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ALERT

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DISTRICT COURT HOLDS CONTRACTOR NOT LIABLE FOR ARMY HELICOPTER PILOT'S PARALYSIS AND CONFIRMS CONTINUING VIABILITY OF GOVERNMENT CONTRACTOR DEFENSE

By Barry S. Alexander

In *Linfoot v. McDonnell Douglas Helicopter Co.*, the United States District Court for the Middle District of Tennessee granted McDonnell Douglas Helicopter Co.'s ("MDHC") motion for summary judgment dismissing failure to warn claims arising out of the crash of an AH-6M model helicopter being piloted by Gary Linfoot during a mission south of Baghdad, Iraq. The court's decision provides an interesting analysis of failure to warn claims, and also reaffirms the continuing vitality of the government contractor defense.

Gary Linfoot was permanently paralyzed when an AH-6M model helicopter he was piloting crashed during a mission south of Baghdad, Iraq. While not a cause of the accident itself, Mr. Linfoot's injuries allegedly were exacerbated by the installation of a voice warning system ("VWS") in the crush box below his pilot seat, which lessened the crush box's ability to absorb the ground impact. The VWS installation was part of the Army's Mission Enhanced Little Bird ("MELB") reconfiguration program, which entailed converting the Army's MD-369FF/D model helicopters into an entirely new model, the "M" or MELB configuration.

McDonnell Douglas Helicopter Company neither manufactured the VWS in question nor selected its location in the helicopter; the location within the crush box was selected by the Army's Special Operations Aviation Regiment ("SOAR"). Nevertheless, Mr. Linfoot and his wife commenced litigation in the United States District Court for the Middle District of Tennessee against MDHC alleging that it should have warned the Army that putting anything, including the VWS, inside the crush box would diminish the crush box's efficacy. ***Linfoot v. McDonnell Douglas Helicopter Co.*, Case No. 3:09-cv-00639 (M.D. Ten. 2016)**.

MDHC contracted with the Army to supply MELB "kits" and to test the kits' component parts. The kits provided by MDHC did not include the VWS's (they were provided by Specialty Enterprises, Ltd.), although MDHC did correspond with the Army about the importance of including a VWS in the MELB configuration. The Army specifically limited the scope of the flight tests performed by MDHC, contracting with MDHC to test only the functionality of the VWS, not to assess its location. Although MDHC was not hired to assess the location of the VWS, there was undisputed testimony that an MDHC representative verbally recommended against installing the VWS in the crush box. The Army never claimed that MDHC violated either contract.

On MDHC's motion for summary judgment, the only issue before the court was whether "MDHC breached its duty of reasonable care to Plaintiffs with respect to the 'design, manufacture, assembly, inspection, distribution, … modification, [and] overhaul … of the subject helicopter and its component parts, including … the pilot's seat and component parts, and equipment under or about the pilot's seat' and that this breach was a proximate cause of Mr. Linfoot's injuries." MDHC argued that summary judgment was appropriate because:

1. Plaintiffs failed to present sufficient evidence that MDHC's involvement with the MELB process and alleged failure to warn was a proximate cause of Mr. Linfoot's injuries;
2. Plaintiffs' claims were non-justiciable and/or preempted by the combatant activities exception to the Federal Tort Claims Act;[1] and
3. Regardless of any duty to warn, MDHC was shielded from liability by the government contractor defense.

Failure to Warn

To prevail on the failure to warn claim, the plaintiffs bore the burden of proving that MDHC had a duty to warn, that its warnings were inadequate, and that the inadequate warnings were a proximate cause of Mr. Linfoot's injuries.

Plaintiffs argued that MDHC's provision of the MELB kits gave rise to a duty to warn the Army that its own design was unsafe, and that the Army's redesign of these helicopters after the accident evidenced that a pre-accident warning would have elicited a similar design change prior to the accident. The court was unpersuaded that the post-accident design change demonstrated that a pre-accident warning would have elicited a change. To the contrary, there was evidence that an MDHC mechanic did warn the Army of the dangers of putting something in the crush box and the Army did nothing in response. The court also was unpersuaded by Plaintiffs' argument that this verbal warning was insufficient because it was not in writing, and because MDHC did not formally classify the VWS location as a hazard. Finally, the court agreed with MDHC that:

1. Common sense would dictate against putting something in the crush box, the very purpose of which is to take up space, indicating that a warning should not have been needed;
2. The Army's express limitations on the scope of MDHC's testing evidenced that a warning would not have brought about a design change (i.e., the Army wanted to avoid setting a precedent of having a contractor review and approve its designs/modifications); and
3. The Army's rigorous design and approval process provided little room for MDHC to suggest design changes or for the Army to implement any such suggestions.

Accordingly, the court held that Plaintiffs could not make out a *prima facie* failure to warn claim and that MDHC was entitled to summary judgment on that claim.

Government Contractor Defense

Notwithstanding its holding that summary judgment should be granted on the failure to warn claim, the Court also addressed and agreed with MDHC's argument that, even if Plaintiffs could prove causation due to failure to warn, MDHC would be shielded from liability by the government contractor defense. This defense, articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is derived from the government's immunity from suit for the performance of a discretionary function. The Supreme Court determined in *Boyle* that the selection of an appropriate design for

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[1] This issue ultimately was not addressed by the Court.

military equipment is a discretionary function. The government's immunity for that discretionary function has been extended to contractors that supply goods to the government.

The government contractor defense provides that "a government contractor may assert immunity when the government approved 'reasonably precise' specifications; the equipment conformed to those specifications; and the supplier/ contractor warned of those equipment dangers that were known to the supplier/contractor, but not the government." While noting that somewhat different factors generally apply in failure to warn cases, the district court held that the traditional *Boyle* factors were most appropriately applied here because the allegations were that MDHC failed to warn the Army itself, unlike the typical failure to warn case alleging that the contractor failed to provide a proper warning to the equipment users.

Applying the traditional *Boyle* analysis, the court found that the first two factors were readily met because (1) the design specification at issue—the location of the VWS—was generated by the government, and (2) no one disputed that the VWS was installed by another contractor in accordance with the Army's design. With regard to the third factor (the requirement that the contractor warn of dangers known to it but not the government), MDHC submitted expert evidence demonstrating that the Army was aware of the importance of protecting the space within the crush box. The policy rationale for this third factor—avoiding an incentive for the manufacturer to withhold knowledge of risks because providing a warning might disrupt the contract while withholding it would produce no liability—did not apply because MDHC had nothing to do with the manufacture or installation of the VWS and, therefore, had no incentive to withhold information about the dangers of installing it in the crush box. Accordingly, the court held that this third factor also was satisfied and that MDHC was entitled to summary judgment under the government contractor defense.

The court's government contractor defense holding serves as a reaffirmation of the defense's viability in cases against contractors that arise out of accidents involving military aircraft. ◆

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