinion. We disagree.

¶46 In all cases raising First Amendment issues, appellate courts must make an independent examination of the record to ensure that the judgment "does not constitute a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 17 (1990) (quoting *Bose,* 466 U.S. at 499). We therefore review de novo whether the statements in this case were protected as opinion.

¶47 The United States Supreme Court has disavowed the creation of an "artificial dichotomy between 'opinion' and fact." *Id.* at 19. Because of First Amendment protections, however, statements on matters of public concern "must be provable as false" before liability may attach under state defamation law.[7] *Id.* The parties dispute whether the statements in this case were on matters of public concern. Assuming, without deciding, that they were, we nevertheless conclude that the statements were provable as false.

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[7] The Supreme Court left open the question of whether this analysis applies to statements made by non-media defendants. *Milkovich,* 497 U.S. at 19-20 n.6. Virginia, however, appears to apply this analysis to non-media defendants under its constitution. *Raytheon Technical Servs. Co. v. Hyland,* 641 S.E.2d 84, 90-91 (Va. 2007). We therefore address the question even though Air Wisconsin is a non-media defendant.

¶48 Even a statement of bare opinion is actionable where it implies an assertion of objective fact. *See id.* at 21; *Raytheon Technical Servs. Co. v. Hyland,* 641 S.E.2d 84, 91 (Va. 2007). For example, if a speaker says, "In my opinion Jones is a liar," the speaker implies knowledge of facts which lead to the conclusion that Jones told an untruth. *Milkovich,* 497 U.S. at 18. This statement is therefore actionable. *Id.* at 18-19.

¶49 Also, where a speaker states the facts upon which he bases his opinion, but those facts are incorrect or his assessment of them is erroneous, the statement may still imply a false assertion of fact. *Id.*

¶50 In this case, intending to report a suspicious transaction relevant to a threat to aircraft or passenger safety, Doyle told TSA that Air Wisconsin officials "were concerned about [Hoeper's] mental stability." Even if, as Air Wisconsin contends, this statement is one of opinion, it implies knowledge of facts which lead to the conclusion that Hoeper was so mentally unstable that he might constitute a threat to others on his flight. These facts are thus provable as false and the statement is actionable.

¶51 Also, Doyle told TSA that Hoeper was an "[u]nstable pilot in FFDO [who] was terminated today." It appears that Doyle's statement that Hoeper was terminated that day was a fact upon which he based his conclusion that Hoeper was unstable. But that fact was incorrect because although Hoeper knew he would likely lose his job after failing the fourth test,

he had not been terminated by the time Doyle called TSA. The statement thus implies a false assertion of fact.

¶52 We therefore conclude that the statements are provable as false and are thus not protected under the First Amendment as opinion.

V. Substantially True

¶53 We determined above that Air Wisconsin is not immune under the ATSA and therefore the trial court properly submitted the case to the jury. The jury was thus correctly charged with determining the elements of the defamation claim, including whether the statements were false. Air Wisconsin contends that its statements were substantially true and therefore we must reverse the jury's verdict in favor of Hoeper. We disagree.

¶54 Under Virginia law, the jury decides whether a statement was true or false, and we limit our review to whether sufficient evidence supports the jury's determination. *Jordan v. Kollman,* 612 S.E.2d 203, 207 (Va. 2005).

¶55 The plaintiff has the burden to prove that the statement is false. *Id.* Speech that is "substantially true" will not support a defamation claim, and a plaintiff may not prove falsity based upon "[s]light inaccuracies of expression." *Id.*

¶56 This defamation claim, however, does not rely upon "slight inaccuracies." Rather, the crux of the

defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety. The record reveals sufficient evidence to support the jury's determination that Hoeper was not mentally unstable. Specifically, the record includes evidence that, although Hoeper lost his temper and "blew up" at one test administrator, Hoeper did not exhibit any other irrational behavior, and no other person who interacted with Hoeper after the confrontation believed Hoeper to be mentally unstable or believed Hoeper to pose a threat to others at the testing center or the airport. This evidence is substantial and sufficient to support the jury's determination and we therefore will not disturb its verdict.

VI. Conclusion

¶57 Immunity under the ATSA is a question of law for the trial court to decide before trial. If the issue turns upon disputed facts, then the court may hold an evidentiary hearing and make findings of fact prior to determining immunity. Although the trial court in this case erred by submitting the immunity question to the jury, the error is harmless because we conclude Air Wisconsin is not entitled to immunity. In addition, clear and convincing evidence supports a finding of actual malice, Air Wisconsin's statements were not protected as opinion, and the evidence is sufficient to support the jury's determination that the statements were false. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE EID concurs in part and dissents in part, and JUSTICE COATS and JUSTICE BOATRIGHT join in the concurrence in part and dissent in part.

JUSTICE EID, concurring in part and dissenting in part.

¶58 Today the majority upholds a $1.4 million defamation award[1] against Air Wisconsin based on a report it made to the Transportation Safety Agency ("TSA") that it was concerned that one of its pilots, who had just been terminated, was mentally unstable and possibly armed. Although I agree with the majority that the district court should have decided the question of qualified immunity rather than sending the issue to the jury, I disagree with its conclusion that the error was harmless on the theory that the airline was not entitled to immunity in any event. I would hold that Air Wisconsin was entitled to immunity under the Aviation and Transportation Security Act ("ATSA") because the statements it made to the TSA were substantially true. The majority's conclusion otherwise – based on its mistaken view that the airline "overstated" its concerns, maj. op. at ¶ 32 – is not only contrary to the report itself, but also contrary to federal airline safety protocols, which require the reporting of potential flight risks even when

[1] The award consists of $849,625 in presumed damages, $350,000 in punitive damages (reduced from $391,875 in accordance with Virginia law), and $222,123.09 in costs.

based on tentative information and evolving circumstances. Because the majority's decision threatens to undermine the federal system for reporting flight risks, I respectfully dissent from all but sections II.A. and B. of its opinion.

¶59 The ATSA provides that any airline "shall not be civilly liable" under the law of any state for a "voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism" to the TSA. 49 U.S.C. § 44941(a). This immunity is lost only if the disclosure is made with "actual knowledge that the disclosure was false, inaccurate, or misleading," or made with "reckless disregard" as to the truth or falsity of the disclosure. *Id.* § 44941(b). This exception to immunity encompasses the standards articulated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), including the requirement that the plaintiff prove that a statement is false. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 773-75 (1986) (under *New York Times,* plaintiff must prove that the statement was false and that it was made with knowledge of falsity or with reckless disregard toward whether it was false). Here, this standard cannot be met – and therefore ATSA immunity must attach – because Air Wisconsin's statements to the TSA were substantially true.[2]

[2] The majority concludes that whether the statements were true is not part of the ATSA immunity analysis to be determined

(Continued on following page)

¶60 The jury verdict in this case states that Air Wisconsin made the following statements to the TSA:

> (a) [Hoeper] was an FFDO who may be armed. He was traveling from [Dulles to Denver] later that day and we were concerned about his mental stability and the whereabouts of his firearm.
>
> (b) Unstable pilot in FFDO program was terminated today.

These statements were true in substance.

¶61 Beginning with the statements in paragraph (a), it was true that Air Wisconsin "*[was] concerned*

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by the court; instead, the court (and here, the majority) need only decide whether the statements were made with reckless disregard to whether they were false – and, if so, immunity is lost and the case is to be submitted to the jury. Maj. op. at ¶ 30 n.6. To put it differently, the majority believes that ATSA immunity is lost when a statement is made recklessly even though it may be true.

In my view, the majority misinterprets the *New York Times* standard. The Supreme Court has held that although the standard – namely, that a statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not" – speaks in terms of "fault," rather than "falsity," it requires the plaintiff to show falsity of the statement. *Hepps,* 475 U.S. at 774-75 (citing *New York Times* and other cases). Therefore, when Congress incorporated the standard into the exception to ATSA immunity, it incorporated the falsity component as well. Even if falsity were not part of the ATSA immunity determination, however, the result would be the same: Hoeper's defamation claim cannot succeed because Air Wisconsin's statements were true and therefore not actionable as defamation. *See id.* at 775.

about [Hoeper's] mental stability and the whereabouts of his firearm." (emphasis added). Air Wisconsin employees met for one and one-half hours to discuss Hoeper's angry outburst after the failed proficiency test – a test Hoeper knew he had to pass or face imminent termination. *See* maj. op. at ¶ 34. The employees discussed the fact that Hoeper was an FFDO, making it possible that he could be carrying a firearm on board with him on his return flight home. They also discussed two incidents involving employees from other air carriers: one in which the terminated employee boarded a plane with a firearm, shot the pilots, and caused the plane to crash, killing all on board; and the other in which an employee facing termination boarded a plane intending to crash it into the company headquarters. After these discussions, the Air Wisconsin employees concluded that they had an obligation under federal aviation protocols to report their concerns to the TSA. Because the statements Air Wisconsin made to the TSA were true – the employees were in fact concerned about the risk that Hoeper might pose to airline safety for the stated reasons – they were not actionable under *New York Times* and, accordingly, would fall within ATSA immunity.

¶62 The statement in paragraph (b) was also true. The record makes clear that this statement was the subject line of an email written by a TSA operator

summarizing Air Wisconsin's call to the TSA.[3] In other words, the TSA used the term "unstable pilot" as a summary of its conversation with Air Wisconsin, in which Air Wisconsin expressed "concern[s] about [Hoeper's] mental stability" referred to in paragraph (a). But even if the statement "unstable pilot" is taken as one used by Air Wisconsin, as the majority mistakenly concludes, maj. op. at ¶ 51, it would be true.

¶63 During the proficiency check (which occurred in a flight simulator), Hoeper ran the aircraft out of fuel, flamed out the engines, and nearly crashed. When the training instructor froze the simulator, Hoeper slid back his seat and threw off his headset. In a raised voice he stated that "this is a bunch of [expletive]," that the flight instructor was "railroading the situation," and that the simulation was "not realistic." Realizing that he would not pass the test required by the "Last Chance Agreement" in order to maintain his employment, Hoeper stopped the training and stated, "you win, I'm calling . . . [pilot union] legal." Hoeper admitted that he stopped the simulator session, slid his seat back, raised his voice, and used profanity. The flight instructor thought that Hoeper was going to strike him at the time.

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[3] The subject line and "Quick Summary" section of the TSA email stated: "Unstable pilot in FFDO program was terminated today," which is identical to the language in paragraph (b) of the verdict form.

¶64 After the simulation ended, Hoeper was standing in the lobby acting in an unprofessional manner, talking in a raised voice, and using profanity. When the flight instructor and another Air Wisconsin employee exited the building, Hoeper followed them to the parking lot and yelled at the instructor. Later, when Hoeper called the training center, he was described as "not exactly calm." It is reasonable to conclude from these events that Hoeper was unstable. *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 519 (1991) (speaker is entitled to make statements reflecting a "rational interpretation" of events).

¶65 Similarly, the statement in paragraph (b) that Hoeper "was terminated today" was the TSA's, not Air Wisconsin's, as the majority mistakenly suggests. Maj. op. at ¶ 51. But even if Air Wisconsin stated that Hoeper had been terminated, the statement would have been substantially true. As noted above, the Last Chance Agreement provided that Hoeper's continued employment was dependent upon him passing the proficiency test – a test he had failed on three previous occasions. During the test, he stopped the simulator after nearly crashing, said he would "call legal," left the facility, and headed to the airport for a flight home to Denver. Everyone knew – Hoeper included – that he had just failed to pass the test upon which his continued employment depended. Of course, official notification of his termination did not come until the following day, as the majority notes. *Id.* But official notification was just a formality. Hoeper himself admitted that he expected to be terminated,

because, having left the facility without passing the test, he could do nothing to prolong his employment. His employment had, in effect, been terminated. Air Wisconsin's statement was therefore substantially true.

¶66 The majority acknowledges that the airline acted properly in making the report to the TSA, but concludes that the report fell outside of ATSA immunity because the airline's statements "overstated . . . events to such a degree that they were made with reckless disregard of their truth or falsity." Maj. op. at ¶ 32. The majority then offers what would have been, in its view, the proper wording of the report to the TSA:

> Air Wisconsin would likely be immune under the ATSA if [it] had reported that Hoeper was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and "blew up" at the test administrators, and that he was an FFDO pilot.

Id. at ¶ 39.

¶67 The majority, in my view, draws hair-splitting distinctions that make no difference to the analysis. It would have made no difference, for example, had the airline reported, as the majority would have it, that Hoeper "knew he would be terminated soon," instead of describing him as terminated. As discussed above, the only thing left with regard to Hoeper's termination was formal notification – and everyone,

including Hoeper, knew that was coming. Similarly, there is no difference of any consequence between stating "[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators," as the majority would have it, and stating "concerns" about his "mental stability." As chronicled above, Hoeper's "irrational[ ]" behavior is precisely what caused the airline to have concerns about his mental stability. And, in fact, the airline did convey the underlying facts to the TSA concerning Hoeper's behavior during the training session.[4] Finally, the majority's approved statement that Hoeper "was an FFDO pilot" contains the very implication that Air Wisconsin expressed to the TSA – namely that, as an FFDO pilot, Hoeper "may be armed." The majority's approved wording elevates form over substance, contrary to its own recognition that substantially true statements are not actionable. *Id.* at ¶ 55.

¶68 The majority is able to find that Air Wisconsin's deviations from the script were substantial only by reading "implications" into the airline's statements that simply are not there. For example, the majority thinks the statement that Hoeper "['was an FFDO who may be armed'] implies the assertion of some fact which led [the airline] to conclude that Hoeper was armed. . . . The tenor of the statement . . . suggests that someone had seen Hoeper with his weapon or

[4] The email written by the TSA operator stated that "[Hoeper] has been very upset and angry with Air Wisconsin simulator technicians and other personnel."

that Hoeper had told someone he had his weapon" – an implication that, in its view, was untrue. Maj. op. at ¶ 35. The "implication" that the majority draws, however, is nowhere to be found in the statement itself. Instead, the obvious "assertion of some fact which led [the airline] to conclude that Hoeper was [possibly] armed" was the fact that was actually conveyed to the TSA – namely, that Hoeper, as an FFDO, had access to a TSA-issued weapon. Maj. op. at ¶ 2. It is as if the majority tosses up the overblown "implication" just to have something to swat down as false.

¶69 Similarly, the majority reads into the report an "implication" that "Hoeper was so unstable that he might pose a threat to the crew and passengers" – an implication that, again in its view, was false. *Id.* at ¶ 36; *see also id.* at ¶ 56 ("[T]he crux of the defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety. The record reveals sufficient evidence to support that jury's determination that Hoeper was not mentally unstable."); *id.* at ¶ 50 (rejecting Air Wisconsin's argument that the statement was one of opinion, on the ground that the statement "implies knowledge of facts which lead to the conclusion that Hoeper was so mentally unstable that he might constitute a threat to others"); *Hoeper v. Air Wisconsin Airlines Corp.,* 232 P.3d 230, 242 (Colo. App. 2009) (resting its decision on the same implication). But again, the majority's "implication" far outstrips the statement itself. Air Wisconsin reported its "concerns" about Hoeper's mental stability – which,

as noted above, represented a reasonable interpretation of events. Of course, the majority is correct that a report of a "suspicious" incident such as the one here suggests, at least implicitly, that the suspicions might actually be true. But this implicit suggestion is present in virtually every report to the TSA. Under the majority's rationale, a person who makes a report to the TSA would be exposed to a defamation judgment whenever the possible threat turned out to be a false alarm.

¶70 At bottom, the majority's reasoning threatens to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA. The federal reporting system rests on the assumption that airlines should report possible threats to airline safety to the TSA even when the report is based on tentative information and evolving circumstances. The text of the ATSA itself makes clear there is immunity for reporting a "suspicious transaction relevant to a *possible violation* of law or regulation, relating to air piracy, *a threat* to aircraft or passenger safety, or terrorism." 49 U.S.C. § 44941(a) (emphasis added). Moreover, the TSA reporting protocol affirms the tentative nature of the information contained in an airline's report. Prior to the events giving rise to this case, the TSA issued a security directive[5]

[5] The security directive is classified. Its general contours were described at trial by Thomas Blank, who, at the time of the incident, was a high ranking official in the TSA. Blank also testified about the evolution of airline security since 9/11.

requiring all airlines to report suspicious activities to the TSA. This directive was part of a fundamental shift in airline security in the wake of 9/11. Prior to 9/11, the airlines were responsible for assessing and investigating possible threats to airline security. After 9/11, the TSA assumed responsibility for such assessment and investigation. According to the TSA official who testified at trial, "we [the TSA] wanted to know about suspicious incidents" from the airlines, but "we did not want to have the carriers. . . . doing the investigation, the assessment of . . . potential security matters that came to their attention." The post-9/11 policy was known as "when in doubt, report." By its very nature, then, a report of a suspicious incident to the TSA – including the report at issue in this case – is a tentative assessment of an evolving situation based on imperfect information. *Contra* maj. op. at ¶¶ 33-39. The majority's reasoning turns the TSA's "when in doubt, report" policy on its head; in other words, if there is doubt, a report may lead to a hefty defamation verdict.

¶71 The majority gives assurances that its "conclusion does not require [the airline] to be sure that Hoeper actually posed a threat." Maj. op. at ¶ 36. But its reasoning belies this assertion, as it repeatedly cites grounds for its decision that are inconsistent with airline safety protocols. For example, it faults Air Wisconsin for making the report when it "could not form an opinion as to whether Hoeper was mentally unstable." Maj. op. at ¶ 33. It also faults Air Wisconsin for failing to investigate the matter sufficiently, *id.* at ¶ 6 (noting that Air Wisconsin "never

sought nor received any additional information about the confrontation from others who were at the test center that day or about Hoeper's demeanor after the confrontation"); *id.* at ¶ 7 (Air Wisconsin "never sought nor received any additional information about whether Hoeper actually brought his firearm to Virginia"); *id.* at ¶ 33 (Air Wisconsin made a report "[b]ased on [ ] minimal facts"), and for not taking additional action to prevent Hoeper from boarding the flight. *See id.* at ¶ 36 (noting that, had Air Wisconsin "truly believed" Hoeper was a threat, it would not have booked him on a flight back to Denver and had an employee drive him to the airport); *id.* at ¶ 36 (had Air Wisconsin believed Hoeper was a threat, it could have "instructed [him] to return to his hotel room for the evening and booked him a flight only when his mental state improved"). Finally, the majority stresses that Hoeper was not actually a threat. *Id.* at ¶ 36 (Hoeper "spent over two hours at the airport waiting for his flight without incident"); *id.* at ¶ 56 (noting that "although Hoeper lost his temper and 'blew up' at one test administrator, [he] did not exhibit any other irrational behavior"); *id.* ("the record reveals sufficient evidence to support the jury's determination that Hoeper was not mentally unstable"). Under the federal safety protocols, however, none of this is relevant. The majority's concerns fall within the purview of the TSA's investigative authority, not within Air Wisconsin's responsibility. Air Wisconsin reported truthfully that it had concerns about Hoeper given his angry outburst, impending termination, and possible possession of a firearm.

Under these circumstances, ATSA immunity plainly attaches.

¶72 The fundamental error committed by the majority is that it ignores the overall context in which the report in this case was made. It is easy for an appellate court to write a script for what Air Wisconsin should have said to the TSA after having had the benefit of hours of trial testimony and ample time for appellate review and reflection. But this is exactly the sort of approach the U.S. Supreme Court has rejected. Most recently, the Court summarily reversed a federal appellate decision that had reversed a district court's grant of qualified immunity to suit under 42 U.S.C. § 1983. *See Ryburn v. Huff,* ___ U.S. ___, 132 S.Ct. 987 (2012) (per curiam). Without merits briefing or oral argument, the Court in *Ryburn* reversed, criticizing the appellate court for, *inter alia,* resting its decision "on an account of the facts that differed markedly from the District Court's finding"; "analyzing the string of events that unfolded . . . [in an] entirely unrealistic" manner; "second-guessing a police officer's assessment, made on the scene"; and making the qualified immunity determination from the perspective of "hindsight and calm deliberation." *Id.* at 991-92. While the *Ryburn* decision addressed the issue of qualified immunity in the context of a suit alleging a Fourth Amendment violation, the Court's admonitions hold true in the ATSA context as well.

¶73 Finally, the majority makes a significant procedural error in deferring to the jury verdict in this case to conclude the statements were false. Although early

on in its opinion the majority properly notes that it must decide "as a matter of law" whether Air Wisconsin is entitled to immunity, maj. op. at ¶ 28, it then concludes that there is sufficient evidence in the record to support a determination that the statements made by the airline were false. *Id.* at ¶¶ 54, 57; *see also id.* at ¶ 30 n.6 (erroneously concluding that falsity is not part of the immunity analysis). But the issue here is not whether the trial court verdict as to falsity can be sustained – that is, whether a rational jury could have decided the way this jury did when the evidence is viewed in the light most favorable to the verdict, *see Western Fire Truck, Inc. v. Emergency One, Inc.,* 134 P.3d 570, 576 (Colo. App. 2006) – but rather whether the defendant is entitled to immunity under the ATSA as a matter of law. *See Trinity Broad., Inc. v. City of Westminster,* 848 P.2d 916, 924 (Colo. 1993) (noting that the trial court "is the finder of fact" in the Colorado Governmental Immunity context); maj. op. at ¶ 28 (relying on *Trinity*).[6] Thus, it is

[6] There is a split in the federal circuit courts with regard to whether federal qualified immunity is a question of law for the court. The majority of circuits have held that it is. *See Curley v. Klem,* 499 F.3d 199, 208-09 (3d Cir. 2007) (noting that the qualified immunity issue is a question of law for the court in the "First, Fourth, Seventh, and Eleventh Circuits" and that the Second and Eighth Circuits are moving in that direction). By contrast, the Tenth Circuit permits the court to submit the issue to the jury "in exceptional circumstances where historical facts are so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated the right at issue." *Gonzales v. Duran,* 590 F.3d 855, 859 (10th Cir. 2009) (internal

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irrelevant that the jury could have rationally concluded that the statements were false (although I would find that a jury could not have so concluded in this case). The issue is whether the statements were false as a matter of law – and they were not.[7]

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quotation omitted). Even under the Tenth Circuit's approach, this case is not one of "exceptional circumstances" requiring a jury verdict, as the relevant facts are rather straightforward.

[7] No deference should be paid to any portion of the jury's liability determination given that it was permitted to find liability on standards below those articulated in *New York Times.* For example, instruction 9 applies the preponderance of the evidence standard instead of the more exacting "clear and convincing" standard required by *New York Times.* 376 U.S. 254, 279-80. Further, the jury instructions allowed the jury to find liability where Air Wisconsin was "negligent," contrary to *New York Times,* and contained the stock recklessness standard (permitting a finding of liability when the actor "consciously disregards a substantial and unjustifiable risk"), rather than recklessness in the *New York Times* sense ("high degree of awareness of [the statement's] probable falsity"). *See Garrison v. State of Louisiana,* 379 U.S. 64, 74 (1964) ("only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions"). Finally, the instructions allowed the jury to reject Air Wisconsin's privilege defense if it found that the statements were "unnecessarily insulting," were "stronger or more violent than was necessary under the circumstances," or were made "because of hatred, ill will, or a desire to hurt the Plaintiff" – again, all inconsistent with *New York Times. See, e.g., Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 666-67 (1989) (*New York Times* malice should not be confused with malice in the sense of ill will). Affirming the verdict in this case, purportedly as a matter of law, is problematic not only because the jury was deciding something (the immunity issue) it

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¶74 It may be tempting to dismiss this case as an outlier. Indeed, the case before us appears to be the first reported case rejecting immunity in the ATSA's ten-year history. But a $1.4 million verdict is not easy to dismiss, nor is the majority's troubling rationale, which I fear may threaten to undermine the federal system for reporting flight risks. The majority recognizes that the entire point of immunity under the ATSA is to "encourage [private air] carriers to take action on issues of public importance, such as avoiding air piracy and other threats to national security, without fear of consequences." Maj. op. at ¶ 25. Unfortunately, the majority appears to forget this statement in analyzing whether immunity would apply in this instance. I therefore respectfully dissent from all but section II.A. and B. of its opinion.[8]

¶75 I am authorized to state that JUSTICE COATS and JUSTICE BOATRIGHT join in this concurrence in part and dissent in part.

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should not have decided, but also because it was deciding that issue under improper standards.

[8] Because I would find that the statements made by Air Wisconsin were substantially true, I would find that they could not have been made with actual knowledge of, or reckless disregard toward, falsity.

232 P.3d 230
Colorado Court of Appeals,
Div. IV.

William L. **HOEPER**, Plaintiff-Appellee
and Cross-Appellant,
v.
AIR WISCONSIN AIRLINES CORPORATION,
a Delaware corporation, Defendant-Appellant
and Cross-Appellee.

No. 08CA1358. | Nov. 12, 2009.

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Opinion

Opinion by Judge WEBB.

This case juxtaposes important air transportation safety procedures established by federal statute against remedies for defamation under state common law. Defendant, Air Wisconsin Airlines Corporation, appeals the judgment entered on a jury verdict in favor of plaintiff, William L. Hoeper, on his defamation claim, awarding $849,625 in compensatory damages and $391,875 in punitive damages.

Air Wisconsin primarily asserts that section 44941 of the Federal Aviation and Transportation Security Act (ATSA) provides immunity from liability for its employee's allegedly defamatory statements to the Transportation Security Administration (TSA) connoting that Hoeper was a threat to a departing aircraft because he was mentally unstable and possibly armed. Hoeper cross-appeals the trial court's refusal to award prejudgment interest. These issues are before us on a C.R.C.P. 54(b) order entered pending retrial of Hoeper's outrageous conduct claim, on which the jury failed to reach a verdict.

We conclude that the trial court properly submitted the ATSA immunity issue to the jury; the record supports the jury's rejection of immunity; the employee's statements to TSA were not protected opinions because they conveyed provably false negative connotations; reviewed de novo, the record includes clear and convincing evidence that the employee acted with actual malice; and Hoeper did not preserve his claims

for prejudgment interest under Virginia law. Therefore, we affirm and remand for further proceedings on his outrageous conduct claim.

I. Facts

Air Wisconsin is a commercial airline that provides regional service as United Express. When this action arose, Hoeper had been an Air Wisconsin captain since 1998 and the individual defendants, Mark Schuerman, Patrick Doyle, and Scott Orozco, who are not parties to this appeal, were Air Wisconsin employees.

In September, October, and November 2004, Hoeper failed three proficiency checks during his flight simulator training to fly a larger aircraft. In debriefings following two of those failures, verbal confrontations occurred between Hoeper and Doyle, Air Wisconsin's fleet manager, and between Hoeper and Todd Hanneman, an Air Wisconsin instructor pilot.

Although Air Wisconsin could have terminated Hoeper after the third proficiency check failure, he was given a fourth opportunity under a last chance agreement. In exchange, Hoeper waived certain rights under his collective bargaining agreement. Before Hoeper could attempt the final proficiency check, however, he needed additional training and the recommendation of an Air Wisconsin instructor pilot.

On December 8, 2004, Hoeper flew from Denver to Virginia for flight simulator training with Schuerman, another instructor pilot, in a simulator owned by another company. During that training, a dispute arose. Hoeper raised his voice, used profanity, and terminated the session. For an experienced pilot, such behavior was unusual. He also told Schuerman that he intended to contact the Air Line Pilots Association (ALPA) for legal advice.

About 11:00 a.m., CST, Schuerman called Doyle, who was at Air Wisconsin's headquarters in Wisconsin, to report that Hoeper "had blown up and was very angry at me," and that he was "uncomfortable" remaining at the simulator with Hoeper. Schuerman did not say that Hoeper was threatening or unstable, nor did Doyle ask if Schuerman felt threatened by Hoeper. Doyle testified that based on this information, he was very fearful of what Hoeper might do.

Doyle arranged for Air Wisconsin to book Hoeper on a United Air Lines (UAL) flight to Denver leaving from Dulles International Airport (Dulles) at 1:30 p.m. Then Doyle called Daniel Scharf, an Air Wisconsin employee who had been acting as Hoeper's first officer during the training, and asked him to drive Hoeper to Dulles. Doyle did not request Scharf to provide any information about what had occurred at the simulator, nor did Doyle tell Scharf that Hoeper might be dangerous. Doyle had no further contact with either Schuerman or Scharf that day, and he never spoke to Hoeper.

When Hoeper could not make the 1:30 flight, Air Wisconsin booked him on a later UAL flight. Doyle did not take any steps to induce UAL, for which Air Wisconsin performs passenger and baggage transfer services at Dulles and elsewhere in the country, to limit Hoeper's access to the aircraft. UAL could have done so independently of TSA had it been informed of a problem with Hoeper.

Before noon, Doyle approached Orozco, Air Wisconsin's Chief Pilot, who officed next to Doyle about Hoeper. Orozco told Doyle that he was leaving for a meeting. By approximately 1:30 p.m., Orozco had returned and taken a very brief telephone call from Hoeper and an ALPA attorney. Orozco confirmed that the training was over and Hoeper was to fly back to Denver, but made no other inquiries. Orozco never spoke to Schuerman or Scharf.

Shortly thereafter, Doyle and Orozco began discussing Hoeper. They were joined by Kevin LaWare, an Air Wisconsin vice president to whom Doyle reported, and later by Robert Frisch, the Assistant Chief Pilot, who reported to Orozco. The four talked about: Doyle's conversation with Schuerman; Hoeper's prior displays of anger in training sessions; Hoeper's expectation of being terminated based on the failed training and the last chance agreement; as a Federal Flight Deck Officer (FFDO), Hoeper could carry a weapon aboard a commercial aircraft[1]; at

[1] The FFDO program deputizes volunteer pilots of air carriers as federal law enforcement officers. Eligible flight

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Denver International Airport, he could have boarded without checking his weapon; whether any means existed to determine the whereabouts of his weapon; one other Air Wisconsin pilot had brought an FFDO weapon to simulator training in violation of FFDO procedures; and two incidents that had occurred before the FFDO program involving disgruntled employees of other airlines who had boarded aircraft with firearms and had caused incidents leading to deaths and injuries.

The meeting lasted 15-20 minutes and included unrelated operational issues. LaWare was not told that Orozco had just spoken to Hoeper. Orozco, Doyle, and LaWare testified that the group had concluded they could not determine whether Hoeper had his FFDO firearm with him. Orozco and LaWare also testified that they had no specific reason to believe Hoeper had brought his weapon with him in violation of FFDO procedures, although they could not preclude that possibility. Frisch testified that he did not remember discussing any specific reason why Hoeper would have brought his weapon with him.

According to Orozco, the whereabouts of Hoeper's weapon "was more of a question than a concern," and he would not have wanted Doyle to tell TSA that Hoeper "may be armed." LaWare did not anticipate that Doyle would use those words to TSA. None of the

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crewmembers are authorized by the TSA to use firearms to defend against an act of criminal violence or air piracy attempting to gain control of an aircraft. 49 U.S.C. § 44921.

four men knew of Hoeper having brought his weapon to the earlier trainings or otherwise having ever violated FFDO weapons procedures.

At the end of the meeting and without calling Schuerman for more information, LaWare decided that TSA should be contacted. He testified that he acted pursuant to that agency's Aircraft Operator Standard Security Program[2], and because TSA oversees the FFDO program.[3] Orozco recalled LaWare saying "we should at least ask TSA if they have any concerns," but LaWare did not instruct Doyle what, specifically, to say. Nor did Doyle indicate what he planned to say.

In a pretrial deposition, Schuerman testified that Hoeper did not pose a threat to anyone. At trial, LaWare agreed that this testimony was not as Doyle had articulated the situation. Orozco testified that Schuerman's description of Hoeper "wasn't the information conveyed to me [by Doyle]." Frisch recalled no reason having been presented why Hoeper would be a

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[2] This document is not in the record because it is considered classified and various witnesses refused to testify concerning its provisions.

[3] The parties presented conflicting expert testimony by former TSA employees on Air Wisconsin's duties under ATSA. Because we do not rely on this testimony, we decline to address the assertion of amicus United States that by testifying those former employees violated TSA regulations adopted pursuant to *United States ex rel. Touhy v. Ragen,* 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).

threat to the UAL flight, nor did he draw this conclusion.

Doyle called TSA shortly after 2:00 p.m., CST. The jury found that Doyle made the following statements during that call:

- [Hoeper] was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm.
- Unstable pilot in FFDO program was terminated today.

At trial, Doyle acknowledged that he lacked the ability to assess Hoeper's mental stability and denied having made such a statement to TSA "because I did not want to cause Mr. Hoeper undue harm." LaWare and Orozco testified that they did not consider Hoeper mentally unstable, although Orozco felt that Hoeper "was acting irrational" when he stopped the simulator training. Frisch did not have any information at the time that Hoeper's mental stability was in question. LaWare could not recall Doyle saying that he had concerns about Hoeper's mental stability, and testified that he would not have told TSA Hoeper was mentally unstable. Orozco testified that he did not intend for Doyle to tell TSA anything about Hoeper's mental stability.

As a result of Doyle's call, the aircraft carrying Hoeper was returned to the gate and armed officers removed him. He was detained and questioned by

TSA, which eventually released him, and he returned to Denver. The next day, Orozco told him that his Air Wisconsin employment was terminated.

On the evening of December 8, Doyle spoke with officials from various federal agencies about his call to TSA. The next day, he created notes of this call and of a confrontation with Hoeper that had allegedly occurred after simulator training on October 14. The notes of the October incident included the statement, "I ended the debriefing session for fear of my own physical harm." Later, Doyle changed those notes, which he described as a "working document," to add the phrase, " . . . harm, and the safety of others at the simulator."

Doyle admitted that he had not previously documented this incident, but testified that he had reported it to Orozco. Orozco recalled Doyle having said that he was not comfortable being in the same room with Hoeper after the training, although Orozco had never heard from Doyle or anyone else that Hoeper had left Doyle fearful for his safety or that of others. Orozco explained that any such fear should have been contemporaneously documented in Hoeper's records. Orozco added that he never considered Hoeper a threat to the safety of Air Wisconsin personnel before December 8.

Doyle also admitted that he took no action concerning the alleged confrontation with Hoeper, such as referring him to the company's employee assistance program, or to protect staff at the simulator. He

arranged for Hoeper to have additional simulator training in November with Air Wisconsin personnel. Hoeper acknowledged that, in a meeting with Doyle after the mid-October training, he had used profanity and Doyle told him to sit down, but denied any more to the alleged "confrontation" than this exchange.

In a 2006 arbitration between Hoeper and Air Wisconsin, Doyle testified that following the alleged October confrontation with Hoeper, he had driven him to the airport. Hoeper testified that after the training he, Doyle, and another Air Wisconsin employee involved in that training had dinner and drinks together. Doyle acknowledged that upon hearing Hoeper's testimony, he realized his own testimony about what happened after the training session ended had been inaccurate but did not correct his testimony.

II. Immunity under Section 44941 of the ATSA

A. Judge/Jury Function

Air Wisconsin first contends the trial court erred in submitting the question of its ATSA immunity for reporting a suspicious transaction to the jury rather than treating immunity as a threshold issue for the court. Because of the fact-dependent nature of the statutory criteria – "suspicious transaction" and "reckless disregard" – we conclude that the trial court correctly sent this question to the jury.

The parties agree that Virginia substantive law and Colorado procedural law apply. We begin by examining the ATSA. Statutory interpretation is an issue of law that we review de novo. *Stamp v. Vail Corp.,* 172 P.3d 437, 442 (Colo.2007). When the statutory language is unambiguous, we construe the plain meaning of the statute without resorting to other rules of statutory construction. *Id.* at 443.

The ATSA, enacted in response to the terrorist attacks of September 11, 2001, federalized aviation security and created the TSA.[4] As a matter of policy, we agree with amicus United States that "[a]ir transportation security depends in significant part on the ability of the [TSA] to obtain intelligence; TSA must be made aware of any and all potential threats in order to expeditiously take necessary protective actions. Air carriers are perhaps the most obvious source of useful threat information for TSA."[5]

ATSA provides qualified immunity:

> (a) In general. Any air carrier or foreign air carrier or any employee of an air carrier or

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[4] *See generally* Kent C. Kruse, *Putting the Transportation Security Administration in Historical Context,* 68 J. Air L. & Comm. 233 (Spring 2003).

[5] *See also* House Conference Report on the Aviation and Transportation Security Act, H.R. Conf. Rep. 107-296 (2001), U.S.Code Cong. & Admin.News 2002, p. 589 ("The conferees recognize that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense. . . .").

> foreign air carrier who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to . . . a threat to aircraft or passenger safety . . . to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure.
>
> (b) Application. Subsection (a) shall not apply to
>
> (1) any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading; or
>
> (2) any disclosure made with reckless disregard as to the truth or falsity of that disclosure.

49 U.S.C. § 44941. This language requires fact-finding at two levels: first, whether a suspicious transaction occurred; and, second, whether the air carrier exhibited reckless disregard in making the disclosure.

The parties have not cited any case, nor have we found one, reaching the merits of immunity under

section 44941.[6] The legislative history does not address whether immunity is for the judge or the jury. *See* H.R. Conf. Rep. No. 107-296 (2001), U.S.Code Cong. & Admin.News 2002, p. 589.

A court usually applies its own procedural rules even where, as here, the substantive law of another state (Virginia) governs the merits. Restatement (Second) of Conflict of Laws § 122; *see Apache Village, Inc. v. Coleman Co.,* 776 P.2d 1154, 1155 (Colo.App.1989). The right to a civil jury trial in Colorado is procedural. C.R.C.P. 38; *Setchell v. Dellacroce,* 169 Colo. 212, 215, 454 P.2d 804, 806 (1969). Hence, the allocation of decision-making between judge and jury is a procedural question to be governed by Colorado law, not the substantive law of Virginia.[7]

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[6] We discern no consensus among the federal courts whether qualified immunity in other contexts may be submitted to the jury or must be resolved by the judge. Even though qualified immunity is generally to be determined as early in litigation as possible, some circuits allow disputed issues of material fact to go to the jury. *Curley v. Klem,* 499 F.3d 199, 209 (3d Cir.2007) (identifying the circuit split; specifically that the First, Fourth, Seventh, and Eleventh Circuits reserve the question of immunity to the court (with the Second and Eighth Circuits evolving in this direction as well), while the Fifth, Sixth, Ninth, and Tenth Circuits permit immunity to go to the jury); *see also Keylon v. City of Albuquerque,* 535 F.3d 1210, 1217 (10th Cir.2008).

[7] Under general *Erie* principles, questions of judge/jury allocation not addressed in a specific federal rule of procedure are considered matters of procedure. *See* 19 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4511, at 322 (listing

(Continued on following page)

Colorado has approximately 30 statutes that confer qualified immunity in a variety of circumstances. But we have not found any reported case in which a court has taken from the jury an immunity question involving a disputed issue of material fact.

Because section 44941 provides qualified immunity that is forfeited by reporting with reckless disregard for the truth of the facts reported, we are guided by *Martin v. Weld County,* 43 Colo.App. 49, 598 P.2d 532 (1979), decided under the Colorado abuse reporting statute, section 19-3-309, C.R.S.2009. Persons who report child abuse are protected as long as the report is made in "good faith." Such decisions "necessarily involve [a defendant's] state of mind" and must be resolved from all evidence, cross-examination, and "determination of credibility made by the trier of facts." *Martin,* 43 Colo.App. at 53, 598 P.2d at 535.

We are not persuaded otherwise by Air Wisconsin's citation to cases decided under the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S.2009, and the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152.

The CGIA prohibits actions against government entities and their employees, subject to certain exceptions and statutory notice. Thus, these threshold questions are jurisdictional for the trial court's

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federal cases where the court has disregarded state law relating to size of juries, unanimity of jury verdicts, and jury instructions).

resolution under C.R.C.P. 12(b)(1), even if the facts are disputed. *City of Lakewood v. Brace,* 919 P.2d 231, 244 (Colo.1996); *see also Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916, 924-25 (Colo.1993) (trial court should have treated matter as a 12(b)(1) motion rather than a 12(b)(6) because, under 12(b)(1) "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case") (internal quotations omitted); *Fogg v. Macaluso,* 892 P.2d 271, 276 (Colo.1995) (reaffirming that immunity under CGIA is properly addressed under C.R.C.P. 12(b)(1) and that trial court is the fact finder in such cases).

However, where an action proceeds based on an exception, the CGIA provides government employees with qualified immunity from tort suits if their conduct was not "willful and wanton." *City of Lakewood v. Brace,* 919 P.2d at 246. That determination is for the jury. *Id.*

Thus, on the one hand, the ATSA is different from the CGIA because the ATSA does not prohibit actions, subject to exceptions that are jurisdictional. On the other hand, it is like the CGIA qualified immunity provision for government employees, under which the jury decides immunity where, as here, material factual disputes exist.

The HCQIA is distinguishable because it presumes immunity. In contrast, under the ATSA, a defendant air carrier or its employees must prove that they are within the protection of the statute.

The HCQIA has been extensively analyzed by several federal courts, which have relied on its legislative history in concluding that the immunity question is for the court. *See, e.g., Brown v. Presbyterian Healthcare Services,* 101 F.3d 1324, 1333 (10th Cir.1996). No similar analysis exists for the ATSA, perhaps because its legislative history is silent on judge/jury allocation.

Moreover, any error in submitting the immunity question to the jury was rendered harmless because the jury necessarily found actual malice in awarding presumed and punitive damages, which we conclude on de novo review in section IV(C) below is supported by clear and convincing evidence. As amicus United States observes, "[w]hile the jury made this finding [of actual malice] in the context of awarding punitive damages, such a finding – if supported by the evidence – precludes application of Aviation Security Act immunity because the statute does not apply to statements made 'with actual knowledge that the disclosure was false, inaccurate or misleading' or 'with reckless disregard as to the truth or falsity of that disclosure.'" *Cf. Government Micro Resources, Inc. v. Jackson,* 271 Va. 29, 624 S.E.2d 63, 70-71 (2006) (failure to instruct jury on qualified privilege was harmless error because actual malice, which jury necessarily found in awarding punitive damages, defeats privilege).

Accordingly, we conclude that because issues of material fact were in dispute, the question of Air

Wisconsin's immunity was properly submitted to the jury.

B. The Jury's Rejection of ATSA Immunity

Consistent with section 44941, the jury was instructed:

> If you find that Defendant AWAC made any of the following statements . . . you must then determine whether Defendant's affirmative defense pursuant to the Aviation and Transportation Security Act is applicable. Defendant is not legally responsible to Plaintiff for defamation based upon these statements if it proves that Defendant: (1) voluntarily; (2) disclosed information about a suspicious transaction; (3) that was reasonably related to a threat to aircraft and passenger safety; (4) to an employee or agent of the Department of Transportation or Federal law enforcement.
>
> However, this defense will not prevent Defendant from being legally responsible to Plaintiff on his defamation claim based upon these statements if Plaintiff proves that (1) Defendant made the disclosure with actual knowledge that the disclosure was false, inaccurate, or misleading; or (2) Defendant made the disclosure with reckless disregard as to its truth or falsity.

Air Wisconsin does not challenge the form of the instruction, but asserts that the evidence entitled it to immunity. We disagree.

Our review of a jury's verdict is highly deferential. *Palmer v. Diaz,* 214 P.3d 546, 550 (Colo.App.2009) ("In determining whether a jury verdict is supported by the evidence, we review the record in the light most favorable to the prevailing party, and every inference fairly deducible from the evidence is drawn in favor of the judgment. Appellate courts are bound by a jury's findings and may not disturb a jury verdict unless it is clearly erroneous.").

The reckless disregard language of section 44941(2) tracks the definition of "actual malice" required for defamation actions to pass constitutional muster. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 510-11, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Because in section IV(C) below we conclude that the evidence shows Doyle acted with reckless disregard, we necessarily also conclude that the record supports the jury's finding that Air Wisconsin failed to meet the immunity provision of the ATSA. And because reckless disregard defeats Air Wisconsin's immunity, we need not address whether Hoeper's behavior was a "suspicious transaction" under the ATSA.

III. Publication of the Second Statement

Air Wisconsin next contends Hoeper presented insufficient evidence that Doyle ever made the second

statement, "Unstable pilot in FFDO program was terminated today," which the jury found that he had made. We disagree.

The jury resolves disputed issues of fact, including the credibility of witnesses. *See, e.g., Clinger v. Hartshorn,* 89 P.3d 462, 466 (Colo.App.2003).

We conclude that the following substantial and competent evidence supports the verdict:

- Doyle's notes of the call to TSA, made the day afterwards, refer to "an FFDO who may be armed" and concern about "his mental stability at the time."
- TSA's contemporaneous documentation of the call carries the header, "Unstable pilot in FFDO program was terminated today." The text of this message includes, "[redacted] called to advise of an Air Wisconsin Pilot who was terminated today. . . . [redacted] has been displaying unstable tendencies." The next message in the string continues, "[redacted], who advised TCC that [redacted] bizarre behavior led to his termination on December 8, also reported. . . ."
- Although Doyle denied having described Hoeper as "unstable," he admitted to having spoken with TSA for about ten minutes.

IV. Defamation

Air Wisconsin next challenges the defamation verdict on two grounds: first, because Doyle's statements to the TSA were opinion and substantially true, they should not have been submitted to the jury; and, second, an independent review of the record does not support the jury's finding of actual malice. We conclude that the statements were not protected as opinion because they conveyed provably false factual connotations, and our independent review of the record identifies clear and convincing evidence of actual malice.

A. Law

The jury was instructed that to award either presumed or punitive damages, it had to find that Air Wisconsin acted with actual malice: knowledge of falsity or reckless disregard for truth. Neither party challenges these instructions.

The parties concede that we must review the punitive damages award de novo, applying the actual malice standard. However, Hoeper contends de novo review does not extend to compensatory damages. We are not persuaded.

Defamation law has been constitutionalized to protect the First Amendment guarantees of freedom of speech and the press. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Here, those constitutional protections apply

because Hoeper was awarded both punitive and presumed damages[8] and, as discussed below, Doyle's communications about a threat to airline safety were a matter of public concern.

"[W]hether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection" must be determined independently by the reviewing court. *Bose Corp.,* 466 U.S. at 511, 104 S.Ct. 1949. This standard of review requires an appellate court to determine whether "the evidence in the record . . . is sufficient to support a finding of actual malice." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 687, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). To prove actual malice, a plaintiff must show that the defendant published a false statement knowing it to be false or in reckless disregard of its falsity. *New York Times,* 376 U.S. at 280, 84 S.Ct. 710.

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[8] The jury was instructed: "If you return a verdict for the plaintiff, and you further find that plaintiff proved by clear and convincing evidence . . . that defendant made the alleged defamatory statement knowing that it was false or with reckless disregard for its truth or falsity, the plaintiff is entitled to recover compensatory damages without any proof of actual or pecuniary injury or the quantum of injury. The statement alleged in this case is understood to mean that the effect of the words is prejudicial to the plaintiff in his work. As a result, if you find that defendant made the alleged defamatory statement knowing that it was false or with reckless disregard for its truth or falsity, injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed."

1. Presumed and Punitive Damages

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court held that defamation plaintiffs awarded presumed or punitive damages must demonstrate that the publisher acted with actual malice. *Id.* at 349-50, 94 S.Ct. 2997; *see also Fleming v. Moore,* 221 Va. 884, 275 S.E.2d 632, 638 (1981) (applying *New York Times* actual malice standard of proof to award of punitive damages). In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759-60, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), the Supreme Court clarified that the First Amendment does not require actual malice or de novo review in purely private defamation cases, even those involving awards of presumed and punitive damages. But the Court went on to explain that it would strike a different balance between the First Amendment and the state interest in providing compensation for reputational injury where the speech dealt with matters of public concern: "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* at 759, 105 S.Ct. 2939 (internal references omitted).

Because in the next subsection we conclude that Doyle's statement raised a matter of public concern, we decline to address Hoeper's argument that Virginia law does not require de novo review of presumed compensatory damages in a purely private action. *Compare Gazette, Inc. v. Harris,* 229 Va. 1, 325 S.E.2d 713, 727 (1985) ("[A]n appellate court in Virginia

must conduct such independent examination of the whole record on the issue of punitive damages or where *New York Times* malice must be established, but not on the question of compensatory damages when *New York Times* malice need not be proven."), *with Great Coastal Express, Inc. v. Ellington,* 230 Va. 142, 334 S.E.2d 846, 852 (1985) ("[T]he question whether to apply the *Gertz* rule prohibiting presumed damages in the absence of *New York Times* malice depends not on the status of the defendant, but rather upon the nature of the defamatory words. . . . [W]e will not, as a matter of state law, apply to speech actionable per se, involving no matters of public concern, the *Gertz* rule inhibiting presumed compensatory damages.").

2. Matter of Public Concern

Awards of actual damages in defamation cases based on statements involving matters of public concern require actual malice and de novo review. *Gertz,* 418 U.S. at 349, 94 S.Ct. 2997; *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 15-16, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

"Whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context [of a given statement], as revealed by the whole record." *Dun & Bradstreet, Inc.,* 472 U.S. at 761, 105 S.Ct. 2939 (plurality opinion) (quoting *Connick v. Myers,* 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). Public concern "is

something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe,* 543 U.S. 77, 83-84, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004). It is a question of law. *Id.*

Public concern is interpreted broadly. *See, e.g., TMJ Implants, Inc. v. Aetna, Inc.,* 498 F.3d 1175, 1185-86 (10th Cir.2007) (health care provider's bulletins disparaging implant manufacturer's product a matter of public concern because "thousands of people . . . have a legitimate interest in the utility" of those devices); *Blue Ridge Bank v. Veribanc, Inc.,* 866 F.2d 681, 686 (4th Cir.1989) (company's inaccurate publication regarding bank's financial stability a matter of public concern because of "obvious importance of banks to the financial health of our communities").

Contrary to the parties' assertions, the record does not show that the trial court ruled on public concern. Nevertheless, we conclude that Doyle's statements suggesting a threat to airline passenger safety – especially because an FFDO may be "unstable" and carrying his federally-issued weapon – involve a matter of public concern. Such a threat directly impacts many people, indirectly affects air transportation overall, and may raise policy questions about the prudence of arming FFDOs.

B. Doyle's Statements Were Actionable

Air Wisconsin next contends Doyle's statements were protected opinions rather than facts, which should not have been submitted to the jury because they depended on Doyle's viewpoint and were only expressions of concern. It also contends that they were substantially true, at least in part. We reject both contentions in turn.

1. Opinion

Pure opinions are constitutionally protected. *Gertz,* 418 U.S. at 339-40, 94 S.Ct. 2997. Statements of opinion that "reasonably impl[y] false and defamatory facts" are not. *Milkovich,* 497 U.S. at 21, 110 S.Ct. 2695. And "[s]imply couching . . . statements in terms of opinion does not dispel these implications." *Id.* at 19, 110 S.Ct. 2695. Although *Milkovich* draws the constitutionally-required line between fact and opinion, states have developed their own jurisprudence in applying this distinction to particular facts.

Virginia courts consider two questions in determining whether a statement is fact or opinion: does it contain a provably false factual connotation, or is it "relative in nature," depending "largely on the speaker's viewpoint"? *Fuste v. Riverside Healthcare Ass'n,* 265 Va. 127, 575 S.E.2d 858, 861 (2003).

With respect to the first question, the following factors bear on whether a statement conveys a provably false factual connotation:

- Considering the statement as a whole, "opinions may be actionable where they 'imply an assertion' of objective fact." *Raytheon Technical Services Co. v. Hyland,* 273 Va. 292, 641 S.E.2d 84, 91 (2007) (quoting *Milkovich,* 497 U.S. at 18, 110 S.Ct. 2695) ("we do not isolate one portion of the statement at issue from another portion of that statement").
- The false connotation may be inferred from how listeners could have understood or would be expected to react to the statements. *WJLA-TV v. Levin,* 264 Va. 140, 564 S.E.2d 383, 393 (2002) (station "told its viewers to watch this broadcast to find out what the 'Dirty Doc' had done to his patients").
- The context of the statement informs the fact/opinion analysis. *Compare Milkovich,* 497 U.S. at 21, 110 S.Ct. 2695 (looking to "the general tenor of the article" may suggest the statement was "loose, figurative, hyperbolic language"), *with Fuste,* 575 S.E.2d at 862 (observing that "abandon" has a particular connotation in the context of a doctor's professional responsibility to patients).

The trial court must decide whether a statement conveys a provably false factual connotation before it may be submitted to the jury. *WJLA-TV,* 564 S.E.2d at 392. The threshold question is whether the statement is capable of being proven true or false. *Tronfeld v. Nationwide Mutual Insurance Co.,* 272 Va. 709, 636

S.E.2d 447, 451 (2006). Because determining whether a statement conveys a false factual connotation is an issue of law, we must review this aspect of Doyle's statements to TSA de novo. *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center,* 879 P.2d 6, 11 (Colo.1994).

We conclude that the statements were properly submitted to the jury because both conveyed the factual connotation that Hoeper was a threat to aircraft or passenger safety, which was provably false, and informing TSA that Hoeper posed such a threat because of his mental instability was not relative in nature.

TSA would have understood the statements as connoting that Hoeper was a threat to aircraft or passenger safety because Air Wisconsin, through Doyle, had no other reason to communicate with TSA about him, and TSA had no other use for the information than responding to a threat, as it did. *See* § 44941 ("any suspicious transaction relevant to . . . a threat to aircraft or passenger safety"); *Fuste,* 575 S.E.2d at 863 (concluding that doctors' and hospital officials' statements to patients and other medical personnel that plaintiff doctors had "abandoned" their patients were actionable in part because prospective patients would understand them to mean that plaintiffs had breached their professional responsibility to patients). Thus, the components of the first statement – Hoeper "may be armed" and concern existed "about his mental stability" – were germane to TSA only as they bore on its threat assessment.

The second statement conveys the same factual connotation that Hoeper is a threat, and for the same reasons. It references an "unstable pilot" who is "in [the] FFDO program." Because such a pilot can carry a firearm aboard an aircraft, it injects into TSA's threat assessment that, as in the first statement, Hoeper "may be armed." And by adding "terminated today," which was untrue, it includes an additional factor suggesting why TSA should consider him a threat.

The context in which Doyle made the statements also contributed to their being understood as provable fact. In *Fuste,* 575 S.E.2d at 861-62, the court concluded that statements conveyed provably false factual connotations because they carried particular factual weight when spoken by medical professionals about other professionals within the medical community. *Id.* As in *Fuste,* Doyle's call to TSA carried comparable factual weight because he spoke on behalf of an air carrier, about a pilot and FFDO, to the agency charged with ensuring airline security.

WJLA-TV is also instructive. There, the court found that by airing the story, which was based on its "under cover" investigation but minimized contradictory information, as a warning to viewers about a "Dirty Doc" who had sexually assaulted his patients, WJLA-TV had authoritatively presented the opinions of some patients as fact. *WJLA-TV,* 564 S.E.2d at 393. As in *WJLA-TV,* Doyle's statements to the TSA had weight because he was in a position to have reliable

information about Hoeper's alleged mental instability and employment status.

2. Provably False

The factual connotation that Hoeper posed a threat was capable of being proven true or false, *see Raytheon,* 641 S.E.2d at 91 (statement was fact because its "negative import" was "susceptible to empirical proof"), by considering it in the context of airline security. *See Fuste,* 575 S.E.2d at 862 ("since the term 'abandon' has a particular connotation in the context of a doctor's professional responsibility to a patient . . . the statement that Drs. Fuste and Vanden Hoek 'abandoned' their patients is demonstrably true or false"). Hoeper's alleged termination and mental instability were likewise provable as true or false. His employment status was determinable from company records and his stability was ascertainable from the people who had been in recent contact with him at the simulator, driving to the airport, and at ALPA. *See Tronfeld,* 636 S.E.2d at 447 (explaining that whether a lawyer rendered value to clients was determinable from settlements and judgments he had obtained).

Doyle's use of the word "concern" in characterizing Hoeper's mental stability does not require a contrary conclusion. As the court explained in *Fuste,* 575 S.E.2d at 862, "evidence could be presented to show whether there were, in fact, concerns about the plaintiffs' competence."

3. Relative in Nature

Air Wisconsin's attempt to avoid liability based on *Raytheon,* because the statements about Hoeper's mental instability allegedly were "relative in nature," is unpersuasive, both factually and legally.

In *Tronfeld,* 636 S.E.2d at 449, the court held statements that the plaintiff attorney "just takes people's money" and that his clients "would receive more money [for their claims] if they had not hired" him provably false rather than dependent on the defendant's viewpoint. The court distinguished *Chaves v. Johnson,* 230 Va. 112, 335 S.E.2d 97, 99 (1985), where it had first articulated the "relative in nature" test concerning a competitor's statement that the plaintiff architect was charging "more than what could be considered a reasonable fee." The *Chaves* court held the statement to be opinion because given its source, the "relative nature of such opinions is obvious to anyone who hears them," in that the import "depended largely on the speaker's viewpoint." *Id.* at 101. The court explained that "[a] corporal might seem inexperienced to a sergeant but not to a private." *Id.*

But the *Tronfeld* court declined to extend the reasoning in *Chaves,* explaining that the statements in *Tronfeld* were not "based solely on a speaker's viewpoint of what 'reasonable' would be." 636 S.E.2d at 451. The statements in *Tronfeld* were objectively measurable – whether the defendant "took people's money" without furthering their cases – whereas the

statement in *Chaves* was not objectively measurable because it depended on the "speaker's viewpoint," a competitor asserting it "can undersell others." *Id.*[9]

Doyle's statements to TSA identifying Hoeper as a threat to aircraft or passenger safety are not relative because unlike a competitor, as an industry participant Doyle would be expected to provide unbiased information to TSA. And unlike statements of a competitor, which "fall on prospective customers' ears like repetitive drumbeats," *id.,* TSA must investigate any threat reported by an air carrier. *See* ATSA §§ 44904-44905. As in *Tronfeld,* Doyle's assessment was provably false because he asserted specific, objective information about mental instability and termination rather than subjective information reflecting only his viewpoint.

In contrast, the *Raytheon* court concluded that three of five statements had been improperly submitted to the jury as actionable because they were opinions. *Raytheon,* 641 S.E.2d at 91-92. The court held that stating the plaintiff was so verbose as to stop

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[9] In support of this argument, Air Wisconsin also cites *Gibson v. Boy Scouts of America,* 163 Fed.Appx. 206, 212-3 (4th Cir.2006) (unpublished) (finding statement that plaintiff was "unfit" to be a Scoutmaster to be opinion because of no "discernable criteria against which to measure 'fitness' "). We decline to address this unpublished case because the Virginia courts have developed this line of authority. *See* 4th Cir. Local Rule 32.1 (citation of Unpublished Dispositions in 4th Cir. "disfavored," but opinion may have precedential value if no published opinion "would serve as well").

open participation in dialogue, referring to the plaintiff's "unwillingness to accept and work with this feedback," and describing the plaintiff as "inappropriately . . . critical" were matters of opinion because "the negative conduct, and whether and how often it occurred, is a matter of the speaker's perspective." *Id.* at 92. But here, on behalf of Air Wisconsin, Doyle conveyed that Hoeper was a threat because of mental instability. Thus, he removed comparable relativity by advising the agency of circumstances he knew would invoke its responsibility to investigate threats to aircraft and passenger safety.

Air Wisconsin cites generalized statements about mental instability in cases from jurisdictions other than Virginia. But they are not analogous to an airline employer reporting one of its employee's mental instability in the context of his threat to a departing passenger flight. Those cases, much like the statements in *Raytheon,* include only generalized characterizations of mental instability, devoid of any connotation that the speaker is urging or expecting action based on that characterization.[10]

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[10] *See Lifton v. Board of Educ.,* 416 F.3d 571, 578-79 (7th Cir.2005) (finding a school principal's "offhand" comments to the assistant principal and a parent about a teacher-that she was "lazy," a "burn out," "resting on her laurels," and "unstable"-to be opinion because they were "vague," "bare statements" that lacked any context, such as a purpose suggesting that the allegations were more specific, and therefore verifiable); *Haywood v. Lucent Technologies, Inc.,* 169 F.Supp.2d 890, 916 (N.D.Ill.2001) (although court found former employer's assertion

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Here, Doyle conveyed "unstable" in the literal sense because this information was inextricably intertwined with his overall connotation that Hoeper was a threat to a departing airline flight. Accordingly, we conclude that Doyle's statements to the TSA were actionable, because the factual connotation that Hoeper was a threat to aircraft and passenger safety was provably false.

4. Substantially True

Alternatively, Air Wisconsin contends portions of the statements were substantially true because as an FFDO officer, Hoeper was authorized to carry a gun, the whereabouts of his weapon was unknown to Doyle, and his termination was imminent. According to Air Wisconsin, those portions of the statements render the statements as a whole substantially true, and thus, not actionable. We disagree.

An alleged defamatory statement "must be provable as false before there can be liability under state defamation law." *Milkovich,* 497 U.S. at 19, 110 S.Ct. 2695 (citing *Philadelphia Newspapers Inc. v.*

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to company security that terminated employee was "unstable" "conceivably verify[able]," neither party had explained how it was verifiable); *Kryeski v. Schott Glass Technologies, Inc.,* 426 Pa.Super. 105, 626 A.2d 595, 601 (1993) (concluding that statement by fellow employee to friend of plaintiff employee that she was "crazy" was "not meant in the literal sense," did not cause the recipient to treat the plaintiff differently, and so was "no more than a vigorous epithet").

Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986)). The plaintiff in a defamation action must prove that the statement is false. *Williams v. Garraghty,* 249 Va. 224, 455 S.E.2d 209, 216 (1995). Once the trial court has determined that a statement can be proven true or false, proof of falsity is a question for the jury and our review is limited to whether sufficient evidence supports the jury's decision. *McIntyre v. Jones,* 194 P.3d 519, 528 (Colo.App.2008) ("[t]he answer to the question whether a statement is true . . . will not implicate constitutional protections").

"Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance." *Saleeby v. Free Press, Inc.,* 197 Va. 761, 91 S.E.2d 405, 407 (1956). And "[a] plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Jordan v. Kollman,* 269 Va. 569, 612 S.E.2d 203, 207 (2005).

Air Wisconsin has conceded that Hoeper was not terminated until the day after Doyle made the call. Given the context – a warning to TSA about a passenger who posed a threat because he was unstable – adding to the threat assessment that Hoeper was terminated "today" is not a harmless inaccuracy. Rather, it presents an additional fact purporting to explain to TSA why Hoeper was unstable, and thus, a threat.

We will assume that stating an FFDO may be armed is always potentially true. But the factual

connotation depends on looking at the statement as a whole. *Raytheon,* 641 S.E.2d at 91 ("we do not isolate one portion of the statement at issue from another portion of that statement"). As we have explained, taken as a whole, the statement connoted that this FFDO was so unstable as to threaten the safety of the aircraft he was boarding. Thus, partial truth does not defeat liability for the negative factual connotation.

Furthermore, *Raytheon* does not support Air Wisconsin's assertion that if portions of the two statements are substantially true, they should not have been submitted to the jury, and we must order a new trial. The *Raytheon* court reviewed five separate statements that were submitted to the jury, evaluating whether each statement, taken as a whole, was opinion or fact. After determining three statements to be opinion, the court reversed and remanded because, unlike here, the instructions did not require the jury to address each statement separately.

C. De Novo Review of Actual Malice

Air Wisconsin finally argues that the record does not include clear and convincing evidence sufficient to warrant a finding of actual malice. Because we conclude that Doyle had obvious reasons to doubt the accuracy of his statements that Hoeper was unstable, which along with the statement that he may be armed connoted a threat to an aircraft or passengers, we disagree.

Alone, falsity does not establish actual malice. *Harte-Hanks Communications, Inc.,* 491 U.S. at 681, 109 S.Ct. 2678. Instead, actual malice requires proof that the defendant "entertained serious doubts as to truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Although "mere proof of failure to investigate, without more, cannot establish reckless disregard [of] the truth," *Gertz,* 418 U.S. at 331, 94 S.Ct. 2997, a defendant's purposeful avoidance of the truth may be sufficient to demonstrate actual malice. *Harte-Hanks Communications, Inc.,* 491 U.S. at 692, 109 S.Ct. 2678.

Because alone, "[p]rofessions of good faith will be unlikely to prove persuasive," a court must probe a defendant's good faith when presented with evidence to the contrary. *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323. Such inquiry may also be necessary where a defendant publishes statements that are "highly improbable." *Harte-Hanks Communications, Inc.,* 491 U.S. at 691, 109 S.Ct. 2678.

"[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks Communications, Inc.,* 491 U.S. at 668, 109 S.Ct. 2678. Actual malice may be inferred "from objective circumstantial evidence, which can override a defendant's protestations of good faith." *Brown v. Petrolite Corp.,* 965 F.2d 38, 47 (5th Cir.1992); *see also Fiber Systems Int'l, Inc. v.*

Roehrs, 470 F.3d 1150, 1170 (5th Cir.2006); *Perk v. Reader's Digest Ass'n,* 931 F.2d 408, 411 (6th Cir.1991).

Such evidence may involve a "defendant's own actions or statements, the dubious nature of his sources, [or] the inherent improbability of the story or other circumstantial evidence." *Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F.2d 1287, 1293 (D.C.Cir.1988).

Circumstantial proof of a speaker's state of mind also includes credibility evidence. *See Celle v. Filipino Reporter Enterprises Inc.,* 209 F.3d 163, 190 (2d Cir.2000) ("[t]he finding of actual malice is bolstered by Pelayo's conflicting testimony"); *Dunn v. Air Line Pilots Ass'n,* 193 F.3d 1185, 1210 (11th Cir.1999) (Tjoflat, J., concurring in part and dissenting in part) (noting actual malice could be inferred from some ALPA officials' knowledge at odds with statements of other officials).

In constitutional defamation cases involving media publishers, reckless disregard turns on what the publisher knew or had reason to know at the moment of publication. Courts look at the publisher as a whole – sources, reporters, and editors – to weigh prepublication awareness that the statements were probably false.

Here, Doyle made the call to TSA. The other three Air Wisconsin employees involved in the pre-call decision provided limited information to Doyle, primarily details of the FFDO program. They disavowed any knowledge of what he would, or specific

direction about what he should, tell TSA. Hence, our reckless disregard analysis focuses on whether Doyle had obvious reasons to doubt the accuracy of his statements, and we conclude that he did.

As discussed in section IV(B) above, we have identified the provable negative connotation in both statements as Hoeper posed a threat to airline passenger safety. And whether Hoeper posed such a threat hinged on his alleged mental instability. We first consider whether Doyle had obvious reasons to doubt that Hoeper was mentally unstable.

Doyle agreed that when he called TSA, he was incapable of judging Hoeper's mental stability. He knew from reliable sources that: Hoeper had walked out of his last-chance simulator training after exchanging words with Schuerman, which made Schuerman uncomfortable; Hoeper had a similarly angry exchange in at least one previous training session; and Hoeper understood his termination was probable.

The other three Air Wisconsin employees with whom Doyle met just before he called TSA did not express their concerns about Hoeper's mental state, nor did any of them provide specific information from which Doyle could draw that conclusion. To the contrary, based on the discussion neither LaWare nor Orozco would have told TSA that Hoeper was unstable, and Frisch did not have any reason to question Hoeper's mental instability. Thus, we conclude that Hoeper presented clear and convincing evidence

Doyle entertained significant doubt as to the accuracy of his statement about Hoeper's mental instability.

We further conclude that Doyle had obvious reasons to doubt that Hoeper posed a threat to airline passenger safety. Doyle knew that while Hoeper's termination was likely, he had not yet been terminated. Doyle was informed during the meeting that Hoeper should not have had his firearm with him, per FFDO procedures, and he lacked information that Hoeper had ever violated any procedures required by his FFDO certification.

The connotation that Hoeper posed a threat to the UAL flight was also inherently improbable. Hoeper had been a commercial pilot for twenty years and an Air Wisconsin captain for almost a decade, most recently in a trainer position. The record contains no evidence that Hoeper had ever acted contrary to passenger safety.

Neither LaWare nor Orozco identified any information, other than Doyle's rendition of his telephone conversation with Schuerman, indicating that Hoeper posed a threat. Frisch recalled no reason having been presented why Hoeper would have been a threat to the UAL flight. Moreover, Hoeper's quarrel, if any, was with Air Wisconsin, not UAL, and the other Air Wisconsin employees from the training were not booked on the same flight as Hoeper.

Three aspects of Doyle's conduct on December 8 and thereafter assist us in resolving against him any

doubt as to clear and convincing evidence of actual malice.

First, Doyle's actions following Schuerman's 11 a.m. telephone call reporting the simulator incident were inconsistent with his then purported belief that Hoeper was a threat. After the phone call, Doyle: asked Scharf to drive Hoeper to the airport, but did not warn him to be cautious in dealing with Hoeper; caused Hoeper to be booked on the 1:30 UAL flight; saw Orozco at noon but agreed to postpone discussion about Hoeper until after Orozco returned at 1:30; never contacted UAL; and waited over three hours to contact TSA. *Cf. Liberty Lobby, Inc.,* 838 F.2d at 1293.

Second, the day after the TSA call, Doyle first documented another alleged training incident involving Hoeper. According to Doyle's notes, this incident had occurred on October 14, and he "fear[ed] for [his] own physical harm." At some point after December 9, Doyle added to his notes that based on Hoeper's conduct, he also feared for others' safety.

However, Doyle had not previously mentioned to anyone at Air Wisconsin that he had felt threatened by Hoeper or warned any Air Wisconsin personnel to be cautious in dealing with Hoeper. He had not taken any corrective action with Hoeper, but instead had arranged for Hoeper to have more simulator training with Air Wisconsin personnel. Doyle had not made any contemporaneous notes about this incident in Hoeper's record, although that would have been proper had he felt threatened. The credibility of

Doyle's documentation that he was in fear for himself and others is further undercut by the arbitration testimony of Hoeper that he, Doyle, and the Air Wisconsin instructor met for dinner and drinks that evening, which Doyle acknowledged was correct.

Evidence of Doyle's discussion of the ramifications of his call to TSA with various federal agencies before he began these notes strongly suggests that he attempted to bolster the grounds for the threat connotation of the TSA call by exaggerating the events of October 14.

Third, in Doyle's notes of the TSA call, also made the next day, he wrote:

> William Hoeper, a disgruntled company employee (an FFDO who may be armed) was traveling from IAD-DEN later that day, and we were concerned about the whereabouts of his firearm, and his mental stability at that time.

But in his trial testimony, Doyle denied having told TSA of concerns about Hoeper's "mental stability." This testimony was contradicted by TSA's records of the call, which refer to "unstable tendencies" and "unstable pilot." *See Celle,* 209 F.3d at 190 (finding of actual malice bolstered by reporter's conflicting testimony).

In sum, we agree with amicus United States that, "[o]nly in the highly unusual situation in which an air carrier has acted with knowing falsity or reckless disregard of the truth or falsity of its statements

does the air carrier need to fear being held liable for its statements to TSA. . . .” On the particular evidence presented, this is just such an unusual case.

Accordingly, on de novo review we conclude that clear and convincing evidence shows Doyle acted with actual malice in communicating to TSA.

V. Prejudgment Interest

On cross-appeal, Hoeper contends the trial court erred by denying his request for prejudgment interest. We disagree.

Hoeper moved for entry of judgment and requested prejudgment interest under Colorado law. Air Wisconsin opposed the motion, arguing that Virginia law applied to prejudgment interest. Citing *AE, Inc. v. Goodyear Tire & Rubber Co.,* 168 P.3d 507 (Colo.2007), which was decided before trial, the court found that Hoeper had waived prejudgment interest because he failed to tender jury instructions or verdict forms on recovering prejudgment interest, as required by Virginia law. In *AE, Inc.,* 168 P.3d at 511, the Colorado Supreme Court discerned “no convincing reason to engage in a different choice of law analysis to determine the law applicable to a claim for prejudgment interest,” and held that “the same law that governs the underlying cause of action in a tort case also governs the award of prejudgment interest.”

Section 8.01-382 of the Virginia Code “provides for the *discretionary* award of prejudgment interest

by the trier of fact, who 'may provide for' such interest and fix the time of its commencement." *Dairyland Ins. Co. v. Douthat,* 248 Va. 627, 449 S.E.2d 799, 801 (1994). Thus, in Virginia the decision whether to award prejudgment interest rests with the jury. *See Upper Occoquan Sewage Authority v. Blake Construction Co.,* 275 Va. 41, 655 S.E.2d 10, 23 (2008).

Here, we agree with the trial court that because Hoeper failed to request jury instructions or verdict forms on prejudgment interest, he waived this issue. *See Banks v. Mario Industries of Virginia, Inc.,* 274 Va. 438, 650 S.E.2d 687, 694 (2007) (applying waiver to a party's failure to request jury instructions and explaining "trial court was not required to instruct the jury, sua sponte, on the elements of damages Mario was entitled to recover in the absence of a request from Banks to do so")[11].

We reject Hoeper's argument, for which he cites no authority, that because his jury instructions – while silent on prejudgment interest – were consistent with Colorado law, Air Wisconsin was required to object on choice of law grounds. The pretrial ruling that Virginia law would apply to defamation dictated that Virginia law also governed prejudgment interest under *AE, Inc.* Thus, Air Wisconsin was not required

[11] We express no opinion whether to apply Colorado or Virginia law on waiver because we discern no difference between them. *See Farmland Mut. Ins. Cos. v. Chief Industries, Inc.,* 170 P.3d 832, 839 (Colo.App.2007) (failure to request jury instruction deemed waiver).

to object on this basis. *Cf. Tait v. Hartford Underwriters Ins. Co.,* 49 P.3d 337, 341 (Colo.App.2001) ("An appellate court will not disturb the trial court's ruling if the *complaining party* failed either to tender a desired jury instruction or to object to the instruction given.") (emphasis added).

We also reject Hoeper's argument that Air Wisconsin's email response to his proposed order for entry of judgment – "this looks right, but please give me until the end of the day to give you a formal response" – indicated Air Wisconsin's consent to apply Colorado law to prejudgment interest. The email used qualified and indefinite language, and made no specific reference to prejudgment interest. *Cf. Sumerel v. Goodyear Tire & Rubber Co.,* 232 P.3d 128, 130, 2009 WL 1477006 (Colo.App. No. 07CA2465, May 28, 2009) (use of qualifying language in email does not constitute an offer capable of acceptance).

Accordingly, we conclude that the trial court did not err by denying prejudgment interest.

The judgment is affirmed and the case is remanded for further proceedings on Hoeper's outrageous conduct claim.

Judge ROMÁN and Judge ROTHENBERG* concur.

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S.2009.

[SEAL] DENIED Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

/s/ Robert L. McGahey, Jr.
Robert L. McGahey, Jr.
District Court Judge
DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: WILLIAM L. HOEPER **Defendants:** AIR WISCONSIN AIRLINES CORPORATION, a Delaware Corporation; MARK SCHUERMAN, individually; PATRICK DOYLE, individually; SCOTT OROZCO, individually; and JOHN DOES 1-10, whose identities are unknown to Plaintiff at this time	**▲ COURT USE ONLY ▲**
	Case Number: 2005CV9967 Courtroom: 5
ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT	

The Court, having reviewed the Defendants' Motion for Partial Summary Judgment (Concerning Only Plaintiff's Training Claims and Claim for Intentional Infliction of Emotional Distress), and Plaintiff's Response thereto, hereby grants the Motion. The Court makes the following Findings of Fact, Conclusions of Law, and Orders:

I. The Training Claims

Findings of Fact:

Plaintiff, in his Third Amended Complaint, has included claims that generally assert that the training that he underwent while employed as a pilot at Air Wisconsin Airlines Corporation ("Air Wisconsin") was done in an outrageous fashion (these claims have been referred to in the litigation as the "Training Claims"), and that he has experienced severe emotional distress as a consequence of the actions of the defendants. In short, the claims arise from training the Plaintiff underwent in an effort to upgrade his qualifications to allow him to become a Captain for the BAe-146 airplane between September to December 2004.

The Court finds that the following facts are not in dispute:

1. Plaintiff was a member of the Air Line Pilots Association ("ALPA") when employed with Air Wisconsin as a pilot.

2. ALPA is a union which represents airline pilots.

3. ALPA had a collective bargaining agreement with Air Wisconsin that contained provisions on pilot training and grievances and arbitration.

4. Section 11 of the CBA governs the training and testing of Air Wisconsin pilots.

5. Plaintiff has admitted that Section 11 governs the training and testing of pilots.

6. Plaintiff invoked the grievance and arbitration provisions to challenge his discharge.

7. An arbitration hearing was conducted on April 25 and 26, 2006 (17 months after his discharge) before a panel of three persons: a company representative, a union representative, and a neutral arbitrator.

8. At the hearing, Plaintiff was represented by an attorney, Robert Plunkett.

9. At the hearing, witnesses were called on Plaintiff's behalf.

10. At the hearing, documentary evidence was presented on Plaintiff's behalf.

11. At the hearing, Plaintiff testified on his own behalf.

12. At the hearing, Plaintiff's attorney cross-examined the witnesses called by Air Wisconsin and made challenges to Air Wisconsin's documentary evidence.

13. One of the issues addressed at the arbitration was whether Air Wisconsin provided proper training during the timeframe of September to December 2004 when Plaintiff attempted to qualify to fly the BAe-146.

14. Plaintiff provided evidence in his attempt to establish that Air Wisconsin did not provide him fair and proper training.

15. After the hearing, the union filed a brief with the arbitration panel in support of Plaintiff's position.

16. On October 2, 2006, the arbitration panel denied Plaintiff's grievance.

17. Plaintiff has never attempted to reopen his grievance based on any new evidence.

18. Plaintiff had 17 months to prepare for his grievance hearing, was represented by counsel, and had a full and fair opportunity to establish his claims.

Conclusions of Law:

In this case, Plaintiff's claim that his BAe-146 training was "outrageous, reckless, and/or malicious" requires both interpretation and application of the CBA.

The RLA covers labor relations in the airline industry and establishes a mandatory arbitration process to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

45 U.S.C. § 153(i). Such disputes are known as "minor" disputes in RLA parlance. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 248 (1994). If a dispute is minor, "the RLA arbitration provisions are mandatory and preempt state court remedies." *Fell v. Continental Airlines, Inc.,* 990 F. Supp. 1265, 1268 (D. Colo. 1998).

An employment claim is minor, and thus preempted, if it requires interpretation or application of the collective bargaining agreement. *Fry v. Air Line Pilots Ass'n,* 88 F.3d 831, 836 (10th Cir. 1996). Such interpretation or application is required not only where the plaintiff's claim depends on a right explicitly found in the collective bargaining agreement, but also where it "implicates practices, procedures, implied authority, or codes of conduct that are part of the working relationship." *Id.*

Plaintiff's claim that his training was improper necessarily implicates the policies and procedures set forth in the CBA. Section 11 contains the following subsections: Initial, Upgrade, and Transition Training Qualification Events; Retraining Following a Failure; and Miscellaneous Provisions Concerning Qualification and Requalification Training.

In *Fell, supra,* the court observed that plaintiffs often attempt to escape RLA preemption by framing their claims in terms of state law theories such as intentional infliction of emotional distress. 990 F. Supp. at 1268 (citing cases). This Court will not allow

Plaintiff to assert claims that other courts have refused to sanction.

In *Fry,* the court held that the "plaintiffs' state law claims, based on the theory that United [Airlines] reneged on its responsibility to protect the plaintiffs, cannot be understood without reference to the various CBAs." 88 F.3d at 836. Specifically, the court found that:

> the alleged outrageous conduct is inextricably bound up with agreements and promises made to protect, and then actions allegedly forsaking, the plaintiffs. As the magistrate judge succinctly stated: "Only be [sic] comparing the protective system put into place by the various labor agreements between United and ALPA can the fact finder determine whether United breached its contract with the plaintiffs, whether United's representations were false, and whether United's conduct was outrageous."

Id. at 836-37 (citations omitted).

Similarly, in *Fell,* the plaintiff brought claims for unfair labor practices, breach of contract, and intentional infliction of emotional distress based upon his termination for failure to pay agency fees to the union. 990 F. Supp. at 1266. The court held that these claims were preempted by the RLA because:

> the alleged intentional infliction of emotional distress is "inextricably bound up" with the agreements and promises made by CAL and then allegedly breached. As in *Fry,* only by

> comparing the protective system promised by [CAL] with its behavior, could a fact finder determine whether CAL breached its contract with Fell and whether CAL's behavior was outrageous or willful and wanton. . . . The same rationale applies to Fell's claim under the Colorado Unfair Labor Practices Act.

990 F. Supp. at 1268 (bracketing in original; internal citation omitted).

In *Calvert v. Trans World Airlines, Inc.,* 959 F.2d 698, 700 (8th Cir. 1992), the plaintiffs claimed that TWA required plaintiff William Calvert to submit to medical testing "solely as a means of harassment and intimidation." The court held that plaintiffs' claims were preempted by the RLA, stating that:

> section 16 of the collective bargaining agreement specifically addresses TWA's ability to require its pilots to undergo medical testing, and TWA denies any wrongful purpose in enforcing its rights against William Calvert under this section. Based on the summary judgment record, TWA's position is not frivolous and TWA's actions were at least arguably justified by section 16 of the collective bargaining agreement. . . . Thus, contrary to the Calverts' contention, the Calverts' claims arise out of William Calvert's working conditions and implicate the collective bargaining agreement.

Id. (internal citations omitted).

This Court is persuaded that Plaintiff's claims in this case are no different from those asserted by the plaintiffs in *Fry, Fell,* and *Calvert.* Section 11 of the CBA specifically addresses Air Wisconsin's pilot training policies and procedures. Thus, the CBA provides the very framework in which this Court must examine Plaintiff's training claims; the rights and obligations of Plaintiff and Defendants are defined by Section 11. Consequently, Plaintiff's training claims are "inextricably bound up" in the CBA, and are preempted by the RLA.

This Court finds that because Plaintiff's training claims are preempted by the RLA, the Court should grant Defendants' motion for partial summary judgment and dismiss his "training claims" as a matter of law.

II. The Intentional Infliction of Emotional Distress Claim

Findings of Fact:

The Court has reviewed the materials referenced regarding Plaintiff's claim of emotional distress. Specifically, Plaintiff's evidence regarding the emotional distress that he claims includes: mental suffering, mental anguish, and mental and nervous shock; grief and depression; shame, humiliation, embarrassment, and chagrin; anxiety, worry, and nervousness; and disappointment and frustration.

Plaintiff admits that he has not sought medical or professional assistance for his alleged symptoms.

Defendants have presented unrebutted expert testimony on the issue of Mr. Hoeper's emotional state. Specifically, Dr. Laura Klein, a psychiatrist, has issued a report in which she concludes:

> Although Mr. Hoeper claims to feel depressed and anxious as a result of the events on and surrounding December 8, 2004, the psychological testing indicates that neither of these disorders are present. This is confirmed by his appearance in the clinical interview and by his own self-report of DSM IV criteria. Mr. Hoeper does not appear depressed and his affect was changing and even brightened at times during the evaluation. Statements that he made, including "I love life" and "If life gives you lemons, you make lemonade" are comments you rarely hear from a depressed individual. He also does not meet either of the two essential criteria in DSM-IV TR for Major Depressive Order. He does not have a depressed mood more days than not by his own report and he is able to experience interest and pleasure through activities around the home including gardening, puttering in the garage, and working with his power tools. Although he does report a loss of energy, he says that it is a result of his intermittent insomnia. Although he has expressed some anxiety about his financial situation, this falls within the anticipated reaction of someone who has had a

> demotion in their employment status. Similarly insomnia is not an uncommon reaction to such a change in employment. The fact that Mr. Hoeper has not sought to treat these symptoms either with professional help or over-the-counter medications would indicate that the symptoms are not disabling. In fact, Mr. Hoeper has been able to work as a pilot at a small company which hauls cargo since April of 2006.

Conclusions of Law:

This Court has previously ruled that Virginia substantive law will apply to this case.

In Virginia, liability for intentional infliction of emotional distress "arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Hatfill v. New York Times Co.,* 416 F.3d 320, 336 (4th Cir. 2005) (quoting *Russo v. White,* 400 S.E.2d 160, 162 (Va. 1991)).

Virginia law holds that allegations that a plaintiff has experienced mental distress, depression, humiliation, nervousness, disappointment, nausea, loss of appetite, and inability to sleep are insufficient to establish severe emotional distress. *See, Denny v. Elizabeth Arden Salons, Inc.,* 456 F.3d 427, 436 (4th Cir. 2006) (holding that plaintiffs failed to present sufficient evidence of emotional distress when they alleged that defendant's conduct made them nervous, caused them stress, and resulted in an inability to eat

or sleep); *Harris v. Kreutzer,* 624 S.E.2d 24, 34 (Va. 2006) (holding that plaintiff failed to allege injuries that "no reasonable person could be expected to endure" where symptoms of plaintiff's distress included nightmares, difficulty sleeping, extreme loss of self-esteem and depression, and where plaintiff sought psychological treatment and counseling); *Russo,* 400 S.E.2d at 163 (holding that plaintiff failed to allege severe emotional distress where she claimed she was nervous, could not sleep, experienced stress "and its physical symptoms," withdrew from activities, and was unable to concentrate at work).

Plaintiff's alleged symptoms in this case are no different from those asserted by the plaintiffs in *Denny, Harris,* or *Russo.* Consequently, they are insufficient as a matter of law. The *Denny* court offered an explanation for its holding:

> It is not to minimize these effects to say they fall short under Virginia law. . . . If the distress plaintiffs allege was sufficient to be actionable, courts could become arbiters of every human interaction that culminated in embarrassment, disappointment, or hurt feelings. Virginia law has refused to countenance this possibility.

456 F.3d at 436.

The Court concludes that Virginia law does not provide a remedy for Plaintiff's alleged symptoms of emotional distress. Plaintiff has failed to establish

that his distress was "so severe that no reasonable person could be expected to endure it."

ORDERS:

The Court ORDERS that Plaintiff's "training claims" are dismissed as a matter of law. The Court ORDERS that Plaintiff's intentional infliction of emotional distress claims are dismissed as a matter of law.

Hon. Robert McGahey
District Court Judge

This document constitutes a ruling of the court and should be treated as such.	
Court:	CO Denver County District Court 2nd JD
Judge:	Robert Lewis McGahey
File & Serve Transaction ID:	17018832
Current Date:	Jan 08, 2008
Case Number:	2005CV9967
Case Name:	HOEPER, WILLIAM L vs. AIR WISCONSIN AIRLINES CORP et al
/s/ Judge Robert Lewis McGahey	

DISTRICT COURT, DENVER COUNTY COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Plaintiff: WILLIAM L. HOEPER Defendants: AIR WISCONSIN AIRLINES CORPORATION, a Delaware corporation; MARK SCHUERMAN, individually; PATRICK DOYLE, individually; SCOTT OROZCO, individually, and JOHN DOES 1-10 whose identities are unknown to Plaintiff at this time	^ COURT USE ONLY ^ Case No. 05CV9967 Div. 5 Ctrm.:

TRANSCRIPT OF PROCEEDINGS
TRIAL TO JURY
February 18, 2008

The following proceedings were had before THE HONORABLE ROBERT L. McGAHEY, JR., Courtroom 5, Denver District Court, 1437 Bannock Street, Denver, Colorado on the 18th day of February, 2008, at the hour of 1:35 p.m., before Bonnie Carpenter, a Notary Public and Certified Shorthand Reporter in and for the State of Colorado and a Registered Professional Reporter.

* * *

[2488] THE COURT: If – I'm going to deny the – the motion for directed verdict on the basis of immunity, but I do think, based on this discussion, that I'm likely to instruct the jury with regard to the statute and let them decide whether there was a – you know, whether there – whether there's a defense available there.

MR. McGATH: Right.

[2489] THE COURT: When the legislature doesn't give us any – when the legislating authority – that's U.S. Code, not CFR. So it's – so it's an actual statute. It's not – it's not an administrative action.

MR. McGATH: That's correct.

THE COURT: Either way, there's no – unless they give us some definition to apply, then I think it becomes factual. And, certainly, when they use words – when they use words like "reckless disregard," that's rarely an issue of law.

MR. McGATH: Right.

THE COURT: Whether somebody has been reckless. So I'm going to deny on – deny the – deny the – the dismissal of the – of the defamation claims on immunity.

* * *

RID:D0162005CV009967-000272

Print Minute Orders
10/07/08 11:17 AM
Status: ROPN District Court, Denver County
Case #: 2005 CV 009967 Div/Room: 5
Type: Personal Injury
HOEPER, WILLIAM L VS
AIR WISCONSIN AIRLINES CORP et al

FILE DATE	EVENT/FILING/PROCEEDING
2/18/2008	**Minute Order (print)**

EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Feb 18 2008 6:00PM MST
Filing ID: 18753340
Review Clerk: Jon M Libid

JUDGE: RLM CLERK: REPORTER:
JUDGE ROBERT L. MCGAHEY JR. RPTR: B. CARPENTER (RETAINED) *JTRL CONT
ATTYS SCOTT MCGATH AND JASON REITZ APPEAR FOR AND W/PLTF, ATTYS ALAN AVERY AND DONALD MARK APPEAR W/REPS OF DEFTS.
JURY IS NOT PRESENT; HRG HELD ON DEFT'S MOTNS FOR DIRECTED VERDICT.
ORD: (1) MOTN FOR DV ON PLTF'S TRAINING, INVESTIGATION, INACTION CLAIMS IS DENIED; (2) MOTN FOR DJ [sic] RE COLLATERAL ESTOPPEL IS DENIED; (3) MOTN FOR DV BY DEFT SCHUERMAN IS GRANTED AS TO PLTF'S DEFAMATION CLAIM AND FALSE IMPRISONMENT, DENIED AS TO EMOTIONAL DISTRESS CLAIM; (4) MOTN FOR DV BY DEFT DOYLE AS TO ISSUES OF IMMUNITY UNDER STATUTE IS

DENIED; RE ARGUMENTS OF QUALIFIED PRIVILEGE IS DENIED; RE TO "TRAINING FAILURE" COMMENT IS GRANTED; RE FALSE IMPRISONMENT IS DENIED; RE EMOTIONAN [sic] DISTRESS AND PUNITIVES IS DENIED; (5) MOTN RE AWAC MOTN FOR DV IS DENIED. ORD: JURY CAUTIONED AND RELEASED – TO RETURN ON 02/19/08 AT 8:30 AM
/JLB/JLB/JLB
/JLB /JLB

DISTRICT COURT, DENVER COUNTY COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Plaintiff: WILLIAM L. HOEPER Defendants: AIR WISCONSIN AIRLINES CORPORATION, a Delaware corporation; MARK SCHUERMAN, individually; PATRICK DOYLE, individually; SCOTT OROZCO, individually, and JOHN DOES 1-10 whose identities are unknown to Plaintiff at this time	^ COURT USE ONLY ^ Case No. 05CV9967 Div. 5 Ctrm.:

TRANSCRIPT OF PROCEEDINGS
TRIAL TO JURY
February 25, 2008

The following proceedings were had before THE HONORABLE ROBERT L. McGAHEY, JR., Courtroom 5, Denver District Court, 1437 Bannock Street, Denver, Colorado on the 25th day of February, 2008, at the hour of 12:10 p.m., before Bonnie Carpenter, a Notary Public and Certified Shorthand Reporter in and for the State of Colorado and a Registered Professional Reporter.

* * *

[3624] as the Court knows, I objected to the giving of the instruction for different reasons and the verdict form.

THE COURT: So that the record is clear, because I'm not sure we did it on the record, I did determine as a matter of law that the – that some of the statements by – that were allegedly defamatory were not defamatory, particularly the statement about a disgruntled employee.

I found, based on my review of Virginia's definitions, that that was strictly opinion and not a question proveable by fact and, therefore, not actionable. The others, some of which are mixed questions of law and fact, I believe do meet the test to go to the jury.

But the Raytheon case, which we all keep coming back to, certainly required that the jury be able to identify what – which of several or any statements were allegedly defamatory. It did not, however, speak to the issue of separate damages for each one. My reading of Raytheon was that there was a collective verdict in that case, and the only reason that a new trial was granted was not the amount of the verdict or the singularity of the amount, but that the jury – the appellate court couldn't tell which statement or statements were deemed defamatory.

* * *

Denver District Court Denver County, Colorado 1437 Bannock Street Denver, Colorado 80202	
Plaintiff(s): **WILLIAM L. HOEPER** **v.** **Defendant(s): AIR WISCONSIN AIRLINES CORPORATION, a Delaware Corporation**	**Case No.: 05CV9967** **Ctrm: 5**
ORDER RE: JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY A NEW TRIAL	

THIS MATTER comes before me upon consideration of Defendant AWAC's *Motion for JNOV or, Alternatively, For New Trial.* I have reviewed the Motion, the response, the reply, the entire court file, and have considered applicable statute and case law. I make the following findings of fact, conclusions of law, and enter the following **ORDER**:

The Defendant claims the Court erred by submitting statements to the jury that the Defendant claims were opinion statements and were not the same statements that were pled in the Complaint. The Defendant also claims the Court must conduct an independent review of the record in which I will find there was no "actual malice" on the Defendant's behalf. Finally, the Defendant claims the Court erred by not instructing the jury that the Plaintiff's earlier

testimony was binding on him as required by Virginia Model Jury Instruction 2.060.

C.R.C.P. 59(e) allows the Court to enter a judgment notwithstanding the verdict if there is an insufficiency of evidence as a matter of law; or no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 59(e)(1) and (2). C.R.C.P. 59(d)(6) allows the Court to order a new trial based upon an error in law. The Defendant requests either form of relief in the alternative.

The burden in overcoming a jury verdict is substantial. When evaluating a motion for judgment notwithstanding the verdict the Court must view the evidence in light most favorable to the prevailing party, indulging every reasonable inference that could be drawn from the evidence in his favor. *Castillo v. Chief Alternative, LLC,* 140 P.3d 234 (Colo. App. 2006).

I ruled that the Virginia substantive law was the proper law of the case but Colorado procedural rules would apply. On May 13, 2008 I affirmed my ruling that Virginia law would be the law of the case. (*See* Order Re: Motion for Application of Wisconsin Law Based on Authorities Not Previously Cited). Colorado procedural laws are proper since Colorado was the chosen forum for this case. *Apache Village, Inc. v. Coleman Company,* 776 P.2d 1154, 1155 (Colo. App. 1989) (*citing Restatement (Second) of Conflict of Laws § 122* comment a (1971)). The Defendant argues that

the Plaintiff did not properly plead his defamation claim – I must use Colorado procedural rules in making this determination. The Defendant's argument that the Plaintiff must "give the exact words" of the defamatory statements is incorrect – Colorado law requires only that a plaintiff plead his defamation claim with a "certain degree of specificity." *Corporon v. Safeway Stores, Inc.,* 708 P.2d 1385, 1390 (Colo. App. 1985). The Defendant's argument that the defamatory statements were not pled in any of the four Complaints is also incorrect. The Plaintiff's Complaint, and subsequent amendments to the Complaint satisfied Colorado law in regards to pleading a defamation claim. Whenever a claim in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment *relates back* to the date of the original pleading. C.R.C.P. 15(c).

The Defendant urges the Court to find there was not actual malice – Defendant put forth this argument twice before and the Court denied them. Having now presided over an entire trial in this case, I find no reason to vacate those previous rulings. Pursuant to Virginia law the Plaintiff had show "actual malice" in order to recover punitive damages, but this same standard does not apply for compensatory damages. A plaintiff must show by clear and convincing evidence that the defendant realized his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. *Jackson v. Hartig,* 645 S.E.2d 303 (Va. 2007). The Plaintiff satisfied his burden at trial.

The Defendant urges the Court to grant a new trial based on its previous ruling which disallowed the use of Virginia Model Jury Instruction No. 2.0600 – the facts of the case and applicable case law did not allow the Court to do so then, nor do they after the fact. The instruction is followed by "THIS INSTRUCTIO [sic] SHOULD RARELY BE GIVEN. SEE *ALERTS*" for a reason.

It should be pointed out that the Defendant filed a Motion consisting of 24 pages, the Plaintiff filed a response consisting of 16 pages, which was followed by the Defendant's reply of 25 pages. Counsel should remember the wise words of C.R.C.P. 121 §1-15, "Motions or briefs in excess of 10 pages in length, exclusive of tables and appendices, are *discouraged*." (Emphasis added). Nonetheless, I have considered *all* of the submitted materials.

Defendant's Motion for Judgment Notwithstanding the Verdict, or Alternatively a New Trial is **DENIED**.

Done this 16th day of May, 2008.

BY THE COURT:

/s/ Robert L. McGahey, Jr.
Robert L. McGahey, Jr.
District Judge

Cc: Counsel (by e-filing)

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: WILLIAM L. HOEPER **Defendants:** AIR WISCONSIN AIRLINES CORPORATION, a Delaware Corporation	
	Case Number: 2005CV9967 Courtroom: 5
SPECIAL VERDICT FORM – DEFAMATION CLAIM AGAINST DEFENDANT	

YOU ARE TO SIGN EITHER PART A. OR PART B. BELOW OF THIS VERDICT, .BUT NOT BOTH.

Part A.

We, the jury, having found that Defendant Air Wisconsin Airlines Corporation abused the privilege, as defined in instruction 10, find for the Plaintiff on his claim of defamation. We find that Air Wisconsin Airlines Corporation made a defamatory statement or statements regarding Plaintiff. The statement or statements contained in instruction 9 that are defamatory are: (Note: you must identify the statements you find as being defamatory by checking the block or blocks that correspond to the statement or statements below):

☑ (a) Plaintiff was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm.

☑ (b) Unstable pilot in FFDO program was terminated today.

☐ (c) Plaintiff has just failed his fourth proficiency check since October to become a Captain.

☐ (d) Plaintiffs bizarre behavior led to his termination.

We award $849,625 in compensatory damages against Defendant Air Wisconsin Airlines Corporation.

We, the jury, having found that plaintiff William Hoeper is entitled to recover compensatory damages on his defamation claims against Defendant AWAC and having further found that AWAC made one or more defamatory statements knowing that they were false, or so recklessly as to amount to a willful disregard for the truth award $391,875 in punitive damages against the Defendant, AWAC.

Signatures of all jurors:

/s/ Stephanie Nelson /s/ Steven D. Traylor
Foreperson

/s/ Jennifer Qualteri /s/ Robyn Middlebrooks

/s/ Joyce Marshall /s/ Andriise Gerstner

/s/ Douglas E. Otto /s/ Jessica Pfeiffer

Part B.

We, the jury, find for Defendant Air Wisconsin Airlines Corporation and against the Plaintiff, William Hoeper, on his defamation claim.

Signatures of all jurors:

_____ _____
Foreperson

_____ _____

_____ _____

_____ _____

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: WILLIAM L. HOEPER **Defendants:** AIR WISCONSIN AIRLINES CORPORATION, a Delaware Corporation	

	Case Number: 2005CV9967 Courtroom: 5
SPECIAL VERDICT FORM – FALSE IMPRISONMENT CLAIM	

YOU ARE TO SIGN EITHER PART A. OR PART B. BELOW OF THIS VERDICT, BUT NOT BOTH.

Part A.

We, the jury, find for the Plaintiff, William Hoeper, on his false imprisonment claim and award $ _____ in compensatory damages.

We, the jury, having found that Plaintiff, William Hoeper, is entitled to be compensated for his false imprisonment claim further finding that Defendant Air Wisconsin Airlines Corporation acted with actual malice toward the Plaintiff award $ _____ in punitive damages against AWAC.

Signatures of all jurors:

_____ _____
Foreperson

_____ _____

_____ _____

_____ _____

Part B.

We, the jury, find for the Defendants, and against the Plaintiff, William Hoeper on Plaintiff's false imprisonment claim.

Signatures of all jurors:

/s/ Stephanie Nelson /s/ Steven D. Traylor
Foreperson

/s/ Jennifer Qualteri /s/ Robyn Middlebrooks

/s/ Joyce Marshall /s/ Andriise Gerstner

/s/ Douglas E. Otto /s/ Jessica Pfeiffer

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: WILLIAM L. HOEPER **Defendants:** AIR WISCONSIN AIRLINES CORPORATION, a Delaware Corporation	

	Case Number: 2005CV9967 Courtroom: 5

SPECIAL VERDICT FORM – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

YOU ARE TO SIGN EITHER PART A. OR PART B. BELOW OF THIS VERDICT, BUT NOT BOTH.

Part A.

We, the jury, find for the plaintiff, William Hoeper, on his intentional infliction of emotional distress claim and award $ _____ in compensatory damages against Defendant AWAC.

We, the jury, find that the Plaintiff, William Hoeper, is entitled to be compensated for his damages on his intentional infliction of emotional distress claim, and further find that AWAC acted with actual malice toward Plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights and award $ _____ in punitive damages.

Signatures of all jurors:

_____ _____

Foreperson

_____ _____

_____ _____

_____ _____

Part B.

We, the jury, find for the Defendants, and against the Plaintiff, William Hoeper, on Plaintiff's claim for intentional infliction of emotional distress.

Signatures of all jurors:

_____ _____
Foreperson

_____ _____

_____ _____

_____ _____

Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Certiorari to the Court of Appeals, 2008CA1358 District Court, City and County of Denver, 2005CV9967	
Petitioner: Air Wisconsin Airlines Corporation, a Delaware corporation, **v.** **Respondent:** William L. Hoeper.	
	Supreme Court Case No: 2009SC1050
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 23, 2012.
JUSTICE COATS, JUSTICE EID and
JUSTICE BOATRIGHT would grant the Petition

Case Number: 2009SC1050

Caption: Air Wisconsin Airlines v Hoeper, William

[Certificate Of Service Omitted In Printing]

[SEAL]

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar Chairman	John L. Mica Ranking Republican Member
David Heymefeld, Chief of Staff Ward W. McCarragher, Chief Counsel	James W. Coon II, Republican Chief of Staff

December 5, 2008

Mr. Roger Cohen, President
Regional Airline Association
2025 M Street NW, Suite 800
Washington, D.C. 20036

Dear Mr. Cohen:

It is my understanding that the Regional Airline Association will be filing an amicus brief in the appeal of *Hoeper vs. Air Wisconsin*. I am writing you as one of the principal authors of the Aviation and Transportation Security Act (ATSA) which created the Transportation Security Administration (TSA.) In the aftermath of the tragic events on 9/11, we understood that the swift flow of threat information to the Government was of critical importance. Information sharing by those on the front lines of the aviation industry was recognized to be of great value in protecting against another attack. In many cases those making suspicious incident reports are regulated entities, such as your airline members and airports,

who are our partners in securing the aviation domain.

TSA's efforts to obtain immediate reports of suspicious and possibly threatening activity in order to effectively assess whether the threat is real or not makes absolute sense in terms of ensuring aviation security. In fact, ATSA contains two provisions providing immunity to regulated entities that make reports of suspicious transactions and to individuals that take action to thwart criminal violence or air piracy (Sec. 125 and Sec. 144, respectively). Our intent was to encourage self reporting of suspicious transactions by airlines and their employees as long as the disclosure was not known to be false, inaccurate, misleading or made in reckless disregard of the truth or falsity of the disclosure. Likewise, we wanted to encourage individuals to attempt to thwart acts of criminal violence and air piracy if the person reasonably believed that such an act was occurring or about to occur.

It is my belief that the verdict in the case entitled, *Hoeper v. Air Wisconsin*, which was tried earlier this year in Colorado, may put into question the application of the legal immunities provided in ATSA. As I understand it, Air Wisconsin made a suspicious incident report to the TSA about one of its pilots who was also an armed Federal Flight Deck Officer (FFDO). The suspicious incident report was subsequently obtained under the Freedom of Information Act (FOIA). In *Hoeper*, the jury found that the pilot was defamed by Air Wisconsin's communication to

TSA. The jury awarded nearly $1.4 million to the plaintiff.

I am concerned that this verdict could interfere with TSA's ability to obtain immediate reports of suspicious incidents and cost precious time needed to investigate and respond to potential terrorist acts. The RAA's efforts regarding the *Hoeper* case are very important to help prevent the undercutting of ATSA's immunity provisions.

It seems to me that the TSA and aviation stakeholders, such as RAA's members, have a real stake in this matter. Imagine if TSA had to wait while regulated parties asked their attorneys to review suspicious incident reports before submitting them to the TSA. Such a delay in reporting could make the difference between life and death for the traveling public.

Thank you for your efforts to address and advance aviation security.

Sincerely,

/s/ John L. Mica
John L. Mica
Ranking Republican Member