1965

Clack-Nomah Flying Club v. Sterling Aircraft, Inc. : Appellant's Brief

IN THE SUPREME CO
of the
STATE OF UT

CLACK-NOMAH FLYING CLU
Plaintiff-

- vs. -

STERLING AIRCRAFT, I
Defendant-

APPELLA

Appeal from the Judgment
Court in and for
Honorable

JAMES E. FAUST
Kearns Building
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

AUTHORITIES

IN THE SUPREME COURT
of the
STATE OF UTAH

CLACK-NOMAH FLYING CLUB,
Plaintiff-Respondent,

- vs. -

STERLING AIRCRAFT, INC.,
Defendant-Appellant.

Case No. 10380

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action before the District Court, Salt Lake County, State of Utah, by the plaintiff against the defendant for damage to an aircraft owned by the plaintiff, such damage claimed by the plaintiff to have been caused by the negligence of the defendant.

DISPOSITION IN THE LOWER COURT

This matter came on regularly for trial before a jury, the Honorable Ray Van Cott, Jr., judge presiding, on February 17, 18, 1965, the matter having been brought to issue by the filing of a Complaint by the plaintiff, the filing of an Answer by the defendant, and other and various pleadings. The plaintiff introduced its evidence and rested. The defendant, upon the conclusion of plaintiff's evidence, proferred a motion to the court for a directed verdict in favor of the defendant and against the plaintiff for the reason and upon the grounds that the plaintiff had failed to prove negligence on the part of the defendant which would entitle plaintiff to judgment. The court refused to rule upon said motion but held the same in abeyance until the conclusion of the evidence to be offered by the defendant. The defendant then presented its evidence and rested. The court instructed the jury, and the jury upon deliberation returned a verdict in favor of the plaintiff and against the defendant in the sum of $7,000.00. Subsequent thereto, the defendant made a Motion for Judgment Nothwithstanding the Verdict in favor of defendant and against plaintiff, no cause of action. The motion was argued and the District Court judge denied the motion.

RELIEF SOUGHT ON APPEAL

The defendant herein seeeks reversal of the lower court judgment by the jury, and the lower

court judgment refusing to grant defendant's Motion for a Directed Verdict, and further for refusal to grant defendant's Motion for Judgment in Favor of the Defendant Nothwithstanding the Jury Verdict and that this court grant a new trial to the defendant, or in the alternative that this court adjudicate, on the basis of the evidence submitted, that there was no negligence on the part of the defendant or its employees, which was a proximate cause or even a contributing cause to the damage to plaintiff's aircraft, and that judgment be made in favor of defendant and against plaintiff, no cause of action.

STATEMENT OF FACTS

On June 3rd, 1963, Mr. R. Al McDonald, a member of the Clack-Nomah Flying Club, of Portland, Oregon, was flying a four place Mooney light aircraft from Rock Springs, Wyoming, towards Salt Lake City, on his way to Boise, Idaho. Mr. McDonald landed at Salt Lake City because of deteriorating weather along his proposed flight route. Upon landing the Mooney aircraft Mr. McDonald taxied the same to the defendant's installation at the Salt Lake Municipal Airport. Mr. McDonald and three other people, who were passengers in the aircraft, departed the aircraft and went into the defendant's terminal. According to the testimony of Mr. McDonald when asked what he did when he taxied up to the defendant's terminal he stated:

"Parked the aircraft, heading into the prevail-

ing winds, which were from the West. I locked the brakes, gave instructions to the gas boy, left the plane unlocked . . . (Question by counsel) . . . I told him that I would probably be there for a day because of the deteriorating weather. I told him which octane gas to put in, what level of oil to bring it up to and to watch the airplane and take care of it, I would leave it unlocked in case he had to move it, and that was it." (Transcript of Trial, Page 3, Lines 17 to 28)

An employee of the defendant, Mr. Parry, then drove Mr. McDonald's party over to the old terminal building for lunch. The aircraft was taken care of by an employee of the defendant and was tied down by said employee; subsequently and at approximately 3:05 PM, without warning as to probable or possible velocity, a wind commenced of approximately 95 miles per hour with gusts which were approximately 25 miles an hour in excess of hurricane velocity which is approximately 70 miles per hour. The aircraft of the plaintiff began to move around, and although an employee of defendant attempted to hang on to said aircraft, and was in fact attempting to hold said aircraft down by grasping the tail section thereof, he was unable to do so, and the aircraft flipped over on its back causing the damage herein sued upon. It might be well to note here that a Mooney aircraft of this type and model is one of the few, if not the only aircraft, which is tied down by three chains from the surface, one end of each chain being secured to the surface or ground and the other

end of the one chain being secured to the tail assembly of said aircraft, and the other two being secured to the wheels or landing carriage of the aircraft, rather than the latter two being secured to the wings as is common with almost every other light aircraft manufactured. Testimony of Leon Parry, former employee of defendant, as to this fact is as follows:

Q Are you generally familiar with the tie-down apparatus on Mooneys?

A This I am.

Q Will you state what they are?

A Well, on a Mooney you don't have any tie-down rings in the wings at all. On this particular model of Mooney there is no tie-down rings in the wings so what you do is — the gear is hinged, the shock absorption or whatever you want to call it on the gear is such a manner that there is a hollow tube that runs the complete width of the gear and through this hollow tube is where we insert the chain and bring the chain back around and loop it through itself and put an S Hook on it.

A The tail tie-down has got a ring, a bar tie-down chain. This is the only ring that is on the aircraft.

Q But no tie-down on the wings?

A No tie-down on the wings.

(Transcript of Testimony, Page 35, Lines 7 to 19 and Lines 27 to 30) This was testimony by the witness called by plaintiff. This is mentioned merely to point out that the holding ability of the anchor chains is obviously far less so far as holding said airplane rigid in a high wind than it would be if the two chains were attached to the left and right wings, approximately half way between the fuselage and the end of the wing. Based upon these facts and a question as to whether or not there were S hooks on the ends of the chains with which and by which the chains were secured after the aircraft was tied down, the jury found for the plaintiff and against the defendant that the defendant was negligent in relation to said aircraft, and from this decision and the judgments of the court as to the Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict the defendant appeals.

The basis upon which the finding of negligence was made, and the motions of the defendant were denied, are based upon the testimony basically of McDonald, the pilot of the aircraft and a member of the Clack-Nomah Flying Club which owned the plane. Let it be known that McDonald, nor any of his party, observed the Mooney aircraft from the time they left the Sterling Aircraft Installation (at which time the Mooney aircraft was not yet tied down) until they returned **after** (bold face ours) the accident and after the aircraft was flipped over on its back. (Transcript of Trial, Page 3, Lines 17 to 30; Page 4, Lines 1 to 26; Page 49, Lines 22 to 25). The

testimony in its entirety is as follows:

Counsel for plaintiff is questioning McDonald as follows and McDonald is answering.

Q Now did you find any broken chains about any of the landing gear?

A Yes, the right wing gear had a broken chain on it. The other chains were not broken.

Q And was the chain still wrapped around the landing gear or had it pulled off?

A No, the right gear still had the chain wrapped around it. It was merely looped around the gear. (Transcript of Trial, Page 6, Lines 1 to 8)

Plaintiff here testifies unequivocally that the right wing gear chain had broken. These chains, as a matter of fact, were put in place on the surface approximately one month prior to this incident and such chains were of the type and size that are commonly used and recommended for use as tie down chains and were nearly new. They had been put on new, according to the testimony of Sterling Meyer, who was at the time of said accident president of Sterling Aircraft, the defendant. He testified that the tie-down facilities were installed under his supervision by the City of Salt Lake, and that the chains themselves were put in by the company approximately three weeks to a month prior to this incident, and that they were half inch chains, new,

and were those commonly used for the mooring of aircraft. (Transcript of Trial, Page 76, Lines 1 to 30)

Further questioning of Mr. McDonald was as follows:

MR. FAUST: I just have one more question.

Q (By Mr. Faust) You have examined these chains?

A Yes.

Q Will you explain to the Court and the jury how the end of the chain was, that is to say if there were a padlock, a bolt, a snap, a bolt or any kind of thing like that?

A On each chain there was nothing. The chain just had the last loop and that was the end of it. There was no S fastening device of any kind.

MR. FAUST: That's all.
(Transcript of Trial, Page 46, Lines 21-30)

Mr. McDonald further testified that subsequent to the incident that there was no S hook on the end of one of the chains. (Transcript of Trial, Page 50, Lines 27 & 28, Page 51, Lines 1 & 2). However, the witness did testify also that the airplane obviously must have been tied down because there was a **broken** chain (bold face ours) on the aircraft. The witness McDonald testified as follows:

THE COURT: Well, tell us what you meant

then, Mr. McDonald.

THE WITNESS: Well, the airplane was obviously tied down because there was a broken chain on the aircraft.

THE COURT: I didn't hear you.

THE WITNESS: The plane was obviously tied down on the one gear at least because there was a broken chain there when I got back and the fact there was gas all around it and they gave me a bill for it also. (Transcript of Trial, Page 50, Lines 3-11) Further McDonald testified in answer to a question by plaintiff's attorney that:

"The tail chain was laying there intact. The left wing chain was laying intact. The right wing chain was **broken."** (bold face ours) (Transcript of Trial, page 44, Lines 21 & 22) While he refers to "wing" chains descriptively, the chains were attached to the landing gear as hereinbefore described.

Mr. Leon Parry, while testifying as a witness for the plaintiff, stated that he inspected the airplane and at the time he inspected it, it did have chain attachments to the main gear meaning the two wheels and to th tail. (Transcript of Trial, Page 36, Lines 17 to 24, and Page 37, Lines 6 to 11)

Mr. Parry also testified, as a witness called by the plaintiff, concerning the tying down of the aircraft as follows:

THE COURT: Can you tell the jury how it was tied down from what you saw?

THE WITNESS: Well, all the tie-down chains was where they should have been. Now as far as the knotting apparatus or something like this, I couldn't say definitely but they was on the tie-down rings or the landing gear. Now this is prior, prior to the peak gusts or when the wind started blowing.

THE COURT: Prior to the time that the left side collapsed?

THE WITNESS: Right.

THE COURT: Was there anything about the tie-downs or the manner that you observed that was not in the usual way of tying a plane under such circumstances?

THE WITNESS: No, definitely not. If there had of been I would have changed it.

THE COURT: I take it then from what you say that from your observation that the tie-downs were as they should have been?

THE WITNESS: Right.
(Transcript of Trial, Page 42, Lines 1 to 21)

Mr. Parry further testified as follows:

THE COURT: Well, from what examination you have made however can you assure this jury

as to what was done?

THE WITNESS: As far as tying it down this way I can't. This is the way it is supposed to be done and this is the way all the line boys done it but as far as my own testimony and saying that I inspected it and got down there and checked it and made sure, I can't, because I didn't — it was just a running glance.

THE COURT: But from the examination you made of this airplane what is your best judgment as to how it was tied down at all three points?

THE WITNESS: Knowing the person that had worked the shift before me I would say definitely that it was tied down properly.

MR. FAUST: I object to that answer and ask that it be stricken.

THE COURT: Well, I think maybe that is correct. You would have to base it, Mr. Parry, upon what you observed as to the chains you saw there, did you not?

THE WITNESS: Right.

THE COURT: And from the observation that you did make what is your best opinion as to how all three points were fastened?

THE WITNESS: They would definitely be

fastened properly or I am pretty sure I would have changed them. I am positive I would have changed them. (Transcript of Trial, Pages 55, Lines 9-30, and Page 56, Lines 1-5) Also he testified as follows concerning the S hooks:

THE COURT: As I understand you know that there were S hooks on these three chains?

THE WITNESS: There was definitely S hooks on the chains.

THE COURT: Thank you.

THE WITNESS: This is positive because we don't install the chains. See, this row of tie-down chains was stuck in just prior to this Mooney coming in and we wouldn't have stuck the chains in without S hooks.

MR. FAUST: Now if the S were hooked it would be secured?

THE WITNESS: This is true but it is possible with the aircraft jumping around, vibrating around, it could have jumped out. (Transcript of Trial, Page 56, Lines 25-30, Page 57, Lines 1-8)

Mr. Herb Smith was called as a witness subsequently by the defendant who stated that he was at the Sterling Aircraft, Inc., installation at the time of this incident and further testified that he saw the three chains on the Mooney aircraft prior to the ac-

cident, and that there was a chain on each main strut (landing gear) and one on the tail, all of which were securely anchored in the ground on the other end, according to regulations of the Salt Lake City Airport. He further testified concerning the S hooks on the chains, as follows:

Q On this particular line of tie-down chains where the Mooney aircraft was parked, do you recall having seen S hooks in the end of the chains?

A Yes sir.

THE COURT: In reference to this plane?

MR. GARNER: I am coming to that plane.

Q (By Mr. Garner) Now with respect to the tie-downs of this airplane did you observe S hooks in the end of those chains?

A Yes, there is S hooks on them.

Q In all three chains?

A All three chains.

Q The chain that affixed the tail?

A Yes, sir.

Q The chain that affixed the left main gear?

A Yes, sir.

Q The chain that affixed the right main gear?

A Yes, sir.

(Transcript of Trial, Page 62, Lines 24-30, Page 63, Lines 1-11)

Mr. Herb Smith, witness for the defendant, further stated that he observed Mr. Parry as he went out of the door of the defendant Sterling Aircraft, Inc., waiting room at the time the wind came up, and that either the nose gear or the left landing gear (he didn't recall which one) started folding when he (Parry) went out of the door, and that is where the oscillation of the airplane came from, and at that time it started to move. (Transscript of Trial, Page 68, Lines 21 to 30, and Page 69, Lines 1 to 12.)

Mr. Sterling Meyer, called as a witness for the defendant, testified that at the time of this incident on June 3, 1963, that he was the president and general managr of defendant, Sterling Aircraft Inc., that he personally supervised the putting in of the iron rods into the cement, and he personally supervised the placing of the chains connected thereto, and that the chains were approximately a one half inch chain, which is commonly used for the mooring of aircraft. (Transcript of Trial, Page 7, Lines 1-30) Mr. Meyer further testified as to wind damage observed by him at the airport, and stated upon direct examination that the wind had blown the plate glass window out in the office of defendant, Sterling Aircraft Inc., that it had blown out approximately 50 panes in the

upper skylight portion of said building and that it blew out several (he did not know how many) windows in the office section; that further he observed that the wind had blown down a hanger, which had five airplanes in it. That it was, in his words, completely and totally torn down, and that there would be about sixteen other hangers that were damaged, and some aircraft.

It was further testified to by one of the witnesses that upon examining the retraction gear in the aircraft, which raises and lowers the landing gear, that the same was not locked, although Mr. McDonald testified that he did in fact lock the gear, and there was some conjectural testimony as reported in the transcript as to whether or not such an aircraft could be landed or taxied without the retraction gear locked, which I think is of no consequence as to whether it could be or was unlocked at the time of this incident. Mr. Perry, as a witness called by the Plaintiff, testified concerning the happenings to the landing gear itself at the time of the windstorm and stated that when he directed his attention to the aircraft, the left gear collapsed and folded up into the wing, and the nose gear collapsed immediately thereafter throwing the tail of the aircraft upward, and by reason of the gear collapse and the intense wind it allowed the tail to go so high in the air that the only way Mr. Parry could reach it was with his fingers in the tie-down ring, and he simply could not hold it. (Transscript of Trial, Page 39, Lines 21-30, Page 40, Lines 1-30, Page 41, Lines 1-9)

ARGUMENT

POINT I

THERE WAS NO EVIDENCE OF NEGLIGENCE PRESENTED BY THE PLAINTIFF UPON WHICH THE JURY COULD CORRECTLY AND PROPERLY BASE A VERDICT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT. THE PLAINTIFF FAILED TO PROVE ANY NEGLIGENCE WHATSOEVER ON THE PART OF THE DEFENDANT AND THEREFORE THE VERDICT WAS IMPROPER.

It is the position of the defendant that negligence is never presumed, and the burden is upon the plaintiff to prove by a preponderance of the evidence the alleged act or acts of negligence claimed by the plaintiff before a jury is justified in making a finding that the defendant was negligent. (Industrial Commission vs. Wasatch Grading Company, 80 Utah 223, 14P (2nd) 988 and also 38 Am. Jur., Section 285, Pages 973 & 974, and cases cited therein) There was no proof of negligence and certainly no preponderance of evidence of negligence on the part of the defendant. The only reference to any possibility thereof was the testimony of McDonald, a member of the Clack-Nomah Flying Club, which owned the Mooney aircraft, and the pilot thereof, that after the accident and after the plane was overturned and after the severe wind had ceased, that two of the three chains that were used to secure the aircraft were intact and lying on the ground, and that the third chain was broken. The most this would infer would be the tremendous force that was obviously placed upon at least one of the chains by reason of

the violent windstorm. These were half inch chains secured according to Salt Lake Municipal Airport Regulations, and were the size and type of chains used in the industry for the securing and mooring of light aircraft. McDonald further testified that subsequent to the accident he did not see any S hooks on the ends of the chains. There is conflicting testimony as to this but were there not, there is no showing of any evidence nor any proof that the presence or lack of S hooks on the ends of the chain was in fact or could be construed as negligence on the part of the defendant. It was testified with no contradiction that the Mooney aircraft was in fact moored to the surface by three chains which were attached to the aircraft, one on the right strut, one on the left strut, and one on the tail. Herb Smith testified that he observed the aircraft, that all three chains were tied and were taut. The plaintiff herein through McDonald, testifying for the plaintiff, did not see the airplane tied down prior to the wind and the incident complained of, but only after when the aircraft was in fact turned over, so he could have no knowledge or information as to whether it was properly tied down or whether it was not. We submit that the doctrine of Res Ipsa Loquitor does not apply in this case, and that it is the obligation of the plaintiff to prove, by a preponderance of the evidence, that the aircraft was not properly tied down. We submit to the court that the jury nor the court can properly **assume** (bold face ours) that it was not tied down properly and particularly in the light of the fact that a wind 25 miles an hour **in excess**

(bold face ours) of the propensities of a hurricane, according to weather bureau definition (70 miles per hour), was present, and did in fact do tremendous damage to the airport and to installations therein. Plaintiff herein is attempting to "pull himself up by his own bootstraps." We agree with the case of Wyatt vs. Baughman, 239 P. 2d 193, a Utah case, that the presumption of negligence can be raised but submit that the case clearly sets out that it can only be raised upon evidence being introduced to raise such a presumption. (Wyatt vs. Baughman, 239 P. 2d 193)

We submit that the court's instruction No. 7 is correct and proper and that the jury in spite of the instruction ignored the same in arriving at their verdict. Instruction 7 is as follows:

> **"You are instructed that the fact that the plaintiff's airplane or other personal property was damaged at the defendant's airport is not in and of itself evidence that the defendant was negligent. You are instructed that negligence is never presumed and that the burden remains upon the plaintiff to prove by a preponderance of the evidence the alleged act of negligence claimed by the plaintiff before you are warranted in making a finding that a defendant is negligent."**

The jury had to assume that by reason of the fact that the airplane did in fact turn over that it by necessity was not properly tied down and secured. This we submit is entirely without merit. McDonald, acting for the plaintiff, did not see the aircraft from the time he left it to be gassed at the defendant's installation prior to the time it had been tied down (he

had left before it was tied down), until he returned after the accident had taken place. The testimony is uncontroverted that the aircraft was secured by more than one witness who testified that there were three chains tied to the aircraft and that they were taut. The court's attention is further called to the fact that there is testimony that the landing retraction gear was not in fact locked, and that as Leon Parry, employee of the defendant, ran toward the aircraft that one of the landing gear, and the nose wheel collapsed, which caused the plane to oscillate and move around, and eventually, because of the violence of the 95 mile per hour gusts and the violent motion of the aircraft brought about by the wind and the collapse of the gear, the tail chain let go, and the aircraft flipped over on its back. Mr. Parry hung on to the aircraft at the tail section as the same was vibrating and bouncing up and down, and in fact held on until such time as he could no longer control or maintain his position, and was threatened with bodily harm at which time the aircraft did in fact flip over. We submit that there is no negligence whatsoever on the part of the plaintiff, and that the jury directly ignored the instruction of the court, No. 7. It was clear from the testimony that there are any number of ways to secure an aircraft, and any number of ways to tie or make fast the chains (or in many cases ropes) that are used for tying down light aircraft. It was further testified that in the event of a tremendous amount of motion up and down or sideways of the aircraft, under certain conditions that it could in fact loosen any chain that was made secure,

whether it was secured by an S hook, a pin spring, a C hook or knotted. For the defendant to have been negligent would have required the failure to do what a reasonable prudent person would have done under the circumstances of the situation or doing what such person under such existing circumstances would not have done. We further submit that no action or lack of action on the part of the defendant was the proximate cause of the accident; that in order to be such proximate cause must be that cause which in a natural, continuous sequence unbroken by any new cause, produced the injury without which the injury would not have occured. Such is not the case here and again the jury ignored the instruction of the court, which Instruction No. 3 clearly set out the above to the jury. We submit that the testimony is uncontroverted, that the aircraft was securely tied down, that a wind with gusts of some 95 miles per hour struck the airport suddenly and with less than a two minute warning, and came up within that time from an ordinary breeze, and further that the retraction gear of the Mooney aircraft was not in fact locked as it should have been, and that the defendant did all that a reasonable and prudent person or company personnel should or could do under the circumstances, and further that there is no testimony whatsoever in the plaintiff's case to prove negligence, certainly not proximate cause, and that by reason thereof and basd upon the instructions given by the court, that the jury improperly returned a verdict for plaintiff and against the defendant. Although the law is

voluminous and clear on these subjects, defendant feels obligated to call the court's attention to authorities on Point I, II, & III and presents the same here to cover all points inasmuch as the law and fact are meshed together covering each Point.

It is properly stated that perfection of conduct is humanly impossible and the law does not exact an unreasonable amount of care from anyone. The degree of diligence one must observe in the performance of his common law duty to use care to prevent injury to others is ordinary care or reasonable care. Both ordinary care and reasonable care mean due care, that is, care according to the circumstances of the case. (38 Am. Jur. Section 29; Stedman Vs. O'Neil, 72 A, 923, 22 LRA (NS) 1229) The standard by which the conduct of a person in a particular situation is judged in determining whether he is negligent is the care which an ordinary prudent person would exercise under like circumstances. Negligence is the omission to do something that a reasonable man, guided by those considerations which would ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. (38 Am. Jur. Section 30; Heller vs. New York, N. H. & H. R. Co., CCA 2nd, 265 F 192, 17 ALR 823 and others following). Defendant submits that it did everything that a normal, reasonable, prudent man would do under the circumstances, and in the ordinary course of business and in this case did more than that in that the employees thereof, after having

properly tied down said aircraft did upon discovering that a wind was coming of any force whatsoever immediately checked this aircraft, and other aircraft to see that they were tied down, and did in fact exert far beyond a reasonable amount of effort to prevent damage to the aircraft in question. There is no proof whatsoever, and was not at the conclusion of plaintiff's case, or at the conclusion of the lawsuit itself any evidence presented that the aircraft was not properly tied down, and moored, but in fact there was testimony by two witnesses that it was indeed properly tied down. Plaintiff's only evidence as to negligence of the defendant is that the fact that the aircraft was blown over during a 95 mile per hour wind and such is evidence and proof that it had not been properly tied down. To find the judgment in favor of plaintiff under these circumstances is contrary to the law and the rules of evidence in that the plaintiff must prove the acts or omissions on the part of the defendant which would constitute negligence and be the proximate cause of the damage. Plaintiff cannot merely profer that the plane was damaged, therefore the defendant had to be negligent.

The question of the defendant's liability lawfully can be withdrawn from the jury and determined by the court, as a matter of law when the facts are indisputable, being stipulated, found by the court or jury, established by evidence that is free from conflict and raise an inference which is so certain that all reasonable men in the exercise of a fair and impartial judgment must agree upon,

and draw the same conclusion. (Lowe vs. Salt Lake City, 13 Utah 91, 44 P 1050) This we agree is an older case, but submit that the law has not changed, that when the facts as presented by the plaintiff are taken at their best and reasonable minds would agree that there is no negligence on the part of the defendant, then the court should, as a matter of law, so find and so inform the jury by a preemptory instruction. (38 Am. Jur., Section 345, Austin vs. Public Service Co., 299 Illinois 112, 132 NE 458)

A nonsuit is proper in an action for negligence when an inference of contributory negligence on the part of the plaintiff **or the absence of negligence on the part of the defendant** (bold face ours) is deducible from the undisputed facts and circumstances proved. (Hausman vs. Madison, 85 Wisconsin 187 55 NW 167) We submit that taking the plaintiff's evidence in its entirety and assuming it to be uncontroverted, the plaintiff sets out that he left his aircraft at the installation of the defendant, that he left the installation prior to the time the aircraft was tied down, that when he returned that the aircraft had been flipped over on its back by the wind, and that the aircraft had been damaged; that two of the anchor chains were lying on the ground, and part of the third anchor chain was secured to the right landing gear, the chain having been broken and the remaining portion of the chain anchored to the ground. This is the sum and substance and total of plaintiff's case against the defendant upon which he claims negligence on the part of the defendant for recovery for damages. He

further states that there were no S hooks visible to him on the other end of the chains as distinguished from that end anchored and moored to the ground, and claims that by reason of there not being S hooks on the ends that the defendant must be negligent. Such is not the case. S hooks are not required by law, or a field regulation, to be attached as a mode of securing a chain to itself after having been attached to an aircraft.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CONCLUSION OF PLAINTIFF'S PRESENTATION OF EVIDENCE.

At the conclusion of the evidence as presented by the plaintiff, the plaintiff had proved nothing further than that Al McDonald had flown his aircraft into Salt Lake City, because of deteriorating weather; that he had parked the aircraft at Sterling Aircraft, Inc., and had instructed the gas boy to gas the aircraft and check the oil. Prior to the time that the aircraft was tied down, Mr. McDonald and his party left, and did not return until the accident had happened. His testimony, prior to the plaintiff resting, was that the aircraft when he observed it, was on its back, that two of the chains were off, one was still partially on the landing gear but had broken the chain, and that he had observed the tie chains, and testified that there were no S hooks on the ends thereof. This is the sum and substance of the testimony submitted to the court by Al Mc-

Donald on behalf of the plaintiff, and it is respectfully submitted that based upon this, that the trial court committed error in not at that time granting the motion of the defendant which was then made requesting a Directed Verdict based upon the fact and grounds that the plaintiff had failed to prove the omission or the commission of any act constituting negligence on the part of the defendant. While it is discretionary with the court to take under advisement a Motion for a Directed Verdict, and hold the same in abeyance until defendant has submitted his case in chief, we submit that to do so by the court in this case was error, and as a practical matter that to refrain from passing judgment on a Motion for a Directed Verdict after plaintiff's case and until after the defendant's case has been prsented, does not render justice to the parties.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT IN FAVOR OF DEFENDANT NOTWITHSTANDING THE VERDICT.

It is respectfully submitted that the court's error in denying the defendant's Motion for Judgment Notwithstanding the Verdict and in favor of the defendant is based upon precisely the same points as herein immediately set out above in Point I and in Point II. The trial court should have ruled in favor of defendant's Motion for Judgment in Favor of Defendant Notwithstanding the Verdict for the reasons and upon the grounds set out in the argument of

defendant, Points I and II, and defendant believes that to elucidate further on Point III would be repetitious. However, defendant would make one final statement. While it is true that the jury is the trier of the facts, and has the right and power to believe one witness against many or many against one, and to ascertain what they believe to be the truth as to the facts of any given situation, we believe that it is the prerogative, yea, the absolute legal duty of the trial judge in his capacity as such to, when the situation is legally apparent, correct the possibility and probability of injustice and to enforce the rules of evidence and the rules of proof as propagated by the statutes and the decisions of this Supreme Court, and the trial court should exercise that restraining or constraining influence which the history of jurisprudence has made abundantly clear as being necessary upon juries and the jury system; such juries while being triers of the facts are nevertheless subject to the laws governing the trial of actions. The failure to do so on the part of the trial judge is error, if not in law, then in fact.

Respectfully submitted

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