Appellee

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

IN REPLY REFER TO

JAG:142:nfa
Harold Weisberg
Lillian Weisberg
3063

22 MAY 1961

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APPELLATE SECTION
CIVIL DIVISION

William H. Orrick, Jr.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Attention: Russell Chapin
Chief, Torts Section

Re: Harold Weisberg and Lillian Weisberg
v. United States - U.S.D.C. for the
D. of Maryland - Civil No. 11036

My dear Mr. Orrick:

This is in reply to your letter WHO:RC:IMG 157-35-234 dated May 1, 1961, in which a copy of the decision rendered in the Weisberg case was forwarded.

Forwarded herewith are comments with respect to the decision, which comments are based upon the facts as set forth in Judge Thomsen's opinion

While the complaints set forth in the instant suit would be properly cognizable under the Military Claims Act (10 USC 2733), for the reasons set forth in enclosure (1), it is felt that they are not actionable under the Federal Tort Claims Act (28 USC 1346(b)). If they are, and this decision stands, Mr. Weisberg could annually vex the Government with a similar suit, for pilots have nowhere else to look but to Federal standards to govern the conduct of their flight.

Sincerely yours,

Geo. F. Stearns, Jr.

GEO. F. STEARNS, JR.
Captain, U. S. Navy
Director
Litigation and Claims Division

Encl:
(1) Comments on decision of Judge Thomsen

157-35-234
DEPARTMENT OF JUSTICE
MAY 24 1961
RECORDS BRANCH
CIVIL DIVISION
Federal Tort Claims Section

Single

Comments on decision of Judge Thomsen in the case of Weisberg v. United States in the United States District Court for the District of Maryland, Civil Action No. 11036.

I Question Presented

Can a state statute which provides no standards of conduct for the operation of aircraft measure the duty owed to a chicken farmer by the pilot of a Government aircraft so as to impose liability upon the United States under the Federal Tort Claims Act?

II Facts

(Taken from the opinion of Judge Thomsen):

From time to time during 1957 and 1958, Army, Navy and Air Force helicopters, and possibly some commercially or privately operated ones, were routed in the vicinity of Hyattstown, Maryland, in order to avoid the main airways used by conventional aircraft in flying to and from the many airports in the high density air traffic area of Washington, D. C. To further lessen the chances of mid-air collision with conventional aircraft, helicopter pilots are generally directed to fly at altitudes not to exceed 1,500 feet above sea level (in the Hyattstown area). The mean surface altitude in the area is from 300 to 500 feet which results in flights of helicopters not much more than 1,000 feet above the surface.

Plaintiffs' claim is for damage to their chickens and is based primarily on a considerable number of helicopter flights over their farm on Civil Defense Day, 12 July 1957, which plaintiffs promptly reported to Government authorities, and flights on five occasions in 1958 of which only an April incident was reported. No witness for plaintiffs was able to recognize the markings on any helicopter except plaintiffs' lawyer who said he "has visions of seeing" an Army Star on one of the khaki helicopters on a Sunday in April 1958 which he thought was April 20; other evidence offered by plaintiffs indicated there were no Army helicopters in the area that day. Plaintiffs complained of jet planes in 1948, made a claim based on a sonic boom in 1959 and offered evidence which indicated his chickens were frightened by the sirens of ambulances and fire engines.

Four other chicken raisers in the neighborhood to the east, south and west of plaintiffs sustained no damage to their poultry during the years in question. Helicopters at Davison USAAF were instructed to fly at a minimum of 800 feet. Navy regulations require pilots to avoid poultry farms.

The Judge found as a fact that flights at altitudes of 800 feet or more might startle chickens, but would cause them no injury, whereas flights at altitudes less than 800 feet might cause panic and resultant injury; that there was a low flight of Government helicopters on 12 July 1957 which caused damage and that on five occasions during 1958 a helicopter (not identified) flew over plaintiffs' chicken farm at less than 800 feet which resulted in damage; and that the plaintiffs' loss was $750.00.

III Law Involved

Part 60, Air Traffic Rules, promulgated by the Federal Aviation Agency set forth regulations for the flight of helicopters under visual flight rule weather conditions as follows:

> "§60.17 Minimum safe altitudes. Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface; . . . . . .
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. Helicopters may be flown at less than the minimums prescribed herein if such operations are conducted without hazard to persons or property on the surface and in accordance with paragraph (a) of this section;
>
> Note: When flight is necessary at an altitude of less than 500 feet above the surface, the pilot must avoid creating any hazard to persons or property on the surface which may result from such flight. In no event should the pilot expose his passengers to unnecessary hazard while engaging in flight at low altitude. The maneuverability of the helicopter permits safe flight below the minimums required in §60.17, provided good judgment and caution are exercised by the pilot."

Army, Navy and Air Force Regulations for the flight of helicopters are in strict conformance with the Federal Aviation Regulation set forth above.

A Maryland statute declares that flights at such low altitudes over land as to interfere with the then existing use to which the land is put by the owner, is unlawful, and provides that the owner of every aircraft is prima facie liable for injuries to property on the land beneath, caused by the flight of the aircraft. The statute further provides that this presumption of liability may be overcome by a showing that the injury was not caused by negligent operation or maintenance, and sets forth a fine up to $500.00 or imprisonment up to 90 days for violation of any provision of the statute.

In his written opinion, Judge Thomsen states that the legal principles controlling this case are stated in United States v. Causby, 328 U. S. 256; D'Anna v. United States, 4 Cir., 181 F. 2d 335; Nunnally v. United States, 4 Cir. 239 F. 2d 521; and Barroll v. United States, D. Md., 135 F. Supp. 441.

In the Causby case the Supreme Court ruled that the common law doctrine that ownership of land extends to the periphery of the universe has no place in the modern world and that the air above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority (now FAA) is a public highway and part of the public domain. In the Nunnally case, as in the instant case, plaintiffs' action was based on both the Tucker Act and the Federal Tort Claims Act. He claimed that the Government had invaded or exercised dominion over his property by the noise and shock of test explosions and by the flights of aircraft over the island which caused his plaster to fall and rendered the premises an unfit place to relax. Nine of the flights were at altitudes of less than 2,000 feet, a few being at treetop height. Plaintiff conceded, in which the court appears to have concurred, that no case was proven under the Federal Tort Claims Act. With respect to the low flights the court went on to hold that the plaintiff was not entitled to relief under the Tucker Act either, the low flights in question not having been of sufficient frequency as to come within the rule laid down in the Causby case. It is interesting to note that Judge Thomsen, sitting with the 4th Circuit, also wrote the opinion in the Nunnally case.

In the D'Anna case an externally mounted auxiliary fuel tank fell from a military aircraft into Lexington Market in the City of Baltimore during an aerial exhibition. Subsequent examination of the aircraft revealed that the fuel tank locking mechanism on the aircraft had been damaged either during the flight in question or during a previous flight. The Government offered no evidence to show that if the damage to the mechanism had occurred during the particular flight, it was not the result of negligent operation, or, if during a previous flight, it could not have been detected by proper inspection. The rebuttable presumption of liability raised by the Maryland statute, not having been overcome by the Government, judgment was entered for the plaintiff.

The Barroll case deals strictly with the discretionary function exception to the Federal Tort Claims Act.

It would appear that the cases of Boskovich v. United States, 3 CCH Aviation 17, 252; Hambright v. United States, 2 CCH Aviation 15,030; and Nova Mink Ltd. v. Trans-Canada Airlines, 2 Dominion Law Reports (1951) 241 are directly in point.

In the Boskovich case, decided by the United States District Court, District of Utah, military aircraft flew over plaintiffs' chicken farm at altitudes not lower than those prescribed by the Federal Civil Aeronautics Administration (now Federal Aviation Agency) or the Civil Aeronautics Administration of the State of Utah. Plaintiffs' chickens were damaged in the amount of $1,917.50. Held; plaintiff had no cause of action against the United States for negligence, no rule or regulation of the Federal

Civil Aeronautics Administration or the State Civil Aeronautics Administration having been violated.

In the Hambright case, decided by the United States District Court, Western District of South Carolina, military aircraft flew over plaintiffs' turkey farm at altitudes lower than those prescribed in Army Air Force Regulations and Civil Air Regulations (FAA). Plaintiffs' turkeys were damaged in the amount of $2,520.45. Held; operation of aircraft at altitudes less than 500 feet in violation of Federal regulations is actionable negligence under the Federal Tort Claims Act.

In the Nova Mink case a commercial airliner flew over plaintiffs' mink farm at an undetermined altitude not above 2,000 feet during the whelping season and the frightened parent mink devoured approximately 300 of their newborn kits. The roof of the ranch was marked in large lettering, observable from an altitude of 2,000 feet "MINK RANCH". The pilots had no actual knowledge of any mink ranch in the area. The aircraft approached the ranch from the opposite side of a hill and whether the pilots could have maneuvered the aircraft so as to avoid flying over it, had they seen it, is pure conjecture. The attention of the pilots at the time was directed at making a landing approach to a nearby airport. Held; the prevision of the reasonable man as to the probability of danger must include whatever notice of plaintiffs' situation the facts afford; and in the absence of knowledge of his special susceptibility to harm from certain conduct, no duty to refrain therefrom arises when it would otherwise be harmless.

IV Discussion

The Federal Tort Claims Act (28 USC 1345(b)) sets aside the mantle of sovereign immunity from liability for negligence or wrongful act or omission committed by its servants under such circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission (negligent or wrongful) occurred. The Federal Government cannot therefor be deemed to have relinguished its immunity in those instances where its servants committed no wrongful or negligent act.

From the facts, it would appear that in no instance did any military helicopter pilot fly at altitudes below the minimums established by Federal regulations or in any other way violate any rule emanating from any Federal source.

Judge Thomsen's decision therefore must, of necessity, be bottomed on some negligent or wrongful act arising from the laws of the State of Maryland. The Maryland statute proclaims as unlawful the flight of aircraft which interferes with the use to which the land is put over which a flight is made. The statute establishes no minimum altitudes which may be flown or maximum decibels of noise which may be produced, nor does it provide any

other standard, criteria, or limits which the operator of an aircraft may look for guidance to operate his aircraft lawfully. The statute does not provide for any notice to be given airmen of the geographic location of poultry farms, nor does it provide for any special markings visible from the air, to be displayed by any poultry farmer. In short, the statute, without establishing any standard for flight, makes unlawful perfectly innocent and reasonable conduct, well within specified limits set by Federal authorities which might be damaging to a very rare and limited class of persons who have a special susceptibility to harm, without providing any system of notification to airmen of the especial precarious circumstances of these persons, the geographic location of their poultry farms, or for any system of warning or identification.

Wherein lies the negligence or wrongfulness, required under the Federal Tort Claims Act before sovereign immunity from liability is waived, of a flight of a Government aircraft conducted at altitudes which are reasonable and within airspace declared to be within the public domain by the Supreme Court, and which, under ordinary circumstances is harmless to the populace below? How can a pilot know whether an outbuilding on a farm contains cord-wood or poultry, in the absence of any notice, any disguishing mark, or identification? He can only be guided in the operation of his aircraft by whatever fixed standards are established. The laws of Maryland having established none, a pilot has nowhere to look but to whatever limits Federal regulations have established.

Under the Maryland statute the operator of an aircraft is tantamount to an insurer. A flight at 20,000 feet could conceivably be held to have interfered and thus be unlawful. The Congress did not intend that the Government would be an insurer under the Federal Tort Claims Act.

V Conclusion

It is therefore considered that in the absence of some established rules of conduct for airmen, or provision for notice, a state statute can raise no duty in a military pilot so as to impose liability upon the Government under the Federal Tort Claims Act.