

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AUBREY ANDERS, as Administrator
of the Estate of Michael R. Anders, deceased,

CASE NO.: 6:15-cv-1115-ORL-28GJK

Plaintiff,

-vs.-

UNITED STATES OF AMERICA,

Defendant,

COMPLAINT

Plaintiff, Aubrey Anders, as Administrator of the Estate of Michael R. Anders, deceased, sues Defendant, The United States of America, and alleges:

1. This action arises out of a fatal January 4, 2013 aircraft crash in Palm Coast, Florida.

Jurisdictional Allegations

2. Plaintiff, Aubrey Anders is a resident of the State of Ohio and was duly appointed the Administrator of her father's Estate on April 24, 2013, by the Clinton District Court for the 40th Judicial Circuit of the Commonwealth of Kentucky, Case number 13-P-00032. At the time of his death, Michael Anders was unmarried and was a resident of Albany, Kentucky.

3. Defendant, United States of America, is a sovereign nation and exists under the Constitution and the laws enacted by the United States Congress. The

Federal Aviation Administration (hereinafter “FAA”) is, and at all times relevant to this lawsuit was, an agency of the United States Department of Transportation, organized and existing under the laws of the United States.

4. This is an action brought pursuant to the Florida Wrongful Death Act, Florida Statutes §§ 768.16 -768.27, to recover damages for the exclusive benefit of the Estate and surviving children of Michael R. Anders.

5. Plaintiff, Aubrey Anders, as Administrator, brings and prosecutes this action on behalf of The Estate of Michael R. Anders; and his surviving daughters, Aubrey Anders and Ariel Anders, who are lawful survivors under the Florida Wrongful Death Act.

6. This Court has Subject Matter Jurisdiction over the defendant pursuant to the Federal Tort Claims Act, because the United States is the proper defendant in this action¹ and, at all times relevant to this action, employees of the FAA were acting in their official capacity, in their performance of non-discretionary duties and under the authority of Defendant United States of America.

7. Plaintiff has complied with all conditions precedent to the filing of this action. Specifically, on December 9, 2014, (received December 17, 2014), Plaintiff served her initial administrative claims with the Federal Aviation Administration (“FAA”) on behalf of the Estate, herself and Ariel Anders. The United States denied said claims on April 16, 2015.

¹ 28 U.S.C. §1346(b) and §2671 *et seq.*

8. The whole law of the State of Florida, including Florida's choice of law rules, applies to all issues in the case.²

9. Venue is proper in the Middle District of Florida because the acts and occurrences giving rise to the action occurred in the Middle District of Florida.³ This claim arises in the Orlando Division, because the Defendant's negligent conduct occurred in Volusia County, Florida.⁴

10. Pursuant to the Florida Wrongful Death Act, Defendant is liable for damages arising from Michael R. Anders' death because it was caused by the negligent acts and/or omissions of FAA employees acting within the course and scope of their employment.

Factual Allegations

11. Plaintiff's decedent, Michael Anders, was an appropriately certificated, rated and current private pilot with airplane single-engine land and instrument airplane ratings, and a valid FAA Class III medical certificate.

12. On the afternoon of January 4, 2013, Mr. Anders boarded his 1957 Beechcraft, model H35, Bonanza single-engine airplane bearing FAA registration N375B. (hereinafter, "N375B") for a flight from the Saint Lucie County International Airport in Fort Pierce, Florida, to the Knoxville Downtown Island Airport (DKX), in Tennessee.

² 28 USCS § 1402(b); Schippers v. United States, 715 F.3d 879 (11th Cir. 2013).

³ 28 U.S.C. §1402(b).

⁴ Beattie v. United States, 756 F.2d 91, 96 (1984).

13. The flight was a private trip being conducted pursuant to Title 14 C.F.R. Part 91, and was not a commercial flight for hire.

14. The Flight was operating under Visual Flight Rules (VFR)⁵ The Flight proceeded as follows:

The Flight

15. The Flight departed the Ft. Pierce Airport, at about 1:11 p.m.

16. At about 1:17, N375B contacted Miami Air Route Traffic Control Center, an FAA facility (“ATC”) that controls air traffic across southern Florida, and requested “flight following”⁶ services. At all times, ATC had real-time data concerning N375B’s location, altitude and ground speed provided by the aircraft’s on-board equipment.

17. At about 1:31, N375B was instructed to establish radio communications with controllers located at the Central Florida Terminal Radar Approach Control in Orlando, which controls central Florida’s airspace from the surface up to 16,000 feet.

18. At about 1:49, N375B was transferred to Daytona Beach Approach’s MATEO arrival sector.

⁵ Under Visual Flight Rules (VFR), pilots remain in visual meteorological conditions (VMC), and maintain their navigation and flight attitudes with visual reference to the outside horizon. In contrast, pilots operating under Instrument Flight Rules, (IFR), continuously operate under the positive control of air traffic controllers (“ATC”) and are generally required to comply with the “clearances” (altitudes, routes, vectors and procedures) assigned by the ATC controllers. This is true even when the IFR pilot is in visual conditions. When pilots are in Instrument Meteorological Conditions (“IMC”), Pilots cannot see outside of the cockpit or navigate visually and, therefore, must rely on the aircraft’s instruments and controllers’ instructions.

⁶ While navigating on its own under VFR, under Flight Following, ATC follows the progress of the flight and provides services, including traffic advisories, depending on their workload.

19. At about 1:57, N375B requested a climb to an altitude of 6,500 feet. ATC reported cloud tops of 7,000 feet and advised N375B to maintain at or above 7,000 feet, and remain in visual conditions. At this time, N375B was above the clouds in visual meteorological conditions. The Pilot complied and climbed to 7,500 feet as suggested.

20. At about 2:07, N375B reported a vibration in the propellers and the Pilot stated, **“I need some help here.”**⁷

21. The approach controller informed the pilot that the closest airport was at his 12 to 1 o'clock position and 5 miles. At the time, the Flagler Airport was actually about 8 miles to the north of the airplane's position⁸ and Ormond Beach was only 6 miles South.⁹

22. The MATEO controller asked if the Pilot was IFR capable and equipped. The pilot confirmed his Instrument rating but advised that he had an oil pressure problem and would have to drop (descend) quickly. Another DAB controller contacted Flagler tower to inform its controllers of the inbound “emergency.”

⁷ Though the Pilot did not expressly declare an “emergency,” the FAA's instructions to pilots seeking Emergency Assistance do not require, or even mention, an express declaration of an “emergency.” See FAA FAR/ARM §6-3-2. The NTSB confirmed that the controller reported the event as an “emergency” to his manager. FAA Order 7110.65, the air traffic control manual, §10-1-2 directs controllers to “[o]btain enough information to handle the emergency intelligently. Further, the FAA instructs pilots and controllers that an emergency is “either a distress or urgency condition.” “Distress” is when being threatened by serious and/or imminent danger and requiring immediate assistance. “Urgency” is when being concerned about safety and requiring timely but not immediate assistance.” The FAA is aware that pilots are reluctant to report an emergency in potentially catastrophic situations. <http://www.faa.gov>.

⁸ NTSB ATC Group Chair Rpt.

⁹ Ormond Beach Airport, which offered far superior approach opportunities for N375B's equipment and was located only about 6 miles to the southeast of the airplane's position at the time, was never offered because, according to controllers, a runway closure would have required a downwind landing. This, even though the reported winds were only 9 knots and the airport had a sufficiently long runway to overcome this.

23. The MATEO controller issued an Instrument Flight Rules clearance to N375B to the Flagler Airport, and instructed it to descend and maintain 2000 feet. ATC asked for clarification of the nature of the problem. The Pilot responded, in part, "...we got a propeller or something going."¹⁰

24. At about 2:08, the MATEO controller instructed N375B to continue its present heading, and advised that ATC would get him as close as he could to the Flagler airport for a Runway 29 approach. The MATEO controller then advised that the ceiling at Flagler airport was 900 feet. It was the MATEO controller, and not the pilot, that made the decision that an instrument approach¹¹ was required.

25. When asked to state his intentions. The Pilot requested a localizer approach.¹² Rather than offering an approach to the Ormond Beach Airport, the MATEO controller responded, "...the best we can do is an RNAV¹³ at that airport (XFL) or we

¹⁰ The controller should have understood that the loss of either a propeller, or engine, in a single-engine airplane constitutes a dire emergency and would limit an airplane's ability to maintain altitude, much less climb.

¹¹ When an airport's broken or overcast ceiling is observed to be lower than 1000' above ground, or its visibility falls below 3 miles, airports operate under Instrument Flight Rules (IFR). Under these rules, pilots may still be able to see the airport environment at times but follow a published instrument procedure that uses radio or GPS signals to guide them to the airport. The published approach procedures are depicted on maps, called "plates," in the cockpit that help the pilot maintain geographic awareness through visual routes, terrain, relevant obstructions and the designated altitudes at various points along the way to reach the runway.

¹² A Localizer approach provides horizontal course guidance to the runway through radio signals.

¹³ An "RNAV" approach requires a certified GPS with approach capability to guide the aircraft to the airport. N375B's Pilot did not have this equipment or the capability to conduct an RNAV approach.

can reverse course back to Daytona. The only precision approach we have in our airspace is the ILS at Daytona.¹⁴

26. The Pilot clarified that he did not need a precision approach and repeated his request for a localizer, or one with VFR conditions. When advised the area's airports were all operating IFR with ceilings around 900', the Pilot requested the **nearest airport** and stated his intent try to **break out at a thousand**.¹⁵ He also confirmed that he did not have RNAV capability.

27. The MATEO controller then asked if N375B could accept an ASR approach¹⁶ into Flagler, which was accepted by the Pilot.

28. The MATEO controller then instructed N375B to descend and maintain 2,000 feet and transferred control over the flight to the NORTH ARRIVAL sector's controller.

29. At about 2:09, N375B checked-in with the NORTH ARRIVAL controller and reported being at 7,000 feet descending to 2,000 feet. The controller cleared N375B to descend and maintain 3,000 feet, and to turn right heading 060 degrees, which was acknowledged.

¹⁴ Daytona's airport was approximately 15 miles south of the N375B's position at this time. An "ILS", or Instrument Landing System, is a "precision" approach that includes a localizer for horizontal guidance and a "glide-slope," which provides vertical guidance to the runway.

¹⁵ The normal pattern altitude for visual flights at the Flagler airport is 1,033 feet. A safe descent and landing from a 900' ceiling in the airport's traffic pattern would essentially be a normal operation. This was overlooked by the controllers.

¹⁶ An "ASR" approach requires the Pilot to strictly rely upon ATC's voice commands for guidance to the runway.

30. At about 2:10, the NORTH ARRIVAL controller advised N375B that he will be conducting an ASR approach to Flagler's runway 29. The Pilot restated that he would try to "break-out," which reflected his intent to make an essentially normal landing once below the 900 foot ceiling.

31. At 2:11, the Pilot reported "zero oil pressure but we've got cool cylinder head temperature." The NORTH ARRIVAL controller acknowledged, but never inquired whether N375B could maintain altitude or what other complications he faced. The NORTH ARRIVAL controller then instructed N375B to turn right to a heading of 090 degrees and descend to 2,000 feet, which was acknowledged. The NORTH ARRIVAL controller informed N375B that he would provide guidance along the "RNAV runway 29 approach" but never warned that the procedure was actually unpublished.¹⁷ The NORTH ARRIVAL controller then advised that the straight in minimum (altitude) was 560 feet, which was acknowledged.

32. At 2:12, The NORTH ARRIVAL controller instructed N375B to turn right to a heading of 110 degrees and descend to 2,000 feet, which was acknowledged. The controller also then promised N375B that it would keep the flight within 5 miles of the airport. N375B acknowledged and reported descending from 4,300 feet to 2,000 feet.

33. At about 2:13, the NORTH ARRIVAL controller provided a right turn to 150 degrees. N375B acknowledged, confirming the descent from 3,400 feet for 2,000 feet.

¹⁷ The Pilot would likely have been stressed looking through his approach "plates" and being unable to locate and follow this unpublished procedure. (Which was first published more than a year later). This is akin to navigating a vertical and horizontal maze while blindfolded using only voice instructions.

ATC then advised N375B that it was 6 miles east/northeast of the field.¹⁸ ATC instructed it to turn right to a heading of 180 degrees, and that it was on a base leg for a 4-1/2 to 5 mile final. The Pilot acknowledged and stated "...we're starting to see some ground here."

34. At 2:14:27, the NORTH ARRIVAL controller instructed N375B to descend to 1,600 feet and to turn to a heading 200 degrees, which was acknowledged. The Flagler Airport's tower controller advised another of Daytona Beach Approach Control's air traffic controllers that Flagler had 3 to 4 miles visibility to the east with a pilot-reported ceiling of 600 feet and automated reports of 900 feet.

35. At 2:14:54, the NORTH ARRIVAL controller instructed N375B to turn right heading 260 degrees. N375B acknowledged and stated, "...we're beginning to see the water here." This reflects that the controller, knowing the flight may have a total power loss, recklessly vectored the flight over open water.

36. At 2:15, the NORTH ARRIVAL controller informed N375B that he was 5 miles southeast of the field. The controller issued N375B various turns and altitudes to intercept the final approach course and then cleared the flight to descend to the minimum descent altitude, stating "the published minimum descent altitude for the RNAV 29 is 560." This was false. As there was no published procedure or published minimum altitude.

¹⁸ This reflects that the controller failed to ensure that the flight remained within five miles as promised.

37. At 2:16, the NORTH ARRIVAL controller announced that N375B was 4 miles straight-in; then 3 miles from the runway; and then asked N375B to advise when the field was in sight. The NORTH ARRIVAL controller advised the flight was “left of course and correcting slowly heading 310” and then issued a landing clearance to which there was no response. The controller announced that N375B was 2½ miles from the runway left-of-course and then repeated its request for N375B to report the field in sight. There was no response.

38. At 2:17, the NORTH ARRIVAL controller announced that N375B was 2 miles from the runway and called the flight twice without response. The controller broadcast that N375B appeared to be below radar coverage and instructed it to contact Flagler Tower. He then provided instructions to N375B climb straight ahead to 2,000 [feet] if the airport was not in sight.

39. This missed approach instruction to climb evinces the NORTH ARRIVAL controller’s reckless failure to understand the dire circumstances facing the Pilot. To even suggest that a single-engine airplane with a loss-of-power would have any ability to climb, absent actual knowledge to the contrary, defies logic.

40. At 2:17:59, the Pilot transmitted, “... do you read me?” The NORTH ARRIVAL controller responded that he had him loud and clear and, again, asked if he had the airport in sight at his 12 o'clock and a mile. N375B did not respond. The controller then assigned a frequency change to Flagler Tower’s radio frequency.

41. At 2:18:27, N375B's Pilot advised "...we need help; we're coming in with smoke." The NORTH ARRIVAL controller informed N375B that Flagler tower was waiting and that N375B was cleared to land.

42. At 2:18:55, the Flagler controller called the NORTH ARRIVAL controller to report that N375B did not make it.

43. N375B impacted trees and a residence about 3/4 mile from the runway.

44. The likely cause of the power loss was a loss of oil resulting in the fracture of a connecting rod in the engine.

45. The cause of the crash was the air traffic controllers' negligent failure to immediately guide the aircraft, as repeatedly requested by the pilot, directly to the nearest airport so that the aircraft could safely descend below the clouds and land and, instead, circled the aircraft around the airport to a position where it could no longer maintain altitude sufficient to land.

46. As a direct and proximate cause of the crash, all aboard, including Plaintiff's decedent, Michael R. Anders, were fatally injured.

COUNT I **Negligence**

Plaintiff re-alleges, and incorporates by reference, the allegations set forth in paragraphs one (1) through forty-seven (46) above, and alleges further:

47. The FAA defines a forced landing as an immediate on or off an airport landing necessitated by the inability to continue further flight, which includes an airplane

forced down by engine failure¹⁹ and, in that situation, most pilots correctly look for the largest available flat and open field.²⁰

48. The FAA advises pilots with a distress or urgent condition to obtain assistance by contacting the air traffic facility stating the nature of the difficulty, pilot's intentions and assistance desired.²¹ Pilots are advised by the FAA that air traffic controllers can provide radar vectors to VFR aircraft in difficulty when in communication with air traffic controllers and the aircraft is within radar coverage.²²

49. Air traffic controllers owe a duty of reasonable care to pilots and, in an emergency, are duty bound to render "maximum assistance" commensurate with the risk.²³ They also owe a duty to issue warnings beyond those required by the manuals when danger to the aircraft is immediate and extreme and when the pilot indicates distress.²⁴ Controllers must also act when they have reason to know that an emergency situation exists.

50. FAA Operational Order 7110.65 (the "FAA Manual") §10-1-1b, entitled "Emergency Determinations," states that "Because of the infinite variety of possible emergency situations, specific procedures cannot be prescribed. However, when you believe an emergency exists or is imminent, select and pursue a course of action which

¹⁹ FAA Flying Handbook, FAA-H-8083-3A, §16-1.

²⁰ *Id.*, §16-2.

²¹ FAR/AIM §6-3-1(a).

²² *Id.*, §6-2-1(a).

²³ Daley v. United States, 792 F.2d 1081, 1085 (11th Cir. 1986) and Barna v. United States, 89 F. Supp. 2d 983, 999 (N.D. Ill. 1999).

²⁴ Turner v. United States, 736 F. Supp. 2d 980, 1008 (M.D.N.C. 2010); Daley at 1085.

appears to be most appropriate under the circumstances and which most nearly conforms to the instructions in this manual.”

51. A single-engine land aircraft with a power loss has a finite glide range and must immediately undertake best efforts to navigate directly to the nearest suitable runway.

52. FAA Operational Order 7110.65, §§10-1-1b and 10-1-2, when read *in para materia*, require that, when an emergency is believed to exist, controllers are expected to “[o]btain enough information to handle the emergency intelligently” so that they can provide the correct type of assistance is needed.

53. Air traffic controllers, having actual knowledge that the pilot was encountering power loss, engine and/or propeller problems, were required by their own rules to determine the extent to which the emergency limited the pilot’s ability to maintain altitude, course and/or direction.

54. At least by 2:07 p.m., when the pilot specifically asked for “help,” controllers had actual knowledge that an emergency existed and that N375B was in appreciable peril, as evidenced by the fact that the controllers working the aircraft initiated standard emergency questions and protocols and notified Flagler Airport of the inbound emergency.

55. Having actual knowledge that the pilot lacked GPS equipment and any visual depiction of his relative position, air traffic controllers should have also appreciated the Pilot’s increased workload and reduced situational awareness while in

Instrument Meteorological Conditions and that the pilot was acting in reasonable reliance of their instructions to reach the nearest runway.

56. Though the air traffic controllers acknowledged that the Pilot needed immediate and direct vectors to the closest suitable runway, they, instead, vectored the airplane through a peculiar series of turns so that it was unable to reach the airport.

57. Having undertaken the task of providing the aircraft with vectors to the nearest airport, air traffic controllers assumed a duty to act carefully and not to put the occupants at undue risk of harm.²⁵

58. The United States, through the FAA and its air traffic controllers, breached its aforementioned non-delegable and non-discretionary duties when it negligently failed to use the reasonable care and diligence exercised by other air traffic controllers under the same or similar circumstances, committing acts and/or omissions constituting negligence, as the term is defined by law, in the following respect or manner:

- (a) by failing to comply with the minimum requirements and procedures contained within FAA Order 7110.65;
- (b) by failing to obtain sufficient information to determine the nature of the aircraft's mechanical condition and the extent of the emergency;

²⁵ Zinn v. United States, 835 F. Supp. 2d 1280, 1312 (S.D. Fla. 2011).

(c) by failing to appreciate the extent of the emergency, or seek additional information about the aircraft's glide range and the pilot's limited spatial orientation;

(d) by unnecessarily elevating the pilot's workload during the emergency by advising the Pilot that he was tracking the RNAV 29 approach which did not exist and was unpublished, and by repeatedly referencing the approach and its "published" minimums;

(e) by failing to reasonably direct the flight to the closest airport using the closest route, having been expressly asked by the Pilot for the "closest" airport and having undertaken the task to do so;

(f) by failing to even offer the Ormond Beach Airport, when controllers had superior and actual knowledge over that of the pilot, including the fact that the airport was closer to N375B's position at the time requested;

(g) by not even offering the Ormond Beach Airport, which had a published VOR²⁶ (non-RNAV) instrument approach procedure to Runway 17, which was most similar to the type of approach, and navigational equipment, requested by the Pilot.

²⁶ A "VOR" approach, similar to a localizer, provides horizontal guidance to the runway using equipment installed in N375B.

(h) by failing to suggest vectors to a position over the Flagler Airport so that the Pilot could safely spiral down for an essentially normal landing once below the 900 foot ceiling;

(i) by escalating the emergency by vectoring the aircraft to a position that took it farther away from the runway than reasonable and promised;

(j) by failing to take the pilot's increased workload into consideration; and,

(k) other acts, omissions and failures to be determined.

59. At all times, ATC had far superior knowledge of the aircraft's geographic position in relation to area airports.

60. The Pilot had a reasonable right to, and did, rely upon ATC's superior and real time view while over the top of the ceiling and while in Instrument Meteorological Conditions.

61. As a direct and proximate cause of ATC's negligence, as aforesaid, Plaintiff's decedent was fatally injured.

62. While not causing the initial emergency, ATC's negligent conduct set the disaster's chain of events in motion. The crash would not have occurred had controllers not unreasonably widely circumnavigated the aircraft around the Flagler Airport and, instead, would have immediately directed the pilot into position for a straight-in landing or, alternatively, directed it to a position over Flagler airport where it could safely spiral down over the airport environment until it broke through the 900 foot ceiling.

63. The crash was directly and proximately caused by the negligence of FAA personnel acting within the course and scope of their employment.

64. As a direct, probable, foreseeable, and proximate result of Defendant's negligence, as aforesaid, Plaintiff Aubrey Anders and Ariel Anders have been deprived of the value of their father's companionship and protection. They have also lost the past and future support and services that Michael R. Anders would have contributed to them during his lifetime, had he lived, with interest. They have both experienced great mental pain and suffering from the date of his death and will continue to experience great mental pain and suffering in the future.

65. As a direct, probable, foreseeable, and proximate result of Defendant's negligence, as aforesaid, the Estate of Michael R. Anders has lost the value of his earnings with interest thereon, lost the net accumulation beyond death reduced to present money value, and incurred funeral and burial expenses.

WHEREFORE, Plaintiff, for herself, the Estate of Michael R. Anders and Ariel Anders demand judgment for damages and costs of this Action.

SPOHRER & DODD, P.L.

/s/ Barry E. Newman
BARRY E. NEWMAN, ESQ.
Florida Bar No. 0246300
701 West Adams Street, First Floor
Jacksonville, FL 32204
(904) 309-6500 Telephone
(904) 309-6501 Facsimile
bnewman@sdlitigation.com
Trial Counsel for Plaintiff