

Aviation Law

The Miller/Mackey Connection

by
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If there be an iota of truth to the old bromide, "any landing you walk away from is a good landing," a logical corollary has to be, "any mid-air you survive is a perfect mid-air." Indeed the most fascinating aspect of *Mackey v. Miller*, 221 Va. 715 (1981), the Virginia Supreme Court's most recent aviation case, is that it involves a mid-air collision which all survived, only to collide again in court.

On April 30, 1977, Horace Mackey decided to fly his Cessna Skylane from a private field near Suffolk to another private field in Isle of Wight County. The sky was clear and visibility was fifteen miles. As he prepared to embark, one John Miller landed in a Piper Pacer to off-load AMWAY goods. After the delivery and an exchange of pleasantries, it was agreed that Miller would follow Mackey to his destination.

After take-off Mackey immediately lost visual contact with Miller, so he inquired over VHF radio as to Miller's position. Miller

reported being at Mackey's eight o'clock position (left rear) without elaboration. Mackey rolled out on course and continued climbing. Visual contact with Miller was re-established as the spinner of Miller's prop nuzzled into the trailing edge of Mackey's right wing.

For reasons not entirely clear from the record, neither plane suffered fatally disabling damage, and neither pilot suffered cardiac arrest. The court did not dwell at all on the sensitive issue of pucker factor, but one can assume it was sufficient to shatter the vacuum gauges in both cockpits.

And for reasons better understood by theologians than aviators, both pilots managed to execute one-eighties and return to the point of departure for "good landings." Earthbound again, Mackey exited his airplane and entered his local courthouse. There he and his wife, who was part owner of his plane, sued Miller for damage to their plane and minor head injuries to Mackey. Apparently determined

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to demonstrate that he is no less bold on the ground than in the air, Miller reciprocated with a hopelessly futile counterclaim. A trial was conducted without a jury before Judge James C. Godwin, who also happens to be a pilot.

Because Miller had approached Mackey from his blind spot, Mackey was unable to testify as to the precise sequence of events immediately preceding impact. Consequently, all the judge had to go on was Miller's testimony, which was that he had been flying Mackey's eight o'clock position at a distance of 100 to 150 feet, when he lost visual contact while making an "instrument sweep." The next thing he knew, the planes were flying united.

Now this would seem like a pretty straight forward case. Miller's explanation for the collision is highly plausible, only if you assume his instrument sweep was performed with a broom. And if there is a single legal principle that all Virginia judges are supposed to have mastered, it is that you never, never hit anyone from behind; be it an auto rear ender, a stab in the back, an ambush, or any less lethal non-consensual contact. Liability always attaches to the guy in the rear.

But the trial judge thought the case was more involved. Invoking Virginia's time-honored—some say archaic—1809 doctrine of contributory negligence, the judge held the Mackeys could not recover a dime, because Mr. Mackey had failed to "reach an understanding with Miller concerning the details of the

flying arrangement, notably the distance to operate the airplane during the trip."

Setting aside the larger question of Virginia's strict contributory negligence rule, and the gross impropriety of penalizing Mrs. Mackey for her husband's putative negligence, consider only the judge's basic finding: that Mackey was negligent. If Mackey was negligent for failing to obtain an explicit commitment from Miller to follow at a reasonably safe distance, then so would be an automobile driver proceeding down the highway at 55 mph, when overtaken and rammed by a following friend, who claims to have been distracted by the speedometer.

Perfect mid-air collisions will be relieved to know the Supreme Court of Virginia was no more enamored of the trial court's reasoning than was Mackey. In reversing the trial court, the Supreme Court ruled the obvious: that Mackey had a right to assume Miller would maintain adequate in-flight separation by obeying FAR 91.65(a), *i.e.*, "not operat[ing] an aircraft so close to another aircraft as to create a collision hazard."

Arguably, the Supreme Court should have put primary emphasis on FAR 91.65(b), which it ignored completely, but which provides: "no person shall operate an aircraft in formation flight except by arrangement with the pilot in command of each aircraft in the formation." But aviation attorneys, their clients, and their clients' survivors have long since learned not to quibble over such fine legal distinctions.