IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 96-4430

LUFTHANSA GERMAN AIRLINES,

Appellant,

vs.

LEONARD KRYS and REBECA KRYS,
his wife,

Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA, WEST PALM BEACH DIVISION

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel hereby certifies that the following individuals or enterprises have an interest in the outcome of this case:

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Honorable Linnea R. Johnson, United States Magistrate Judge, Southern District of Florida

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STATEMENT REGARDING ORAL ARGUMENT

If the Court grants Lufthansa's request for oral argument, the appellees respectfully request the opportunity to participate. We do not, however, believe that oral argument is necessary in this case. The primary issue on appeal is an issue of law, on which the Supreme Court and several other courts have spoken, and the extant decisions overwhelmingly support the district court's ruling. The other issues raised are either subsidiary legal questions dependent upon the Court's agreement with Lufthansa on its primary point--questions which the district court has not yet addressed; or a handful of challenges to the district court's factual findings, all of which are supported by overwhelming evidence. We believe that the instant brief makes these points clear, and oral argument unnecessary.

CERTIFICATE OF TYPE SIZE AND STYLE

The instant brief is typed in Courier 12-point non-proportional type.

I. STATEMENT OF JURISDICTION

This is a plenary appeal under 28 U.S.C. § 1291 and Rule 3, Federal Rules of Appellate Procedure.

II. ISSUES ON APPEAL

A. WHETHER THE PLAINTIFFS' CLAIM AGAINST LUFTHANSA IS GOVERNED BY THE WARSAW CONVENTION.

B. WHETHER THE DISTRICT COURT'S FACTUAL FINDINGS OF NEGLIGENCE AND CAUSATION ARE CLEARLY ERRONEOUS.

III. STATEMENT OF THE CASE AND FACTS

Lufthansa's statement of the facts can best be described as a jury argument to the factfinder. It states only the evidence which supports Lufthansa's position, and none of the evidence, credited by the factfinder, which supports the plaintiffs' position. As Lufthansa has acknowledged (brief at 15-16), its challenge to Judge Johnson's factual findings requires the demonstration that they were clearly erroneous; and in that context this Court has properly required that the appellant accurately state all of the evidence of record, including the evidence favorable to the factfinder's conclusions.[1/] From this perspective, Lufthansa's statement of the facts is worse than worthless, because it suggests to the Court

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[1/] Eleventh Circuit Rule 28-2(i)(ii) provides that each party "must state the facts accurately, those favorable and those unfavorable to the party." *See Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F. 3d 1219 (7th Cir. 1995) (striking appellant's brief for failing to state unfavorable facts).

that the evidence which it summarizes was uncontradicted. Precisely the opposite is true. We have no choice but to start over, and to tell the story which the district court heard, but which Lufthansa has concealed from this Court.

A. Statement of the Facts.

1. Mr. Krys' Pre-Flight Condition. Although Lufthansa is correct (brief at 4, 14) that Mr. Krys at the time of the flight unknowingly had ischemic heart disease (*see* R6-362; R7-518-21), there is no evidence of record supporting Lufthansa's assertion (brief at 4) that "his heart was a time bomb about to explode." To the contrary, the evidence is uncontradicted that Mr. Krys was in good health, was extremely active and aggressive physically, and suffered no restrictions upon his activities (R5-104-05, 182, 212; R7-393).[2/]

[2/] Lufthansa's representation (brief at 4)--that Mr. Krys "was overweight, and did not follow a regular regimen of exercise"--is not supported by the one cite to the transcript provided (R4-212), which notes only that Mr. Krys smoked. Similarly, the single cite provided (R7-518) for the assertion (brief at 4)--that "[a]s Mr. Krys' unhealthy habits continued and the build up of fatty deposits progressed, it was only a matter of time before the flow of blood would be reduced to the point of the appearance of pre-heart attack symptoms and/or the occurrence of a full heart attack"--does not remotely support it. It is only a clinical definition of ischemic heart disease, which says nothing about the risks involved.

2. Mr. Krys' Initial Symptoms. Lufthansa has described at length the self-serving testimony of Dr. Fischmann, Purser Freund and Captain Schnabl that in the early stages of the flight, the only symptoms which they observed in Mr. Krys were an upset stomach, nausea and some unexplained perspiring (*see* Lufthansa's brief at 4, 6, 7-8, 9-11). According to Dr. Fischmann, who was heading back to Germany after a vacation, and was scheduled to see patients the following Monday morning (and thus would have been significantly inconvenienced if the flight had been diverted) (R5-201), and whose judgment was pilloried by the plaintiffs' witnesses, it was not until the flight was over Amsterdam, close to landing, that Mr. Krys' symptoms changed (he did not say they changed "dramatically," brief at 2; that is Lufthansa's word), indicating a heart attack (R7-425-28). What Lufthansa has failed to inform the Court, however, is that this testimony was overwhelmingly contradicted by other witnesses.[3/]

According to Mr. Krys and two other passengers who observed him (the only other passengers to testify), his symptoms commenced,

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[3/] Lufthansa not only has omitted the substantial evidence which we will summarize in text; it also has failed to acknowledge the substantial extent to which its own witnesses were impeached. For example, Mr. Krys testified that contrary to Captain Schnable's testimony, the captain at no time visited Mr. Krys during the flight (R6-202, 417). And Purser Freund's testimony that he did not see the nitroglycerin being given to Mr. Krys (R6-269) was contradicted by Dr. Fischmann (R6-279-80).

in full force, when the plane had been in the air as little as an hour, and certainly within the first two hours (R5-60, 63, 82-83, 107, 175, 212-13; R6-369; R7-477, 479, 485). Mr. Krys and the two other passengers testified that he experienced difficulty breathing; unrelenting perspiration, through his clothing; a pallor which turned his face white or gray; an upset stomach; severe nausea; dizziness; confusion; and beginning with his second trip to the bathroom, "unbearable, crushing, excruciating" chest pain (R5-138) which radiated into his arms and other parts of his body (R5-107-08, 143), which was "constant" (*id.*) from that time until Mr. Krys was given an analgesic after the plane had landed in Frankfurt (R5-117),[4/] and which was so unbearable that he was forced to remain in almost constant movement while either sitting or walking throughout the plane--his arms behind his head or raised in the air (R5-48-51, 57-58, 61, 107-08, 110-12, 114, 116, 137-38, 140-41, 146, 163, 170, 172, 174-77; R7-473, 476-80, 508-09). This is the evidence, taken in the light most favorable to the factfinder's conclusions, of what Dr. Fischmann and the flight's crew and captain observed. Moreover, Judge Johnson also was entitled to credit Mr. Krys' testimony (acknowledged by Lufthansa, brief at 38) that he reported these symptoms to Dr. Fischmann and to Purser

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[4/] This evidence directly rebuts Lufthansa's assertion (brief at 13), for which no citation is provided, that Mr. Krys "was not feeling serious pain even after the plane landed at Frankfurt."

Freund--indeed, that he asked Dr. Fischmann whether he was having a heart attack (R5-49, 59, 111, 114, 137, 140, 143-44).[5/]

3. The Evidence is Overwhelming that Mr. Krys Unmistakably Displayed the Symptoms of a Heart Attack. On the basis of the minor symptoms which its witnesses reported observing in Mr. Krys, Lufthansa proceeds to the equally self-serving evidence that such symptoms did not necessarily connote a heart attack (*see* Lufthansa's brief at 4, 6, 9, 10). This conclusion may follow from the limited symptoms acknowledged by these witnesses, but even Lufthansa's witnesses conceded what Mr. Krys and the two eyewitnesses knew (R5-54, 59, 65, 112; R6-311; *see* R5-176; R7-481-82)--that the symptoms reported by Mr. Krys and confirmed by the two eyewitnesses overwhelmingly signaled a heart attack (*see* R5-85-86, 99, 204, 243; R7-421-22). Indeed, Lufthansa's flight operations manual (Plaintiffs' Exhibit 3) lists precisely these symptoms as the symptoms of a heart attack (R5-85-86; R7-390-91); and Lufthansa's employees were trained to recognize those symptoms (R5-190; R7-463). In particular, Lufthansa's manual notes that cardiac infarction is fatal 40-50% of the time; and it points out, as Dr. Fischmann confirmed (R5-204; R7-422), that a patient suffering mere angina remains relatively calm, while a patient suffering a heart attack, like Mr. Krys, is unable to sit still (R7-391).

[5/] In response, Dr. Fischmann told Mr. Krys not to think about having a heart attack, and scolded him for having a drink on the flight (R5-109, 111, 142, 147).

The plaintiffs' experts readily endorsed these admissions; the symptoms reported by Mr. Krys and confirmed by his two fellow passengers were classic symptoms of a heart attack (R5-214; R6-313-14, 343, 349, 369). The defendant's expert witness agreed as well (R7-440, 452).

Therefore, in the light most favorable to Judge Johnson's conclusions, the evidence is overwhelming that Mr. Krys' heart attack was obvious to Lufthansa at the outset. And even if it had not been, in light of the uncontradicted testimony that nitroglycerin ordinarily relieves angina within a few minutes, but offers no relief of cardiac infarction (R5-214-15; R6-327)--a fact noted in the manual (Plaintiffs' Exhibit 3), of which Purser Freund was aware (R5-196-97)--Mr. Krys' condition certainly should have been apparent when two doses of nitroglycerin failed to relieve his excruciating pain (R5-54, 56-57, 61, 110-12, 114).[6/]

4. Lufthansa's Negligence. In light of the foregoing, the plaintiffs might have chosen to sue Dr. Fischmann for his negligence in failing to recognize Mr. Krys' condition, and/or in failing immediately to recommend to the crew and captain that the flight be diverted to the nearest airport. Instead, the issue for the factfinder was whether Lufthansa also was negligent; and again Lufthansa's brief has simply ignored the overwhelming evidence to that effect.

[6/] Even Dr. Fischmann admitted that the nitroglycerin didn't work (R7-423).

To begin with, on the basis of the foregoing evidence alone, Judge Johnson could conclude that notwithstanding Dr. Fischmann's impressions, Lufthansa's employees knew or should have known that Mr. Krys was suffering a heart attack, and thus that they had to land. Given the symptoms reported by Mr. Krys and confirmed by the two eyewitnesses, and the unmistakable import of those symptoms, Judge Johnson was amply entitled to conclude that Lufthansa was not reasonable in relying upon Dr. Fischmann's impressions.[7/]

There is, however, much more. As we have noted, Lufthansa's operations manual (Plaintiffs' Exhibit 3) identifies the symptoms of a heart attack; and it also says (Plaintiffs' Exhibit 2) that the flight should be aborted in the face of a serious medical condition (R5-83-85; R7-389-90, 556). The manual does not suspend or qualify this requirement if a doctor is on board (R6-275). Even apart from the admission that Lufthansa's manual prescribes mandatory rules and regulations governing the crew's conduct (R5-85); even apart from the expert testimony that Lufthansa was negligent for failing to follow its own procedures (R6-311); and even apart from the admission that the symptoms reported by Mr. Krys required Lufthansa to land (R5-83), the factfinder could conclude that Lufthansa was negligent for violating its own regulations. Indeed, as we will note in the argument, under

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[7/] As we will note in the argument, under Florida law, Dr. Fischmann's advice at most created an issue of fact; it did not, as a matter of law, relieve Lufthansa of its duty, or break the chain of causation. *See infra* note 20.

Florida law the violation of a company's internal operating procedures alone constitutes sufficient evidence to support a jury's finding of negligence.

Finally, the plaintiffs offered substantial expert testimony that Lufthansa was negligent. The plaintiffs' expert, with forty-two years' experience as a pilot (*see* R6-283-97), testified that Lufthansa was not relieved of its duty to its passenger, Mr. Krys, by Dr. Fischmann's presence or his intervention (R6-302, 311, 341-42), and that in light of Mr. Krys' manifest condition, Lufthansa was negligent in failing to divert the flight to the nearest airport (R6-304, 337; *see also* R7-542-53). Three subsidiary acts of negligence were Lufthansa's failure to ascertain whether Dr. Fischmann had any knowledge of or training in cardiac care (R6-301-337-38; *see* R5-92; R7-275, 554, 563)[8/]; its failure to verify the

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[8/] Lufthansa's representation (brief at 6)--that "because Dr. Fischmann was very experienced in the area of emergency medicine, it was decided that he should treat Mr. Krys"--is not supported by the one citation given (R7-468), or by any other citation; and it is contradicted in the pages cited above. Federal Air Regulation 121.309, promulgated in 1994, provides that an airline's first aid kit is available "for use only by properly identified volunteer licensed medical or osteopathic doctors" who have "professional identification" such as "wallet cards identifying state medical licensure, local medical society membership or medical specialty membership certification"; although the captain in his discretion may release the medical kit to doctors without such written

doctor's impressions by monitoring the passenger closely (R6-302, 310, 312, 340; *see* R5-88)[9/]; and by forbidding Mr. Krys to lie down in the galley between business class and tourist class (*see* R5-112-13; R6-249)--conduct which the expert found "particularly reprehensible" (R6-345; *see* R7-543-44). The evidence is overwhelming that notwithstanding Dr. Fischmann's involvement, Lufthansa also was negligent.

5. Causation of Damage. Mr. Krys suffered an acute cardiac infarction of the front and septum wall of the left ventricular,

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identification (R6-338-39). This regulation was not in effect at the time of the incident at issue, but it codifies the standard of care which was in effect at that time (R6-339).

[9/] The evidence, in the light most favorable to the plaintiffs, is that Lufthansa's crew utterly abrogated this responsibility, in light of Dr. Fischmann's presumed attendance to Mr. Krys (*see* R5-88, 94-95, 97, 113-15, 132, 162-63; R7-493-94). As Captain Schnabl protested, when reminded of the crew's responsibilities under Lufthansa's regulations: "Only if there is no doctor available. Then the doctor takes over" (R5-88; *see* R5-99; R6-265). As it turned out, this reliance upon Dr. Fischmann was misplaced, even apart from his incompetence. Mr. Krys testified that Dr. Fischmann attended to him only twice during the entire flight (R5-115-16, 146); and one of the passengers said that Dr. Krys showed up two times after his initial visit (R5-52, 55-56). Judge Johnson was entitled to credit this testimony, notwithstanding the contradictory evidence summarized by Lufthansa in its brief.

which commenced at the time he first began to experience severe chest pain (R5-215-17, 220-22; R6-359, 361-62; R7-531). Notwithstanding Lufthansa's citation of one witness' testimony that the infarction was "moderate-sized" (brief at 14), the factfinder could agree that this was a "major heart attack" (R6-362)--"not a run-of-the-mill heart attack," but "a major life-threatening heart attack, and the fact that he did survive the heart attack is a credit to the people who were taking care of him in Germany" (R6-363). Mr. Krys "has suffered extensive myocardial infarction, and Mr. Krys' heart is working at about 50 percent of the normal heart" (R6-361-62; *see* R5-218); he "now has an area in the front wall of his heart which is not pumping properly" (R6-362); he may have "a thrombus or blood clot in the apical region of the heart" (*id.*); "his life expectancy is significantly reduced and his chance of complications and cardiovascular sequelae is significantly increased over the next number of years" (R6-362); he has "lost a lot of heart muscle and lost a lot of his reserve" (R6-363); he has "a 30 percent rejection fraction [damage to the heart wall] with an extensive anterior wall nonfunctioning" (*id.*); he has "severe left ventricle disfunction secondary to the previous infarction", meaning "a significant disruption of normal chondric activity of the heart" and "severe left ventricle infarction [of] 30 to 50 percent less of what a normal ejection should be" (R6-373); "an ejection fraction of approximately 30 percent, which means that with each heartbeat only 30 percent of the blood that's within the heart cavity is ejected, compared to 60, maybe 65 percent" normally

(*id.*); and he "suffered damage such that the front part of the heart, the apical and septal walls, are akinetic, in which case they don't move" (*id.*; *see* R5-217)--"[t]hey are not pumping. They are not contracting" (R6-374; *see* R6-358).

Mr. Krys' condition is permanent, with no hope of improvement (R5-219; R6-356-57). He no longer has a normal life expectancy (R6-362, 364-65); his life expectancy is less than even that of the average heart attack victim (R6-365). Although Mr. Krys' life expectancy at the time of trial was 24.7 years (R6-378), and the time of trial was over three years after the incident, the plaintiff's expert had never seen a patient with a 30% ejection fraction who survived more than 20 years (R7-384).[10/]

These effects obviously had a significant impact upon Mr. Krys' activities and outlook. He was in intensive care in a Frankfurt hospital for eight days, and then remained in the hospital for another nine days (R5-117-19, 216). He was at home recovering for another four months (R5-128, 185; R7-402). Mr. Krys testified that his life is now "totally different" (R5-129). Because a portion of his heart no longer moves, he can feel it beating (*id.*). He has trouble sleeping, he is intolerant, he has

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[10/] Lufthansa has cited (brief at 14) the testimony that a patient's odds increase with each year he survives; but Lufthansa has failed to acknowledge the plaintiffs' expert's contrary testimony: "I don't think there's any relationship between a short or long-term survival and the ultimate longevity of the patient" (R6-352; *see* R6-351).

been counseled for depression, and he experiences periodic angina pains (R5-129-30). His son testified that while Mr. Krys before the incident was a confident, aggressive, competitive business person, the incident robbed him of vitality, self esteem, stamina and confidence; he is no longer the business person that he once was (R5-184-85). His wife testified (R7-402-03):

> Leonard was like a different person. He never was scared about too many things, and here I have a husband that he didn't want to do too many things. He was just recovering, extremely tired. He took a shower. He couldn't even dress himself immediately because he was so tired, very tired all the time.
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> [H]e tries his best to be as normal as possible, but, really, he gets tired very easily. His mind, it's a different mind. He gets depressed very easily, very emotional all the time. I don't know. He's different.
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> He has half of his heart working properly. I know that, said by the doctor, he won't tolerate a second heart attack. Then I worry about what he eats, how he's--he gets upset or the things he does that could aggravate him, and I don't know. It's different.

The plaintiffs offered substantial evidence that a significant amount, if not the entirety, of the permanent damage could have been avoided if Lufthansa had diverted the flight. The damage suffered by Mr. Krys never occurs all at once at the onset of a heart attack (R6-364). In 1991, thrombolytic (clot-busting) therapy was in use (R6-353-54), and if employed within twelve hours of the heart attack created a "good likelihood", as it would have

here, that the damage to the heart would be less (R6-354-55, 371). If the treatment is provided within 1-2 hours of the onset of the attack, the damage can be significantly lessened if not eliminated (R5-219; R6-350-51, 355, 360, 365, 371). Within 2-4 hours, the damage can be significantly lessened (R6-370). Within 4-6 hours, it can be limited, even significantly (R5-219; R6-364-65).

The route of this flight, which left Miami at 8:27 p.m. (R6-308), took it straight up the east coast (R5-51, 54-55, 84, 114-15, 175; R6-304; R7-480); and it was somewhere between Norfolk, Virginia and Philadelphia--probably near Baltimore or Washington, D.C.--when Mr. Krys suffered his heart attack (R6-306-07). Dulles Airport was 110 miles (20-22 minutes) away; Philadelphia was 50 miles away; New York was 40 miles away; and the flight was "abeam" New York at 10:30 p.m.--a time when Kennedy Airport is "dead," and an immediate landing was possible within 25-30 minutes (if the plane does not have to dump fuel, which would take another 25-30 minutes, R6-305-10). In light of this evidence, and the medical experts' testimony, the factfinder certainly could have concluded that thrombolytic therapy could have been provided to Mr. Krys well within the time necessary to prevent the significant damage which he suffered.

B. The Standard of Review. The question of whether the Warsaw Convention[11/] applies to a given set of facts, when those facts are uncontradicted, is a question of law reviewable *de novo*

[11/] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C. § 1502 note (hereinafter referred to as the "Warsaw Convention").

by this Court. *Air France v. Saks,* 470 U.S. 392, 405-06, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 300-01 (1985); *See Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989); *Sulewski v. Federal Express Corp.,* 933 F. 2d 180, 182 (2d Cir. 1991); *Block v. Compagnie Nationale Air France,* 386 F. 2d 323 (5th Cir.), *cert. denied,* 392 U.S. 905, 88 S. Ct. 2053, 20 L. Ed. 2d 1363 (1967).

If the Court agrees with the district court that the Warsaw Convention is not applicable in this case, then the Court need not address the subsidiary legal questions advanced by Lufthansa--whether the Warsaw Convention would borrow general maritime law in defining any of the issues in this case; whether Lufthansa's asserted reliance upon the doctor would constitute a defense or partial defense under general maritime law; whether the damages awarded by the district court were excessive under general maritime law; and whether the Warsaw Convention permits an award of attorneys' fees. These contentions all depend upon the assumption that the Warsaw Convention is applicable in this case, and they would be mooted by the Court's affirmance of the district court's determination that the Warsaw Convention is not applicable. Moreover, even if the Court should reverse on that question, it would be appropriate for the district court to address any and all subsidiary questions in the first instance on remand.

Under Rule 52(a), Fed. R. Civ. P., all of Lufthansa's challenges to the district court's factual findings are subject to the "clearly erroneous" standard. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 528 (1985); *Martin v. University of South Alabama,* 911 F. 2d 604, 608 (11th Cir. 1990). The reviewing court "is not to decide factual

issues de novo," *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); and it must affirm "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety . . . even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City,* 470 U.S. at 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d at 528. If the evidence admits of two permissible views, the district court's findings cannot be clearly erroneous, *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150 (1949), whether its findings are based upon the physical and documentary evidence, *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982), or instead upon the credibility of witnesses, in which case "Rule 52(a) demands even greater deference to the trial court's findings . . . ." *Anderson v. City of Bessemer City,* 470 U.S. at 575, 105 S. Ct. 1504, 84 L. Ed. 2d at 529, *citing Wainwright v. Witt,* 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

IV. SUMMARY OF THE ARGUMENT

Lufthansa's primary contention presents a question of law--whether its asserted negligence in failing to respond to Mr. Krys' heart attack constituted an "accident" under Article 17 of the Warsaw Convention. The appropriate standard was articulated in *Air France v. Saks,* 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985), which held that an "accident" occurs under the Convention only when the cause of the plaintiff's injury (as opposed to the injury itself) was an unexpected, unusual or unintended event which was external to the passenger. Thus in *Air France v. Saks,* because the plaintiff's loss of hearing was caused by the normal operation

of the aircraft's pressurization system, there was no compensable "accident" under the Convention. *Air France v. Saks,* like all of the other decisions on this question (with only one exception), places dispositive reliance upon the nature of the event initially precipitating the plaintiff's injury, holding that there is no "accident" under Warsaw if that initial event was internal to the passenger, and was not precipitated by any external abnormality in the plane's operation. As Lufthansa concedes, and the unanimous authorities hold, a passenger's heart attack itself therefore cannot constitute an "accident" compensable under Warsaw.

It necessarily follows, as five out of six extant decisions have held, that when the initial precipitating event was internal to the passenger, and therefore was not caused by an "accident", any subsequent aggravation of the plaintiff's injury cannot retroactively convert a non-Warsaw case into a Warsaw case. To the contrary, because the dispositive focus is upon the event which caused the initial injury, it is irrelevant (from the perspective of Warsaw jurisdiction) whether any subsequent event aggravated that injury. And contrary to Lufthansa's representation, there are not merely two extant cases on this issue, which disagree with each other; there are six cases, and five of them, three involving heart attacks, agree with the plaintiffs. A crew's alleged aggravation of a passenger's internal condition does not transform that condition into an accident under Article 17 of the Warsaw Convention.

If the Court agrees with this conclusion, that will moot about half-a-dozen subsidiary issues advanced by Lufthansa on the assumption that this is a Warsaw case. Lufthansa addresses the cap on damages under the Warsaw Convention, the choice-of-law rules

under the Warsaw Convention, the availability of attorneys fees under the Warsaw Convention, and a few other issues--all of which become moot if the Warsaw Convention does not itself apply. And even if it does apply, as we have suggested, it would be appropriate for the district court to address all of the subsidiary issues in the first instance, on remand.

Finally, Lufthansa has challenged three of the district court's factual findings as clearly erroneous; but all three are supported by substantial evidence of record. First, Lufthansa's negligence was not proved merely by 20/20 hindsight, but by overwhelming testimony, including its own admissions and expert testimony, that it was negligent to rely upon Dr. Fischmann's recommendation, in light of all the manifest evidence that it was wrong. Second, that evidence included a series of symptoms, reported by Mr. Krys and two eyewitnesses, which could only have been the symptoms of a heart attack, as Lufthansa's own operations manual verifies. And third, in the light most favorable to the factfinder's conclusions, the evidence clearly shows that much if not all of the permanent damage suffered by Mr. Krys would have been prevented if Lufthansa had diverted the flight. There may be evidence to the contrary on all of these points, but there is also substantial evidence supporting the district court's findings, which cannot be considered clearly erroneous. For all these reasons, the district court's judgment should be affirmed.

V. ARGUMENT

A. THE PLAINTIFFS' CLAIM AGAINST LUFTHANSA IS NOT GOVERNED BY THE WARSAW CONVENTION.

We agree that the flight in question constituted international transportation under the Warsaw Convention. However, as Lufthansa

acknowledges (brief at 23), Article 17 of the Convention applies only in the event of an "accident," and thus the carrier "is liable to a passenger under the terms of the Warsaw Convention only if the passenger proves that an 'accident' was the cause of her injury." *Air France v. Saks,* 470 U.S. 392, 396, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 295 (1985).

1. Air France v. Saks. The question in *Air France v. Saks* was whether the plaintiff's loss of hearing after a flight, which assertedly "was caused by the normal operation of the aircraft's pressurization system," 470 U.S. at 396, 105 S. Ct. 1338, 84 L. Ed. 2d at 295, was compensable because it was caused by an "accident" within the meaning of Article 17 of the Convention. The Supreme Court began with the language of the Convention, noting that Article 17 provides compensation for death or bodily injury "if the accident which caused the damage" occurred in international air transportation; while Article 18 covers destruction or loss of baggage or goods "if the occurrence which caused the damage" took place in international air transportation. *Id.* at 397-98, 105 S. Ct. 1338, 84 L. Ed. 2d 295-96. The difference "implies that the drafters of the Convention understood the word 'accident' to mean something different than the word 'occurrence'"; and the language of Article 17 also "refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury"--language through which "the drafters of the Warsaw Convention apparently did make an attempt to discriminate between 'the cause and the' effect; they specified that air carriers would be liable if an accident caused the passenger's injury." *Id.* at 398-99, 105 S. Ct. 1338, 84 L. Ed. 2d at 296 (emphasis in original). The court

continued, *id.* at 399, 105 S. Ct. 1338, 84 L. Ed. 2d at 296 (emphasis in original):

> The text of the Convention thus implies that, however we define "accident," it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone. American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident.

The Convention does not itself define "accident", but the original French embraces reference both to "the *event* of a person's injury" and "to describe a *cause* of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. . . . The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event." *Id.* at 400, 105 S. Ct. 1338, 84 L. Ed. 2d at 297 (emphasis in original). The court found this conclusion "consistent with the negotiating history of the Convention, the conduct to the parties to the Convention, and the weight of precedent in foreign and American courts." *Id. See id.* at 400-03, 105 S. Ct. 1338, 84 L. Ed. 2d at 297-99. The court's review of the legislative history confirmed that the drafters indeed recognized a distinction between an "occurrence" for purposes of property damage under Article 18, and damage caused by an "accident" under Article 17: "A passenger's injury must be caused by an accident, and an accident must mean something different than an 'occurrence' on the plane." *Id.* at 403, 105 S. Ct. 1338, 84 L. Ed. 2d at 299.

The question, therefore, is "what causes can be considered accidents," *id.* at 404, 105 S. Ct. 1338, 84 L. Ed. 2d at 299; and consistent with the language and history of the Convention, the decisions of our "sister signatories" (*id.*) hold that "Article 17 . . . embraces causes of injury that are fortuitous or unpredictable"--that is, "that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the plane." *Id.* at 404, 105 S. Ct. 1338, 84 L. Ed. 2d at 300. These holdings "are in accord with American decisions which . . . refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of the passenger." *Id.* at 404-05, 105 S. Ct. 1338, 84 L. Ed. 2d at 300.

In light of the foregoing, the Supreme Court held:

> We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. . . . [W]hen the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.
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> We draw this line today only because the language of Article 17 and 18 requires it, and not because of any desire to plunge into the "Serbonian bog" that accompanies attempts to distinguish between causes that are accidents and injuries that are accidents. [Citation omitted]. Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose

> carrier liability for injuries that are not caused by accidents.

Id. at 405-06, 105 S. Ct. 1338, 84 L. Ed. 2d at 300-01.

The dispositive focus, therefore, is upon the event or the chain of events which caused the passenger's initial injury. "But for" that event (or chain of events), the passenger would have suffered no injury at all. If the event was "the passenger's own internal reaction," *id.* at 406, 105 S. Ct. 1338, 84 L. Ed. 2d at 301, Article 17 does not apply. In contrast, if the initial "injury [was] the product of a chain of causes, and . . . some link in the chain was an unusual or unexpected event external to the passenger," then Article 17 does apply. *Id.* at 406, 105 S. Ct. 1338, 84 L. Ed. 2d at 301. Lufthansa has seized upon that language (brief at 25), arguing that although the heart attack itself was certainly not caused by an event external to the passenger, the asserted aggravation of the heart attack--and thus the extent of the injury if not the fact of the injury--was indeed caused by an external event. Thus, Lufthansa's contention is that the relevant chain of events extends even beyond the plaintiff's initial injury.[12/]

[12/] Lufthansa's argument on appeal is exactly the opposite of the argument which Lufthansa initially advanced below, in support of summary judgment. Lufthansa's initial motion contended that Mr. Krys' "heart attack was not the result of an 'accident', [and] thus his claims are not cognizable under the Warsaw Convention"; and "[t]he failure to provide medical treatment to a passenger is not

Lufthansa's argument, however, misses the whole point of *Air France v. Saks,* which focuses upon the nature of the event which caused the plaintiff's initial injury, regardless of any subsequent events which may have aggravated the initial injury. As we note below, with the exception of a single New York decision, discussed *infra*, we can find no authority which supports Lufthansa's position.

2. The Case Law Defining a Warsaw "Accident". As even the cases cited by Lufthansa make clear (brief at 26-27), the question

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an accident under the Warsaw Convention" (R2-75-7-8). The plaintiffs responded to the motion by citing the overwhelming authority that if the Warsaw Convention does not create a cause of action, it does not preempt its assertion under some other law (R2-89-6-7). *See In Re Air Disaster at Lockerbie, Scotland on December 21, 1988,* 928 F. 2d 1267, 1273 (2d Cir.), *cert. denied sub nom Rein v. Pan American World Airways, Inc.,* 502 U.S. 920, 112 S. Ct. 331, 116 L. Ed. 2d 272 (1991); *Martinez Hernandez v. Air France,* 545 F. 2d 279 (11th Cir. 1976), *cert. denied,* 430 U.S. 950, 97 S. Ct. 1592, 51 L. Ed. 2d 800 (1977). In its reply memo, Lufthansa switched sides on the issue, and argued that although the heart attack itself was not an accident, "[i]f there was post-heart attack crew negligence, and if this negligence did aggravate the injury, this negligence would certainly constitute a Warsaw Convention 'accident'" (R2-94-1). The district court (Hurley, J.), denied the motion for summary judgment (R2-102).

consistently asked is whether the plaintiff's initial injury resulted from internal forces on the one hand, or from some external event on the other--such that "but for" the initial external event, the plaintiff would have suffered no injury at all. Thus in *Gezzi v. British Airways,* 991 F. 2d 603 (9th Cir. 1993), the Convention applied because the plaintiff's fall, and thus his initial injury, was caused by water on the stairs, and thus the plaintiff would have suffered no injury "but for" that water. The same formulation applies to all the other cases cited by Lufthansa (brief at 26-27), in which the plaintiff was injured by an overhead bin opening above him; by tripping over a bag negligently placed by another passenger; by spilled food or beverage; or by the positioning of a boarding ramp.[13/] In every one of these cases, and every other Warsaw case we can find (except the one New York case), the "accident"--the external event--caused the initial injury, such that "but for" that event there would have been no injury at all.

In the same way, as the citations provided by Lufthansa also make clear (p. 27), in cases holding that the Convention was not applicable, the court also focused upon the character of the event which caused the initial injury, excluding coverage when all events

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[13/] *Accord, Husserl v. Swiss Air Transport Co.,* 351 F. Supp. 702, 707 (S.D.N.Y.), *aff'd,* 485 F. 2d 1240 (2d Cir. 1972) (hijacking); *Chutter v. KLM Royal Dutch Airlines,* 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (fall from aircraft doorway caused by misplaced ramp); *Weintraub v. Capitol International Airways, Inc.,* 16 Avi. 18, 058 (N.Y. S. Ct. 1981) (sudden dive causing hearing loss).

in the chain or sequence leading to the initial experience of injury ("but for" which the plaintiff would have suffered no injury) consisted of the plaintiff's own internal experience. *See, e.g., Air France v. Saks,* 470 U.S. at 394, 105 S. Ct. 1338, 84 L. Ed. 2d at 293 (severe pressure and pain in the left ear, resulting in loss of hearing); *DeMarines v. KLM Royal Dutch Airlines,* 580 F. 2d 1193, 1197-98 (1978) (pressure; loss of hearing); *Warshaw v. Trans World Airlines, Inc.,* 442 F. Supp. 400 (E.D. Pa. 1977) (same); *Scherer v. Pan American World Airways, Inc.,* 54 A.D. 2d 636, 387 N.Y.S. 2d 580 (1976) (thrombophlebitis resulting from sitting in a small seat during a long flight).[14/]

As *Air France v. Saks* requires, all of these cases focus upon the cause of the plaintiff's initial injury. As the court put it in the *Warshaw* case, the "common thread" of the extant decisions "has been a happening or an event which in each case was beyond the normal and preferred mode of operation for the flight." 442 F. Supp. at 410. The dispositive focus is on the "happening or event" which creates the initial injury. If that happening was "triggered by some external event," the Convention applies. *Id.* at 412. In contrast: "The event or occurrence is not an accident if it

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[14/] *Accord, MacDonald v. Air Canada,* 439 F. 2d 1402 (1st Cir. 1971) (fall in baggage area not caused by any external event); *Padilla v. Olympic Airways,* 765 F. Supp. 835 (S.D.N.Y. 1991) (fall in lavatory not caused by any external event); *Rullman v. Pan American Airlines, Inc.,* 471 N.Y.S. 2d 478 (S. Ct. 1983) (fainting on jetway not caused by any external event).

results solely from the state of health of the passenger and is unconnected with the flight." *Id.*

In all of these cases, therefore, the Convention was not implicated because the "happening" or "event" which caused the initial injury was internal to the passenger, resulting "solely from the state of health of the passenger" and "unconnected with the flight"--and that took the case outside of the Warsaw Convention regardless of any subsequent events or occurrences which may have aggravated the initial injury.

This central distinction is no less applicable when the event in question is a heart attack. As Lufthansa points out, the parties are in agreement that a heart attack itself cannot qualify as an "accident" under the Warsaw Convention. All of the relevant cases recognize that.[15/] And it necessarily follows, given the dispositive criterion outlined in *Air France v. Saks* and recognized in the cases cited above, that any alleged aggravation of the injury caused by that initial event--an event which is not itself an "accident" under the Convention--cannot bring back into the scope of the Convention an injury which initially was outside of

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[15/] *See Tandon v. United Air Lines,* 926 F. Supp. 366, 369 (S.D.N.Y. 1996); *Fischer v. Northwest Airlines, Inc.,* 623 F. Supp. 1064, 1065 (N.D. Ill. 1985); *Northern Trust Co. v. American Airlines, Inc.,* 96 Ill. Dec. 371, 376, 142 Ill. App. 3d 21, 27, 491 N.E. 2d 417, 422 (1986); *Seguritan v. Northwest Airlines,* 86 A.D. 2d 658, 446 N.Y.S. 2d 397, 398 (S. Ct., App. Div.), *aff'd,* 57 N.Y. 2d 767, 454 N.Y.S. 2d 991, 440 N.E. 2d 1339 (Ct. App. 1982).

it. And contrary to Lufthansa's representation (brief at ii, 17, 28-30) (a representation which Lufthansa itself qualifies elsewhere in its brief, p. 31), there are not merely two extant cases on this issue, which disagree with each other. There are six extant decisions, and five of them, three involving heart attacks, agree that a crew's alleged aggravation of a passenger's internal condition does not transform that condition into an accident under Article 17.

3. Aggravation of an Event Which is Not a Warsaw "Accident" is Not Itself a Warsaw "Accident". In *Abramson v. Japan Airlines,* 739 F. 2d 130, 133 (3d Cir. 1984), *cert. denied,* 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985), the passenger had a pre-existing hernia condition and suffered an attack during the flight; and he charged that the airline made the condition worse by forbidding him to lie down notwithstanding the availability of empty seats. The airline made precisely the argument advanced here by Lufthansa, and the court rejected it: "In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." The hernia attack--the initial injuring event--was "not a risk either associated with or inherent in aircraft operation," and it was not caused by any "alleged acts and omissions of JAL and its employees . . . ." (*id.*). As the *Air France* decision later counseled, the dispositive focus was upon the nature of the initial triggering

event causing injury, regardless of any subsequent actions which may have aggravated that injury.

The same holding is found in *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996), in which the plaintiff's decedent suffered a heart attack on board, and allegedly died because the airline did not have oxygen on board. The court noted that the dispositive criterion articulated in *Air France v. Saks* is the initial triggering event--that is, whether "any unusual, external event triggered [the] heart attack"; cited the majority of cases which "have held that death caused by a heart attack suffered on a normal flight did not arise from a Warsaw Convention accident even if alleged negligence on the part of airline staff was a link in the chain of causation"; and held that "the failure to provide adequate medical care to a heart attack victim is not the type of external, unusual event for which liability is imposed under the Warsaw Convention." Likewise in *Fischer v. Northwest Air Lines, Inc.,* 623 F. Supp. 1064, 1065-66 (N.D. Ill. 1985), in which the crew allegedly was negligent in failing properly to aid a passenger who had suffered a heart attack, the court followed *Air France v. Saks* in asking whether the precipitating event was external or internal; and it cited *Abramson* (*supra* p. 26) for the proposition that if the initial injury is not itself an accident under the Warsaw Convention, any alleged aggravation of that injury does not convert the case into a Warsaw case.

The same holding is found in *Northern Trust Co. v. American Airlines, Inc.,* 96 Ill. Dec. 371, 142 Ill. App. 3d 21, 491 N.E. 2d

417 (Ill. Ct. App. 1986), in which the plaintiff's decedent died of a heart attack, and alleged that the airline was negligent, both en route and on the ground, in responding to it. The court held that "no accident occurred in this case. An accident has been defined as an unusual or unexpected happening. . . . [The heart condition] was an inherent weakness or disability and was not the result of an unusual or unexpected happening which was connected with the flight." 96 Ill. Dec. 371, 376, 142 Ill. App. 3d at 28, 491 N.E. 2d at 422.

Finally, at least one New York court--the one jurisdiction invoked by Lufthansa--has come to the same conclusion, on analogous facts. In *Adamsons v. American Airlines, Inc.,* 105 Misc. 2d 787, 433 N.Y.S. 2d 366 (S. Ct. 1980), *aff'd,* 87 A.D. 2d 785, 449 N.Y.S. 2d 487 (S. Ct., App. Div. 1982), *rev'd on other grounds,* 58 N.Y. 2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21 (Ct. App. 1982), *cert. denied,* 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983), the plaintiff suffered a disability while visiting Haiti, but the airline declined to fly her back for treatment in New York, assertedly resulting in delays which significantly aggravated her injuries. In addition to the primary holding that the plaintiff was not a passenger under the Warsaw Convention, the court found "no accident within the meaning of the Convention," because the injury "occurred 'in accordance with ordinary and routine operating procedures under conditions which were free of any malfunctions or abnormalities . . . .'" 105 Misc. 2d at 791, 433 N.Y.S. 2d at 369, *quoting Warshaw v. Trans World Airlines, Inc.,* 442 F. Supp. 400,

412 (E.D. Pa. 1977). The plaintiff therefore proceeded with her state law claim, but her judgment subsequently was reversed on the ground that the airline's conduct was authorized by applicable FAA regulations.

In light of these five decisions, the single New York case relied upon by Lufthansa is a lonely wave in a sea of contrary authority. In *Seguritan v. Northwest Airlines, Inc.,* 86 A.D. 2d 658, 446 N.Y.S. 2d 397 (S. Ct., App. Div.), *aff'd,* 57 N.Y. 2d 767, 454 N.Y.S. 2d 991, 440 N.E. 2d 1339 (Ct. App. 1982), the plaintiff suffered a heart attack en route from New York to Manila, and alleged that the airline's inattention aggravated her condition. Citing no authority, the court held, *id.* at 659, 446 N.Y.S. 2d at 398:

> The incident in question is clearly an "accident" within the meaning of article 17. The "accident" is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of the defendant's employees to render her medical assistance. This is somewhat analogous to the hijacking cases where the 'accident' which caused the injury is not the act of the hijacker but the alleged failure of the carrier to provide adequate security [citation omitted].

Given the distinction prescribed by the Supreme Court in *Air France v. Saks,* and enforced in the many cases cited above, and in light of the five contrary decisions cited above, we must respectfully submit that *Seguritan* is wrong. The logic of *Air France v. Saks* and the other decisional law--the logic of five

cases dealing with the asserted aggravation of an internal condition--all demonstrate that this is not a Warsaw case.

4. Lufthansa's Subsidiary Arguments All Are Based on the Erroneous Premise that This is a Warsaw Case. If the Court agrees with this conclusion, it need not address the following arguments advanced by Lufthansa, all of which depend upon the applicability of the Warsaw Convention in this case: 1) that liability is limited to $75,000 in the absence of willful misconduct (Lufthansa's brief at 31-32); 2) that general maritime law supplies the substantive law concerning issues not specifically covered by the Warsaw Convention (Lufthansa's brief at 32-34)[16/]; 3) that

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[16/] Lufthansa has invoked maritime law only through the Warsaw Convention, and has raised no argument that maritime law would apply even if this were not a Warsaw case. Thus, no such contention is before the Court. *See Torrington Extend-A-Care Employee Ass'n v. NLRB,* 17 F. 3d 580, 593 (2d Cir. 1994); *United States v. Restrepo,* 986 F. 2d 1462 (2d Cir.), *cert. denied,* 510 U.S. 843, 114 S. Ct. 130, 126 L. Ed. 2d 94 (1993); *Gonsalves v. Flynn,* 981 F. 2d 45, 49 (1st Cir. 1992); *Frazier v. Garrison I.S.D.,* 980 F. 2d 1514, 1527-28 (5th Cir. 1993); *G. Heileman Brewing Co. v. Joseph Oat Corp.,* 848 F. 2d 1415, 1419 (7th Cir. 1988).

Moreover, no such contention could succeed, in light of the Supreme Court's declaration that an asserted act of negligence in the air over navigable waters is not sufficient to create admiralty jurisdiction. *Executive Jet Aviation, Inc. v. City of Cleveland,*

"pursuant to general maritime law, following the advice of a competent physician, Lufthansa fulfilled its duty to a sick passenger" (brief at 34-35)[17]; 4) that under admiralty law, "lay people are not competent to supervise a doctor" (brief at 35-36); 5) that any Florida law permitting attorneys' fees is pre-empted by the Warsaw Convention (brief at 36-37); and 6) that the damages awarded were excessive "in admiralty" (brief at 44-45). None of these arguments has been advanced under Florida law; no Florida authority has been cited--only cases decided under the Warsaw Convention or under federal admiralty law, which assertedly is incorporated by the Warsaw Convention. Having failed to raise any of these arguments under Florida law, Lufthansa has waived any such contention. *See supra* note 16. Therefore, if the Court has determined that the Warsaw Convention is not applicable in this case, it need not address these other issues.

Ohio, 409 U.S. 249, 93 S. Ct. 493, 505, 34 L. Ed. 2d 454 (1972). *See Hurley v. Larry's Water Ski School,* 762 F. 2d 925 (11th Cir. 1985); *Beiswenger Enterprises Corp. v. Carletta,* 779 F. Supp. 160 (M.D. Fla. 1991); *Feenerty v. Swiftdrill, Inc.,* 706 F. Supp. 519 (E.D. Tex. 1989).

[17] Although we disagree strongly with Lufthansa's contention that reliance upon a doctor's advice always constitutes an absolute defense in admiralty (none of the cases cited by Lufthansa for this proposition remotely support it), we do not believe that it is necessary to address the point at this time.

Moreover, as we have suggested, even if the Court should find the Warsaw Convention to be applicable, it should be noted that in the light of its ruling below, the district court did not consider any of these ancillary questions, and it would be appropriate upon remand for the district court to consider them in the first instance. Indeed, given that the Warsaw Convention caps a plaintiff's damages at $75,000 in the absence of wanton and willful misconduct, and that the district court rejected the plaintiffs' claim for punitive damages under Florida law (R3-134-13, 14-15), it seems likely that a reversal by this Court on the issue of Warsaw's applicability would put a very quick end to this litigation. In this context, regardless of the Court's disposition of the Warsaw question, it would seem to be a needless expenditure of the litigants' and the Court's resources to address any of the Warsaw-dependent subsidiary questions advanced by Lufthansa.

B. THE DISTRICT COURT'S FACTUAL FINDINGS OF NEGLIGENCE AND CAUSATION ARE NOT CLEARLY ERRONEOUS.

Lufthansa's brief concludes with three factual assertions, presumably offered to demonstrate that the district court's findings on three issues are clearly erroneous: 1) that the district court's finding of negligence is based entirely on 20/20 hindsight (brief at 37-38); 2) that Mr. Krys did not display the symptoms of a heart attack (brief at 38-42); and 3) that Mr. Krys would have sustained damage to his heart even if Lufthansa had made an emergency landing (brief at 42-44). Although we acknowledge

that there is some minimal evidence for Lufthansa on all three points, the relevant question is whether the district court's rejection of that evidence was clearly erroneous, in light of conflicting evidence. As we already have established, there is substantial competent evidence supporting the district court's findings on all three points.

1. 20/20 Hindsight. Although, by definition, every negligence claim examines the defendant's conduct in retrospect, we certainly agree with Lufthansa (brief at 37-38) that the propriety of its conduct could not be judged on the basis of evidence not available at the time of its conduct; and indeed, we might even agree *arguendo* that any evidence developed later--in this case that Mr. Krys did in fact suffer a heart attack--could not alone create an inference that Lufthansa was negligent earlier in failing to discover it. Under Florida law, a defendant is negligent only if he knew of or should have foreseen the danger at the time of his conduct--not in retrospect. *See, e.g., Florida Power & Light Co. v. Macias,* 507 So. 2d 1113, 1115 (Fla. 3d DCA), *review dismissed,* 513 So. 2d 1060 (Fla.), *review denied,* 518 So. 2d 1276 (Fla. 1987). Typically, under Florida law, this question of foreseeability is for the factfinder. *See McCain v. Florida Power Corp.,* 593 So. 2d 500 (Fla. 1992); *Orlando Executive Park, Inc. v. Robbins,* 433 So. 2d 491, 493 (Fla. 1983); *Regency Lake Apartments Associates, Ltd. v. French,* 590 So. 2d 970 (Fla. 1st DCA 1991); *Holiday Inns, Inc. v. Shelburne,* 576 So. 2d 322, 327 (Fla. 4th DCA), *review dismissed,* 589 So. 2d 291 (Fla. 1991).

Lufthansa has raised no contention that the district court misapprehended the appropriate standard under Florida law, and therefore adjudged Lufthansa negligent solely because it turned out that Mr. Krys did in fact suffer a heart attack. Nor could any such contention succeed, in light of Judge Johnson's findings that Mr. Krys "suffered the symptoms of a cardiac infarction, as described by the American Medical Association and LUFTHANSA's Manual, while a passenger on Lufthansa flight 463 . . . within the first one and a half (1 1/2) to three (3) hours" of the flight (R3-134-8); and that Lufthansa was negligent in failing to determine Mr. Krys' life-threatening condition (*id.* at 2), failing to comply with its own policies and procedures requiring it to divert the aircraft (*id.* at 3), failing to apply its own policies regarding the treatment of cardiac infarction (*id.* at 4), failing to contact ground personnel in order to obtain medical assistance (*id.* at 5), and failing in general to take adequate measures to protect the health of a passenger (*id.* at 6). None of these findings connotes an attempt to assign fault to Lufthansa on the ground that in retrospect, Mr. Krys in fact suffered a heart attack.

Lufthansa's argument, therefore, reduces to the contention that all of these findings by the district court are clearly erroneous, and thus that the district court's finding of negligence could only have been based upon the mere fact that Mr. Krys in fact did suffer a heart attack. As our statement of the facts should already have demonstsrated, that contention is wrong.

Lufthansa's challenge regarding the symptoms assertedly displayed by Mr. Krys during the flight is the subject of the next sub-point, and we will address it there. Assuming that Lufthansa knew or should have known that Mr. Krys in fact was suffering a heart attack during the flight, we have listed already (*supra* pp. 6-9) the overwhelming evidence of Lufthansa's negligence. As we noted, on the basis of Mr. Krys' symptoms alone, even without the aid of Lufthansa's internal policies or guidelines, of its admissions, or of expert testimony, the factfinder could conclude that Lufthansa was negligent in failing to divert the flight. In addition, Captain Schnabl admitted that the flight should be diverted if a passenger is seriously ill (R5-83). Lufthansa's operations manual identifies the symptoms of a heart attack, and says that the flight should be aborted in the face of a serious medical condition (*see supra* p. 7).[18/] And the plaintiffs also

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[18/] Under Florida law, the violation of a company's internal operating procedures alone constitutes sufficient evidence to support a finding of negligence. *See Dean Witter Reynolds, Inc. v. Hammock,* 489 So. 2d 761 (Fla. 1st DCA 1986); *Salas v. Palm Beach County Board of County Commissioners,* 484 So. 2d 1302, 1303-05 (Fla. 4th DCA 1986), *aff'd,* 511 So. 2d 544 (Fla. 1987); *Marks v. Mandel,* 477 So. 2d 1036 (Fla. 3d DCA 1985); *Nesbitt v. Community Health of South Dade, Inc.,* 467 So. 2d 711 (Fla. 3d DCA 1985); *Clements v. Boca Aviation, Inc.,* 444 So. 2d 597 (Fla. 4th DCA 1984). Captain Schnable admitted that Lufthansa's regulations prescribe mandatory requirements governing the crew's conduct (R5-

offered substantial (and uncontradicted) expert testimony that Lufthansa was negligent in a number of ways (*see supra* pp. 8-9). Under federal and Florida law, expert testimony alone is sufficient to sustain the factfinder's conclusions.[19/] In light of all this evidence, assuming that Lufthansa knew or should have known that Mr. Krys was suffering a heart attack (evidence which we will revisit in the next sub-section), the evidence of record is overwhelming that Lufthansa was negligent, not by 20/20 hindsight, but on the basis of what it knew or should have known during the flight.[20/]

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85).

[19/] *See G.M. Brod & Co. v. U.S. Home Corp.,* 759 F. 2d 1526, 1538 (11th Cir. 1985); *Jay Edwards, Inc. v. New England Distributor, Inc.*, 708 F. 2d 814, 819-20 (1st Cir.), *cert. denied,* 464 U.S. 894, 104 S. Ct. 241, 78 L. Ed. 2d 231 (1982); *Nanda v. Ford Motor Co.,* 509 F. 2d 213, 222 (7th Cir. 1975); *Cromarty v. Ford Motor Co.,* 341 So. 2d 507, 508-09 (Fla. 1977); *Wale v. Barnes,* 278 So. 2d 601 (Fla. 1973); *City of Hialeah v. Weatherford,* 466 So. 2d 1127 (Fla. 3d DCA 1985).

[20/] As we have noted, Lufthansa has raised no contention that under Florida law, Lufthansa had a right, as a matter of law, to place dispositive reliance upon Dr. Fischmann's recommendation. That point has been raised only under admiralty law (which we will debate on remand if necessary), on the assumption that the Warsaw Convention is applicable and borrows admiralty law. Therefore, any such contention under Florida law has been waived. *See supra* note

16. In an abundance of caution, we should note for the record that under Florida law, Lufthansa's asserted reliance upon Dr. Fischmann's expertise at most presented an issue of fact for the factfinder; it did not relieve Lufthansa of liability as a matter of law. *See Sowell v. American Cyanamid Co.,* 888 F. 2d 802, 803-04 (11th Cir. 1989) (Fla. law), *citing Restatement (Second) of the Law of Torts* § 388, Comment n (1965), *adopted in Florida, Tampa Drug Co. v. Wait,* 103 So. 2d 603 (Fla. 1958). In the instant case, as we have noted, there is substantial evidence of record that Lufthansa did not reasonably rely upon Dr. Fischmann's opinion.

We should also point out (although Lufthansa has not raised the point on appeal) that under Florida law, the intervening negligence of a physician can never relieve a prior tortfeasor of liability under principles of proximate causation, because intervening negligence by a doctor is considered foreseeable as a matter of law. *See Davidson v. Gaillard,* 584 So. 2d 71, 73 (Fla. 1st DCA), *review denied,* 591 So. 2d 181, 182 (Fla. 1991); *Rucks v. Pushman,* 541 So. 2d 673 (Fla. 5th DCA), *review denied,* 549 So. 2d 1014 (Fla. 1989); *Gonzalez v. Leon,* 511 So. 2d 606 (Fla. 3d DCA 1987), *review denied,* 523 So. 2d 577 (Fla. 1988); *Albertson's, Inc. v. Adams,* 473 So. 2d 231 (Fla. 3d DCA 1985), *review denied,* 482 So. 2d 347 (Fla. 1986). At best for Lufthansa under Florida law, any asserted intervening negligence would create an issue for the factfinder. *See Department of Transportation v. Anglin,* 502 So. 2d 896, 899 (Fla. 1987); *Waters v. ITT Rayonier, Inc.,* 493 So. 2d 67

2. The Evidence of Record is Overwhelming that Mr. Krys Displayed the Symptoms of a Heart Attack. Although Lufthansa acknowledges some of the substantial evidence on this point (brief at 38), it nevertheless repeats at length the same summary of the self-serving testimony of Dr. Fischmann, Purser Freund and Captain Schnabl which dominates its statement of facts (brief at 39-40); and it then repeats the testimony that the limited symptoms reported by these witnesses did not necessarily connote a heart attack (brief at 40-42). We can only refer the Court to the overwhelming contrary evidence summarized *supra* pp. 5-6. Mr. Krys' treating physician said that "this patient provided all the criteria for diagnosing a heart attack" (R6-369); and the plaintiffs' expert said that in addition to Mr. Krys' reports of his symptoms, "I am impressed by the fact that two lay witnesses were able to describe Mr. Krys's symptoms in a manner that absolutely fulfills the description of a heart attack by the AMA, by Lufthansa German Airlines and by Dr. Fischmann himself" (R6-342-43). And these are only two citations from an overwhelming body of evidence.

We do not dispute that Lufthansa offered contrary evidence; but at this stage of the proceeding Lufthansa's recitation of that evidence is nothing more than "jury" argument in the wrong court. The district court's finding--that Mr. Krys "suffered the symptoms of a cardiac infarction . . . while a passenger on Lufthansa flight 463" between one and a half and three hours into the flight (R3-

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(Fla. 1st DCA 1986).

134-8)--is not clearly erroneous. It is supported by substantial competent evidence.

3. The District Court's Finding on the Issue of Actual Causation is Not Clearly Erroneous. Lufthansa recites the evidence (brief at 42-44) that damage to the heart may commence at the outset of a heart attack, and suggests that it would have taken three hours to land and transport Mr. Krys to a hospital; and on that basis Lufthansa finds it "clear that he would have suffered damage to his heart wall even if an emergency landing had been made somewhere along the coast of North America" (brief at 44). That discussion apparently attempts to challenge the district court's finding that Mr. Krys "sustained significant permanent injury as a direct result of the failure . . . to land the aircraft at an available airport"--"significant anterior chamber heart wall damage as a direct result of the delay in his receiving proper cardiovascular care" (R3-134-9-10).[21/]

As we have noted, *supra* pp. 9-13, Lufthansa has simply ignored the substantial evidence of record which supports the district

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[21/] The district court's subsidiary findings on this question are that Mr. Krys suffered additional medical expenses as a result of the aggravation (R3-134-10); his life expectancy was "significantly reduced," to "less than the average heart attack victim" (*id.* at 11); his "chance of future complications and future cardiovascular problems is significantly increased" (*id.* at 12); and he suffered consequent psychological and emotional damage, as well as damage to his marital relationship (*id.* at 12).

court's findings. In the light most favorable to the plaintiffs, the plane could have been down within an hour of Mr. Krys' attack (*see supra* p. 13); and thrombolytic therapy within 1-2 hours can significantly lessen or even eliminate the effects of the attack (R5-219; R6-350-51, 355, 360, 365, 371). Within 2-4 hours, the damage can be significantly lessened (R6-370); and even within 4-6 hours, it can be limited, sometimes significantly (R5-219; R6-364-65). The district court was entitled to credit this testimony. Lufthansa's contention to the contrary is "jury" argument, which is inappropriate at this stage of the proceeding. All of the district court's factual findings are supported by substantial competent evidence. None are clearly erroneous.[22/]

VI. CONCLUSION

[22/] As we have noted, *supra* p. 31, Lufthansa's final point (brief at 44-45) challenges Judge Johnson's damage award as excessive, but only "in admiralty," which assertedly applies only because the Warsaw Convention assertedly applies. Lufthansa has raised no challenge to the damage award under Florida law, and thus has waived any such challenge. *See supra* note 16. In an abundance of caution, we should note for the record that no such challenge would succeed. *See generally Ashcroft v. Calder Race Course, Inc.,* 492 So. 2d 1309 (Fla. 1986); *Wackenhut Corp. v. Canty,* 359 So. 2d 430, 435 (Fla. 1978); *Bould v. Touchette,* 349 So. 2d 1181, 1184-85 (Fla. 1977); *Loftin v. Wilson,* 67 So. 2d 185, 189 (Fla. 1953); *Philon v. Reid,* 602 So. 2d 648 (Fla. 2d DCA 1992), *review dismissed*, 620 So. 2d 762 (Fla. 1993); *Simmonds v. Lowery,* 563 So. 2d 183, 184 (Fla. 4th DCA 1990).

It is respectfully submitted that the judgment of the district court should be affirmed.

VII. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of April, 2009, to: JOHN N. ROMANS, ESQ., Biedermann, Hoenig, Massamillo & Ruff, P.A., 90 Park Avenue, New York, New York 10036; and to JEROME A. PIVNIK, ESQ., 9130 S. Dadeland Blvd., Two Datran Center, Suite 1700, Miami, Florida 33156-7848.

Respectfully submitted,

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