IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1987
Summary Calendar

KELLY GARRETT and JOHN H. GARRETT,

Plaintiffs-Appellants,

VERSUS

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1070-T)

(December 29, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Kelly and John Garrett, passengers involved in an emergency evacuation of an American Airlines ("American") flight, appeal the dismissal of their lawsuit against American. Concluding that, under the procedural posture of this case, the plaintiffs are left without a remedy, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A.

On March 17, 1991, American Airlines Flight No. 1004 had an emergency landing, and the Garretts were forced to evacuate the plane. Kelly Garrett recently had undergone cervical surgery from which she was recovering. During the evacuation, she was required to jump out of the plane onto a chute and then, once on the ground, to run away from the plane. As a result of American's alleged negligence, she suffered exacerbation of her prior injuries as well as "new and serious" injuries.

B.

Kelly and John Garrett[1] brought a tort action against American in state court. American removed the action to federal court in Oklahoma, and the action was ultimately transferred to the Northern District of Texas. American moved to dismiss, claiming that the FAA preempts state negligence suits. The district court granted the motion after the plaintiffs appeared to concede federal preemption.

II.

In their opposition to the motion to dismiss, the plaintiffs denied that they were suing under a state tort theory: They stated, "It is the defendant that has labeled the plaintiffs [sic] cause of action as state law claim to support its preemp-

[1] John Garrett claimed loss of companionship and consortium.

tion theory . . . ." In a further effort to avoid any implication that they were asserting a state cause of action, they stated, also in their opposition to the motion to dismiss, that "Morales v. Transworld Airlines, 112 S. Ct. 2031 (1992), leaves no question that there is federal preemption of state law claims against airlines that relate to rates, routes, or services." Nowhere in the district court did the plaintiffs argue that the negligence they allege was not related to American's "services."

To the extent that the plaintiffs now argue, on appeal, that their claim is not wholly preempted by § 1305(a)(1) of the Federal Aviation Act of 1958, as amended at 49 App. U.S.C.A. § 1301-1557, we will not consider that argument, as we do not entertain issues that are raised for the first time on appeal, nor are parties permitted to change their position on appeal. See Brandon v. InterFirst Corp., 858 F.2d 266, 268 (5th Cir. 1988); Jett v. Zink, 474 F.2d 149, 155 (5th Cir.), cert. denied, 414 U.S. 854 (1973). Accordingly, we need not address the preemption issue, which is discussed in Hodges v. Delta Airlines, 4 F.3d 350 (5th Cir. 1993), petition for rehearing en banc pending. We assume, only for purposes of this appeal in light of the waiver, that the instant plaintiffs have no remaining state cause of action.

III.

The plaintiffs, conceding that "no federal common law exists," are left only with their contention that there is an

implied cause of action under 49 App. U.S.C.A. § 1374(a), which provides that "[i]t shall be the duty of every air carrier . . . to provide safe and adequate service, equipment, and facilities . . . ." This court, however, in Diefenthal v. Civil Aeronautics Bd., 681 F.2d 1039, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983), squarely held that "Congress did not intend to create a private cause of action to enforce section 1374(a)." We also observe that although plaintiffs aver that denial of a state law claim necessitates a federal remedy for the alleged wrong, we have rejected the notion that federal law cannot preempt state law without providing a federal remedy. See Stamps v. Collagen Corp., 984 F.2d 1416, 1425 & n.11 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

The judgment of dismissal is AFFIRMED.