ELECTRONICALLY FILED APR 18, 2018 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT

NO. 17-1458

THE CARROLL AIRPORT COMMISSION
(OPERATING THE ARTHUR N. NEU MUNICIPAL AIRPORT),

Plaintiffs/Appellees,

VS.

LOREN W. DANNER and PAN DANNER,

Defendants/Appellants

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CARROLL COUNTY, IOWA
Case No. EQCV039422
THE HONORABLE WILLIAM C. OSTLUND

FINAL BRIEF OF APPELLANTS LOREN W. DANNER AND PAN DANNER

STEVEN HAMILTON
Hamilton Law Firm, P.C.
P.O. Box 188
606 Ontario Street
Storm Lake, Iowa 50588
(712) 732-2842
(712) 732-6202 (FAX)
steve@hamiltonlawfirmpc.com
ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ARGUMENT I

THE FEDERAL AVIATION ADMINISTRATION (FAA) HAS PREEMPTED THE FIELD OF HAZARD DETERMINATION IN AIRCRAFT OPERATON SUCH THAT A CARROLL COUNTY ORDINANCE MORE RESTRICTIVE THAN FAA FINDINGS AND RULINGS REGARDING AN AIRCRAFT OPERATION HAZARD IS NOT VALID UNDER CURRENT PREEMPTION RULES.

Cases:

State v. Martinez,
896 N.W.2d 737 (Iowa, S.Ct. 2017)

Chamber of Commerce of United States v. Whiting,
563 U.S. 582, 131 S.Ct. 1968

Hillman v. Maretta,
569 U.S. 483, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013)

Hughes v. 11th Judicial District of Florida,
274 F.Supp.2d 1334 (Fla. 2003)

Sikkelee v. Precision Airmotive Corp.,
822 F.3d. 680 (Third Cir. 2016)

Witty v. Delta Air Lines, Inc.,
366 F.3d 380 (5th Circ. 2004)

Statutes:

Iowa Code Ann. § 657.1
Iowa Code Ann. § 715A.2(1)
Iowa Code Ann. § 715A.8
5 U.S.C. § 8705(a)
8 U.S.C. § 1101
8 U.S.C. § 1324
49 U.S.C. § 44701(a)
49 U.S.C. § 44718
Va. Code Ann. 20-111-1(D)

Other:

14 C.F.R. § 77.15
14 C.F.R. § 77.21
14 C.F.R. § 77.23
14 C.F.R. § 77.25
14 C.F.R. § 77.29
US Constitution Art. VI, Clause 2

ARGUMENT II

THE CARROLL COUNTY AIRPORT COMMMISSION HAS BROUGHT ITS INJUNCTIVE ACTION BASED UPON PROOF OF A SAFETY HAZARD. BECAUSE THE FAA HAS RULED THAT NO HAZARD EXISTS, THE COMMISSION CANNOT "SHIFT GROUND" AND SEEK INJUCTIVE RELIEF AND DESTRUCTION OF AN EXISTING STRUCTURE WHERE NO "HAZARD" EXISTS, AND ITS ONLY BASIS FOR REMOVAL IS A REMOTE AND SPECULATIVE ECONOMIC IMPACT ON ITS AIRPORT TRAFFIC.

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State v. Martinez,
896 N.W.2d 737 (Iowa, S.Ct. 2017)

Wis. Dept. of Indus. v. Gould, Inc.,
475 U.S. 282, 106 S. Ct. 1057, 89 L.Ed.2d 223 (1986)

Other:

14 C.F.R. § 77.21
14 C.F.R. § 77.23
14 C.F.R. § 77.25

ROUTING STATEMENT

Appellants believe this matter is an application of existing legal principles and therefore should be assigned to the Iowa Court of Appeals under Iowa R. App. Rule 6.1101(3)(a).

STATEMENT OF THE CASE

This is a trial of an equity action in Carroll County, Iowa, Honorable William Ostlund presiding. Plaintiff Arthur Neu City of Carroll Airport Commission brought its equity action to enjoin continued operation of and to require removal of an improvement to real property in Carroll County, Iowa.

Loren and Pan Danner, husband and wife, are Defendants to the action because they constructed a grain leg on their farm property in proximity to the Artur Neu Airport that is alleged to violate certain building ordinances and other regulations of the Airport Commission, and County and City zoning. They further allege and the Court found the grain leg to be a nuisance because it is a danger or hazard to air traffic.

After trial in Carroll County, the Court entered its ruling on June 16, 2017, finding that the Danner grain leg violated certain ordinances and constituted a nuisance. Defendants timely filed Defendants' IRCP 1.1003, 1.1004 Motion For Judgment Notwithstanding the Verdict and IRCP 1.1004 Motion for a New Trial (App. P. 43) due to the later decision of the Iowa Supreme Court,

to wit: *State v. Martinez,* 896 N.W.2d 737 (Iowa, S.Ct. 2017), articulating principals of preemption.

The trial Court denied such motion and Defendants filed a timely Notice of Appeal. This matter is before the proper Appellate Court on *de novo* appeal.

STATEMENT OF THE FACTS

Loren Danner was born in Carroll County, Iowa. (App. P. 91) He attended Kemper High School in Carroll, Iowa, where he graduated in 1963. (App. P. 92). He served four years in the U.S. Air Force in Thailand, Guam, and the United States. (App. P. 92).

Loren and his wife, Pan Danner, began farming on the site at issue here in 1968. Loren later bought the site from its owner. (App. P. 92).

Loren originally farmed and raised livestock. However, that changed to exclusively row crop farming in approximately 2000. (App. P. 93). Loren explained that his present farm operation consists of about 240 acres that he owns, a total of 1000 acres which he farms and a sharing of equipment arrangement with his nephew, Marty Danner, which allows them to minimize the cost of equipment. (App. Pp. 93-94).

In 2009, farmers had a good harvest but a wet year. (App. P. 94). Elevators slowed down the harvest considerably because grain needed to be dried upon delivery and the elevators

lacked the capacity for large quantity grain drying. (App. P. 94). Loren decided to put up some bins, as did two of his farm clients, Marty Halbur and Paul Halbur. (App. P. 95). Movement of the grain to the bins was always an issue so Loren progressed through a series of equipment for grain movement. The first was an air driven system that moved the grain pneumatically. This had limits, (App. P. 96) so an auger system was considered for a time. (App. P. 97). However, it too was rejected because the cost was dramatically higher. (App. P. 97).

Loren ultimately settled on and constructed a system of corn drying and storage which had, as its central feature, a grain leg. The grain leg is a vertical structure, which in this case, was arranged around five bins of varying size. (App. P. 95). The leg services a bin of 50,000 bushels owned by Marty Halbur, a bin of 36,000 bushels owned by Paul Halbur, and bins of 30,000, 20,000, and 11,000 bushels owned by Loren Danner. (App. Pp. 102-103, 223)

The grain leg rises vertically 127 feet above ground level and is driven mechanically and by gravity. (App. Pp. 184, 62, 96). The leg mechanically lifts the grain through a series of buckets that are mechanically drive, then dumps the grain into one of five distributators (sic) which are metal tubes, that distribute the grain to one of the five preselected bins. (App. Pp. 96, 106-109).

Plaintiff, the Airport Commission's recommendations were to lower the grain leg to a level of sixty feet. However, that would not work without additional assistance on delivery. One of those type of assists is a conveyor or auger driven system in the distributator (sic) arms. However, such a system dramatically increases costs, both in construction and operation. (App. Pp. 97-99).

Prior to construction of the leg, Loren went to see Carl Wilburn, the county zoning administrator, at the Carroll County Courthouse in January 2013, to secure a building permit. Construction started with soil testing in April 2013 and completion was in August 2013. (App. Pp. 97-98). Carl Wilburn checked "exempt" on the building permit which Loren took to mean exempt from zoning. (App. Pp. 98, 110). Wilburn admitted he did not know or realize that any Airport Zoning compliance was required. (App. Pp. 79-80, 100).

On a Sunday in July 2013, long time Neu Airport Commission member, Greg Siemann, was at the airport. He noticed the construction of the grain leg approximately 1 1/2 to 2 miles south of the Neu airport. He became concerned immediately. He contacted other board members and ultimately Carl Wilburn, the county zoning administrator. (App. P. 78). Siemann pointed out that the Airport Commission had no notice of the construction. Very shortly, he spoke to the County Building administrator, Carl

Wilburn, who indicated he had no knowledge that the Airport Zoning rules required that the Airport Commission be notified of construction. Wilburn also confirmed that he believed that agricultural construction was exempt from county zoning requirements. (App. Pp. 78-79).

The Commission notified the FAA for enforcement action. Several contacts were had between the Airport Commission and FAA per Vee Stewart. The FAA ultimately ruled that the grain leg would not be a hazard to incoming, departing or en route aircraft provided certain lighting and painting of the leg occurred. (App. Pp. 201-203, 213-219).

The FAA inquiry was commenced by the Airport Commission per Pete Crawford, its engineer, expecting that the FAA would order removal. (App. P. 80). On July 14, 2013, the FAA issued its ruling pursuant to 49 U.S.C. § 44718 and Title 14, C.F.R. 77.15 et seq. concerning the grain leg.

The FAA determined that, "the structure does exceed obstruction standards but would not be a hazard to air navigation, providing …conditions are met…". (App. Pp. 198-222). The conditions were the marking and lighting requirements set out in a ruling dated November 21, 2013. (App. Pp. 157-160). Loren has complied with those requirements since that time. (App. P. 101).

ARGUMENT I

THE FEDERAL AVIATION ADMINISTRATION (FAA) HAS PREEMPTED THE FIELD OF HAZARD DETERMINATION IN AIRCRAFT OPERATON SUCH THAT A CARROLL COUNTY ORDINANCE MORE RESTRICTIVE THAN FAA FINDINGS AND RULINGS REGARDING AN AIRCRAFT OPERATION HAZARD IS NOT VALID UNDER CURRENT PREEMPTION RULES.

The Arthur Neu Airport Commission seeks an injunction or order that a lawful structure, to wit, a grain leg, be removed at great cost to its owner. It does so on the legal theory that the leg constitutes a hazard to arriving or departing aircraft from the Arthur Neu Airport. Admittedly, Mr. Danner was in error in constructing the grain leg without seeking Airport Commission approval prior to construction of the grain leg. So too, was the Carroll County Building Code Administrator regarding certain zoning regulations.

However, after the fact of construction, Plaintiff Commission sought the intervention of the Federal Aviation Administration (hereafter FAA for ease of reference). To the surprise of the Airport Commission, the FAA did not require removal of the grain leg. On the contrary, it found that the leg was not a hazard provided certain lighting and coloration was provided. (App. Pp. 198-222)

Having been rebuffed by the FAA, the Plaintiff Commission filed an action for injunction and removal that it entitled “Petition for Abatement of Nuisance”. In its Petition, it

makes frequent use of the term “hazard”. “The powers granted to the Airport Commission include but are not limited to the abatement as nuisances the creation or establishment of airport “hazards” appertaining to said Airport.” (App. P. 7). It goes on to recite, “Airport hazards means any structure or tree or use of land that would exceed the Federal obstruction standards as contained in 14 C.F.R. § 77.21, § 77.23 and § 77.25 and that obstructs the airspace required for the flight of aircraft and landing or takeoff at an airport or is otherwise hazardous to such landing or taking off of aircraft”. (App. P. 7).

However, 14 C.F.R. § 77.29 addresses the impact of an existing structure. It indicates that its evaluation includes the effect of an existing structure on “arrival, departure and en route procedures” for aircraft operating under visual flight rules (VFR) or instrument flight rules (IFR), which would encompass every type of flight operation imaginable. The FAA performed such an evaluation. (App. P. 201). It determined the Danner grain leg would not constitute a “hazard”.

The Carroll Airport Commission cites its own Airport Zoning Regulations. (App. Pp. 179-222). It defines an “Airport hazard” as “any structure or tree or use of land that exceeds the Federal obstruction standards as contained in 14 C.F.R. § 77.21, § 77.23 and § 77.25 and that obstructs the airspace required for the flight of aircraft and landing or takeoff at an airport or is

otherwise hazardous to such landing or takeoff of aircraft." The use of "hazard" in both statutes and rules is significant. The Iowa Zoning ordinance obviously defers to the C.F.R. terms regarding that term.

In the view of Defendant Danner, this involves significant issues of federal preemption. Strictly from a lay point of view, it is difficult to understand how the FAA, which has exclusive control over commercial aircraft, could define a term while a local entity can, at its discretion, define the term more restrictively or less restrictively.

The Iowa Supreme Court has had the opportunity to address this issue very recently in the case*, State v. Martinez,* 896 N.W.2d 737 (Iowa, S.Ct. 2017). There the Iowa Supreme Court was called upon to address the issue of Federal preemption in the context of immigration matters. In *State v. Martinez,* a DACA (Deferred Action for Childhood Arrivals) candidate was prosecuted under Iowa state law for forgery and identity theft, Iowa Code Ann. § 715A.2(1) and § 715A.8 respectively. In that case, Ms. Martinez was a child brought to the United States from Mexico by her parents, educated in Iowa public schools, the mother of four children who had been employed in Iowa. She sought a driver's license using the birth certificate of another individual. She used the driver's license and a social security card to seek employment at a packing plant

in Muscatine, Iowa. This resulted in her prosecution for the above crimes.

In deciding this case, the Supreme Court began its opinion by reviewing the broad and expansive jurisdiction the Congress has assumed in the Immigration and Naturalization Act 8 U.S.C. § 1101 et seq.. That jurisdiction was expanded with the Immigration Reform and Control Act which determined the employment availability of non-citizens. 8 U.S.C. § 1324, et seq. The Court's discussion progressed to the citation of various Federal laws, allowing Federal officers to prosecute or not. The Court identified Art. VI cl. 2 of the United States Constitution that even if states pass laws in the legitimate exercise of state power, those that interfere with or are contrary to the laws of Congress must yield to federal law. This concept is called Supremacy clause preemption. It reasoned that there are two types of Federal preemption, express and implied. Express preemption occurs when federal statutory context indicates that congressional authority is exclusive.

Implied preemption acknowledges that preemption can occur without express preemption if either field preemption or conflict preemption occur. Conflict preemption can occur, when state law is an obstruction to accomplishment of a Federal purpose. The Iowa Supreme Court cited Justice Anthony Kennedy who in *Chamber of Commerce of United States v. Whiting,* 563 U.S. 582, 131 S.Ct.

1968, opined that conflict preemption occurred even if the State regulation was parallel to the Federal system of regulation. In support of its rationale is the case of *Hillman v. Maretta,* 569 U.S. 483, 133 S.Ct. 1943, 186 L.Ed.2d. 43 (2013). There the U.S. Supreme Court held that a state statute regarding succession of interest in a governmental life insurance policy was determined under the FEGLI, or Federal Employee Group Life Insurance Act 5 U.S.C. § 8705(a). FEGLI provided the death benefit went to the beneficiary named in the succession document, as opposed to a Virginia State provision invalidating the designation in the succession document where there had been a change in marital status such as divorce, after the designation was made. Va. Code Ann. § 20—111-1(D). There the state statute on designation invalidation was held to be preempted despite the strong recognition that domestic relations were the provision of the States. However, the strong precedent that the insurance proceeds belonged to the named beneficiary invalidated the State position that a widow or widower could through civil process, compel delivery of such funds. The Supreme Court was clear to say that that was not the goal or process that Congress chose. 569 U.S. at 495. Consequently, it held that the Virginia statute was preempted by the FEGLI.

The *Martinez* court resolved that these state laws, whether by design or effect, have intruded into an area wholly

occupied by the federal government. They are preempted by Article VI clause 2 of the United States Constitution.

Witty v. Delta Air Lines, Inc., 366 F.3d 380 (5th Circ. 2004) held

> "Pursuant to its congressional charge to regulate air safety, the Federal Aviation Administration has issued a broad array of safety regulations codified in Title 14 of the Code of Federal Regulations. These regulations cover airworthiness standards, crew certification and medical standards and aircraft operating requirements." 366 F.3d 382.

In keeping with this federal preemption principle, *Hughes v. 11th Judicial District of Florida,* 274 F.Supp.2d 1334 (Fla. 2003), holds that a state may not utilize state statutes to prosecute commercial pilots for operation under the influence where there is no injury, loss of life or property damage because a federal statute on regulation of pilot qualifications occupies the field. 49 U.S.C. § 44701(a). *Sikkelee v. Precision Airmotive Corp.,* 822 F.3d 680 (Third Cir. 2016) holds that conflict preemption occurs if a state law stands as an "obstacle to the full accomplishment and execution of the full purposes and objectives of a federal law." 822 F.3d 688.

Here the finding and objective of the Arthur Neu Airport Commission obviously conflict with the full purpose of the findings and determination of the FAA. This Airport Commission has brought its action for a number of reasons. It contends that the grain leg

is a hazard based upon the personal judgments of a meteorologist-instructor-pilot, other local pilots and a fixed based operator (FBO) at the Carroll airport. Contra to that determination is the finding of the FAA. As stated above, if a state law or rule is an obstacle to the full purposes and objective of the federal law it cannot stand. The full purpose of the federal law is obviously to have a uniform, predictable set of aviation standards. Local airports may believe if they can raise standards, they can also lower them. For this reason, the "hazard" determination of the Arthur Neu Airport Commission cannot stand. Every airport in every state would have a precedent for lowering or raising the standard for a "hazard".

Clearly the FAA has done its job in this matter and found no hazard is provided by the Danner grain leg with the additional paint and lighting.

It is provided in 14 C.F.R. § 77.15 that,

> "Objects that are considered an obstruction under this subpart are presumed hazards to air navigation until further aeronautical study determines that the object is not a hazard."

The Court found that the grain leg was a nuisance under the Code. (App. P. 36). To qualify as a nuisance under the Code, the condition must be, "injurious to health, indecent or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably

with the comfortable enjoyment of life or property is a nuisance,…" Iowa Code Ann. § 657.1.

The Trial Court made no factual finding about how the grain leg was a danger when the FAA clearly determined it was not. Some speculative testimony from Mr. Siemann was offered regarding the possible economic impact but that does not qualify the leg as a nuisance. No finding was made by the Court that any of the claims of Mr. Siemann were proved by a preponderance of the evidence. Carroll and the Neu Airport have been very successful at securing Federal grants for all of the improvements on its wish list. (App. Pp. 111-149). It has presented no evidence that any grant applications were denied. It has only presented speculative evidence about the change of approaches to various runways and no evidence has been submitted about how that may affect the Carroll airport. Mr. Siemann repeatedly used a variance of the word "experimental" and "experimenting" in discussing any flight approach improvements at airports like Omaha. (App. Pp. 85-86).

The value of Mr. Siemann's testimony was seriously impaired when he was asked if the Danner leg was a danger and a hazard and he responded "Absolutely". The FAA, whose job it is to make that determination, specifically found that it was not. Mr. Siemann continually asserted that FAA representative Vee Stewart was "in error", much like the excuses lawyers like Mr. Siemann make about adverse rulings they receive. (App. P. 88).

ARGUMENT II

THE CARROLL COUNTY AIRPORT COMMMISSION HAS BROUGHT ITS INJUNCTIVE ACTION BASED UPON PROOF OF A SAFETY HAZARD. BECAUSE THE FAA HAS RULED THAT NO HAZARD EXISTS, THE COMMISSION CANNOT "SHIFT GROUND" AND SEEK INJUCTIVE RELIEF AND DESTRUCTION OF AN EXISTING STRUCTURE WHERE NO "HAZARD" EXISTS, AND ITS ONLY BASIS FOR REMOVAL IS A REMOTE AND SPECULATIVE ECONOMIC IMPACT ON ITS AIRPORT TRAFFIC.

The issue here is whether the city\county ordinance describing a "hazard" survives on its own aside from the FAA resolution of whether the grain leg is a "hazard".

Plaintiff thinks not. The same reasoning applies here. The "Airport hazard" incorporates the standards of 14 C.F.R. § 77.21, § 77.23, and § 77.25.

Under *State v. Martinez,* 896 N.W.2d 737 (Iowa, S.Ct. 2017), citing *Wis. Dept. of Indus. v. Gould, Inc.,* 475 U.S. 282, 286, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986). "Conflict preemption is imminent whenever two separate remedies are brought to bear on the same activity."

CONCLUSION

Upon *de novo* review, the appellate Court should reverse the ruling of the trial court because it did not make any sufficient findings that the Danner grain leg was a nuisance. It simply found that it violated the ordinance and other standards.

It made no finding as to how or why the leg was a danger to any aircraft of any kind. The grain leg has been in operation for over four years. The witnesses for the Neu Airport Commission cited very frequent levels of flight. However, no one reports any real concrete instances of close calls. Furthermore, the FAA has determined that the grain leg is not a hazard to approaching, departing or en route aircraft. This finding preempts state, county or city findings to the contrary.

Respectfully submitted,

__/s/_____
STEVE HAMILTON, AT0003128
HAMILTON LAW FIRM, P.C.
P.O. BOX 188
606 ONTARIO STREET
STORM LAKE, IOWA 50588
712-732-2842
712-732-6202 (FAX)
steve@hamiltonlawfirmpc.com
ATTORNEY FOR APPELLANTS

REQUEST FOR ORAL ARGUMENT

Appellants, Loren W. Danner and Pan Danner, request oral argument in this matter.

Respectfully submitted,

_/s/_____
STEVE HAMILTON, AT0003128
HAMILTON LAW FIRM, P.C.
P.O. BOX 188
606 ONTARIO STREET
STORM LAKE, IOWA 50588
712-732-2842
712-732-6202 (FAX)
steve@hamiltonlawfirmpc.com
ATTORNEY FOR APPELLANTS

CERTIFICATE OF FILING

I, Steve Hamilton, hereby certify that I have filed the foregoing "Final Brief of Appellants" with the Clerk of the Supreme Court of Iowa through the ECF/EDMS System on the 18th day of April, 2018.

_/s/_____
STEVE HAMILTON, AT0003128
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Steve Hamilton, hereby certify that on this same date, I served the attached "Final Brief of Appellants" through the ECF/EDMS System on the following:

Mr. Jeffrey R. Minnich
721 North Main Street
P.O. Box 367
Carroll, Iowa 51401
jeff@nmcnlaw.com
ATTORNEY FOR DEFENDANTS/APPELLANTS

_/s/_____
STEVE HAMILTON, AT0003128
ATTORNEY FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 356 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(1)(g)(2).

_/s/_____
STEVE HAMILTON, AT0003128
ATTORNEY FOR APPELLANTS