

**No. 09-2271**

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**In The  
United States Court of Appeals  
For The Tenth Circuit**

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US AIRWAYS, INC.,  
*Plaintiff-Appellant,*

v.

KELLY O'DONNELL and GARY TOMADA,  
in their official capacities,  
*Defendants-Appellees.*

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On Appeal from the  
United States District Court for the District of New Mexico  
No. 07-cv-1235 (MCA/LFG) (Armijo, J.)

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**BRIEF OF MOTHERS AGAINST DRUNK DRIVING AS  
AMICUS CURIAE IN SUPPORT OF DEFENDANTS-  
APPELLEES AND IN SUPPORT OF AFFIRMANCE**

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### **INTERESTS OF AMICUS CURIAE**

Mothers Against Drunk Driving (MADD) is a non-profit, grassroots organization with more than two million members and 600 affiliates nationwide. MADD's mission is to stop drunk driving, support victims of this violent crime, and to prevent underage drinking. MADD is the nation's leader in the fight against drunk driving and in supporting crime victims' rights. MADD has no financial stake in the outcome of this case.

The authority for filing this brief is FRAP 29(a). All parties, through their respective counsel, have consented to the filing of this *amicus curiae* brief.

### **ARGUMENT**

This appeal arises out of a tragic incident in which a US Airways passenger, who was served alcohol by the airline, departed the flight, drove the wrong way on an interstate highway in Northern New Mexico, collided with a mini-van, and killed five family members traveling in the mini-van and himself. The New Mexico Licensing Regulation Department (NMLRD), and the Alcohol and Gaming Division (AGD) cited US Airways for serving an obviously intoxicated person. Thereafter, it was discovered that US Airways had failed to obtain a New Mexico liquor license authorizing the sale of alcohol to persons on flights arriving or departing from New Mexico. NMLRD issued US Airways a temporary 90 day license until it could obtain a permanent one. However, during the 90 day period,

US Airways was subsequently cited for a second instance of serving an obviously intoxicated person. NMLRD subsequently declined to extend US Airways' temporary license because their alcohol server training did not comply with New Mexico law. On the same basis, NMLRD denied US Airways a public service license. Thereafter, US Airways filed this lawsuit seeking an injunction restraining New Mexico from enforcing its liquor laws against US Airways. The District Court denied the injunction and this appeal ensued.

MADD submits this Amicus Brief in support of Defendant/Appellees. MADD urges the Court to affirm the District Court in all respects. In the interest of avoiding the repetition of arguments made previously by Defendant/Appellees, MADD will not discuss whether the Airline Deregulation Act of 1978 either expressly or impliedly preempted New Mexico's liquor laws, except to note that the District Court was unerringly correct in its analysis of that Act and applicable law. Rather, this Brief will focus on the individual and societal tragedy of drunk driving, as well as the real-life connection between in-flight alcohol service and drunk driving, the need to properly train alcohol servers, and the importance of continuing to allow the states to provide their own regulations over the alcohol industry.

The problem of drunk driving cannot be overstated. Over 15 years ago, the American Medical Association (AMA) recognized that alcohol related traffic crashes are a “leading cause of unintentional injury and deaths and a substantial contributor to health-care costs in the United States.”<sup>1</sup> Unfortunately, impaired drivers remain a scourge on society. Almost 12,000 people died in alcohol-related car crashes in 2008.<sup>2</sup> Another quarter million people were injured.<sup>3</sup> That same year, 366 people were killed in alcohol-related crashes in New Mexico, 105 of whom were killed in crashes where at least one driver had a BAC at or above the illegal 0.08 limit.<sup>4</sup>

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<sup>1</sup> Reduction in Alcohol-Related Traffic Fatalities—United States, 1990-1992, 271 J. A.M.A. 99 (January 23, 1994).

<sup>2</sup> See Traffic Safety Facts, <http://www-nrd.nhtsa.dot.gov/Pubs/811250.PDF> (NHTSA December 2009). The National Center for Statistics and Analysis (NCSA) compiled the information utilizing the Fatality Analysis Reporting System (FARS) and the National Automotive Sampling System General Estimates System (NASS GES). The federal government estimates that drug use is a factor in approximately 18% of motor vehicle deaths. See “Impaired Driving,” [http://www.cdc.gov/MotorVehicleSafety/Impaired\\_Driving/impaired-drv\\_factsheet.html](http://www.cdc.gov/MotorVehicleSafety/Impaired_Driving/impaired-drv_factsheet.html) (National Center for Injury Prevention and Control (CDC) 2004).

<sup>3</sup> Id.

<sup>4</sup> Id.

Sadly, approximately 30 percent of Americans will be involved in an alcohol-related crash during their lifetime.<sup>5</sup> Alcohol-related crashes cost American taxpayers over one hundred *billion* dollars a year.<sup>6</sup> Shockingly, as impressive as these figures are, they may grossly underestimate the impaired driving problem.<sup>7</sup>

The purposes of the laws prohibiting driving while intoxicated are to deter drunk driving and to “aid in discovering and removing from the highways the intoxicated driver.”<sup>8</sup> As common sense dictates, those that serve alcohol to an individual have a duty to protect foreseeable victims that may be injured or killed as a result of the sale or service of alcohol. Like most states, New Mexico, in order

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<sup>5</sup> See [http://www.madd.org/Drunk-Driving/Drunk-Driving/Statistics/AllStats.aspx#STAT\\_4](http://www.madd.org/Drunk-Driving/Drunk-Driving/Statistics/AllStats.aspx#STAT_4).

<sup>6</sup> See “Impaired Driving in the United States,” [http://www.nhtsa.dot.gov/people/injury/alcohol/impaired\\_driving\\_pg2/US.htm](http://www.nhtsa.dot.gov/people/injury/alcohol/impaired_driving_pg2/US.htm) (Pacific Institute for Research and Evaluation (PIRE) 2003). See also Jenson, A. et al, “Impaired Driving in the United States” (PIRE 1999).

<sup>7</sup> Law enforcement officials and traffic safety experts experience a myriad of difficulties in obtaining accurate information. See e.g., B. Chapman, Pathologists Say Alcohol Factor Greater than Suspected in Motor Vehicle Accidents, 39 PATHOLOGIST 21 (Mar. 1995); B. Chapman, CAP Survey Confirms Pathologists’ Suspicions, Reveals Data-Gathering Problems, 39 PATHOLOGIST 24 (Mar. 1995).

<sup>8</sup> State v. McCain, 84 N.M. 657, 506 P.2d 1207 (N.M. 1973). See also State v. Suazo, 117 N.M. 785, 788, 877 P.2d 1088, 1091 (N.M. 1994)(citing State v. Bernhardt, 245 N.J. Super. 210, 584 A.2d 854 (N.J. Super. 1991)(noting that New Jersey laws were designed to eliminate “obstacles impeding the efficient and successful prosecution of those who drink and drive” (quoting State v. Tischio, 107 N.J. 503, 527 A.2d 388 (1987), appeal dismissed, 484 U.S. 1038, 108 S.Ct. 768 (1988)); State v. Harrison, 115 N.M. 73, 77, 846 P.2d 1082, 1086 (N.M. Ct. App. 1992); Ransford v. District of Columbia, 583 A.2d 186 (D.C. Ct. App. 1990).



to protect public safety, prohibits a retailer from selling alcohol to an obviously intoxicated person. In order to ensure that such sales do not occur, New Mexico also requires that a retailer's alcohol server training programs contain certain components, key among those that a server have the requisite training to recognize signs of intoxication and refuse to serve alcohol to an obviously intoxicated individual. The ability of the State to suspend or revoke the license of commercial servers, including airlines, is also an integral part of the enforcement process. To take this power away from the State of New Mexico would be to render it virtually powerless to implement sanctions against non-compliant alcohol servers.

Having been apprised of *US Airways, Inc. v. O'Donnell*, MADD fears reversal of *US Airways, Inc. v. O'Donnell* will encourage airlines to disregard the duty they owe to foreseeable victims of drunk driving affected by the intoxicated state of those leaving their planes. Reversal of *US Airways, Inc. v. O'Donnell* will send a signal to persons in the business of providing commercial flights and selling alcohol on those flights that they do not have a duty to promote responsible drinking. Such blatant disregard for a duty to foreseeable plaintiffs that has been common law since the time of Justice Cardozo's famous *Palsgraf* opinion means many more persons will lose their lives to drinking and driving. It is clear from this case's record that US Airways allowed an obviously intoxicated individual to purchase and consume additional alcohol while flying on its plane.

Additionally, the facts of this case show that, not only was US Airways selling alcohol in New Mexico without a public service license, but that any server training that did occur was woefully inadequate and noncompliant with New Mexico law. The fact that US Airways is serving alcohol on an airplane, rather than in a bar, does not mean that it does not have a duty to comply with the public safety requirements applicable to all retailers. This case is a tragic reminder that the risks to the public are exactly the same, regardless of where service occurs.

Should this case be reversed, innocent drivers and passengers on New Mexico's and America's roadways will be the losers. It will also set a dangerous precedent for future incidents of such non-compliance. The servers of intoxicated persons will once again be free to profit from enabling their patrons to abuse alcohol while ignoring the direct danger posed by excessive service of alcohol, whether it be in a bar or on an airplane. To attempt to disconnect the obvious link between in-flight alcohol service, understanding that the plane will eventually land (likely placing the potentially intoxicated passenger behind the wheel of an automobile) and the liability incurred by those serving the alcohol, is reckless at best. Furthermore, to disrupt an existing and efficient criminal legal system already in place within the State of New Mexico would undermine the 21<sup>st</sup> Amendment to the Constitution.

**CONCLUSION**

Based on the forgoing arguments and authorities, Mothers Against Drunk Driving respectfully requests that the District Court's judgment be upheld.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

So far as is known to *Amicus Curiae* Mothers Against Drunk Driving, there are no related cases pending in the Tenth Circuit Court of Appeals.

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,429 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

/s/ Leslie Patterson Moore  
Leslie Patterson Moore

**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of April, 2010, I filed the forgoing brief via the Court's electronic case filing (ECF) system. Pursuant to this Court's General Order of March 18, 2009, the resulting Notice of Docket activity generated by the ECF system constitutes service on counsel for the Appellees.

/s/ Leslie Patterson Moore  
Leslie Patterson Moore

**CERTIFICATE OF DIGITAL SUBMISSION**

Pursuant to this Court's General Order of March 18, 2009, I certify that in the foregoing brief, no privacy redactions were required and hence no such redactions were made. I further certify that an electronic version of the brief has been scanned for viruses by Trend Micro Client/Server Security Agent (updated continuously) and is, according to that program, free of viruses. I further certify that the electronically filed version of this brief is an exact copy of the paper version filed with the clerk of court.

/s/ Leslie Patterson Moore  
Leslie Patterson Moore