1965

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

IN THE SUPREME COURT
of the
STATE OF UTAH

CLACK-NOMAH FLYING CLUB,
Plaintiff-Respondent,

vs.

STERLING AIRCRAFT, INC.,
Defendant-Appellant.

Case No. 10380

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court in and for Salt Lake County, Utah
Honorable Ray Van Cott, Jr., Judge

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

JED W. SHIELDS
53 East Fourth South
Salt Lake City, Utah

HUGH C. GARNER
Kearns Building
Salt Lake City, Utah
Attorneys for Defendant-Appellant

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CASES CITED

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STATEMENT OF KIND OF CASE

The Respondents, Clack-Nomah Flying Club and R. A. MacDonald agree with the statement of the "Kind of Case" as set forth in Appellant's Brief.

DISPOSITION IN THE LOWER COURT

Respondents agree with the statement of the "Disposition in the Lower Court", made in Appellant's Brief, except that the verdict rendered was in the sum of $7,100.00 for the Plaintiff, Clack-Nomah Flying Club, Inc. and $300.00 in favor of the Plaintiff, R. A. MacDonald. R. A. MacDonald was added as a Party Plaintiff prior to the trial.

RELIEF SOUGHT ON APPEAL

The Plaintiffs and Respondents, Clack-Nomah Flying Club, Inc. and R. A. MacDonald, seek a de-

cision of this Court affirming the Jury verdicts for the Plaintiffs and the Judgments entered upon these verdicts.

STATEMENT OF FACTS

Respondents accept generally the "Statement of Facts" contained in Appellant's Brief, but desire to point out that the Transcript does not contain the testimony of the witnesses who testified about wind velocity and damages. Additional significant facts are as follows:

The Defendant, Sterling Aircraft, Inc., maintained a service for tie-down, refueling and for the general care and protection of airplanes based or stopping at the Salt Lake Airport, for which a storage and handling charge was made in addition to the cost of gasoline, oil and other services sold to aircraft owners. The Plaintiff, R. A. MacDonald, testified that the Mooney Aircraft of Plaintiff and Respondent, Clack-Nomah Flying Club, was in good working condition, having, about thirty days prior to the date of the accident, received an annual inspection signed by F.A.A., certified personnel. (R. 164). MacDonald further testified that as he approached to land at the Salt Lake City Airport, he locked the landing wheels and that the gear handle was in the locked position when he left the airplane parked and in the care of the Sterling Anrcraft Company. The Agents of the Appellant, Sterling Aircraft, Inc. then took charge of the plane and moved it prior to the time of the accident.

Throughout Appellant's Brief, reference is made to the velocity of the wind. The portion of the testimony of witnesses on wind velocity was not certified in the records. Exhibit "7", however, which does appear in the record, is a resume' of strong winds recorded at the Salt Lake Airport since 1949 and shows that at the Salt Lake Airport alone, in fourteen and one-half years, the wind has blown at a velocity of over forty miles per hour eighty-two times.

Mr. Parry and Mr. Smith both testified the chains were loose on the Mooney aircraft, so that the aircraft was moving in the wind prior to its being blown over. Mr. Parry testified that:

> "I was approaching the Mooney and the tail tied down at that time, had come loose". (R. 116).
>
> Question: And then what did you do.?
>
> Answer: At this time, the left wing was also starting to come loose, so —
>
> Question: What do you mean "come loose", the wing, or the mooring or what?
>
> Answer: The chain had started to loosen up on the gear. In other words, it was working loose.

As the aircraft tried to swivel into the wind, bringing the tail up so that the wind got under the tail, despite Parry's efforts to hold it down, the nose gear collapsed and the airplane blew over on its back. Parry was the only person in the employ of

the Defendant and Appellant, Sterling Aircraft, Inc. on the line at that time. In fact, at the time when the wind was blowing, he was not out on the line, but was in the office and was pushed out of the door by Smith.

There were twenty-five to thirty other aircraft parked at the Defendant's apron, but no other planes blew over. (R. 111). Only two other planes at the Defendant's facility were slightly damaged. (R. 91, 92). In fact, no witness knew of any other airplane at the Salt Lake City Airport being blown over. (R. 149, 150-157).

No witness knew exactly how the Mooney was tied down. When asked by the Court, witness, Parry stated that he did not form an idea as to how the airplane was tied down. (R. 120).

> 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 testify, or whether there was a padlock on it or anything else. This I couldn't say definitely, but they was on the tie-down rings or the landing year. Now this is prior, prior to the peak gusts or when the wind started blowing.

Herb Smith likewise testified that he did not examine the tie-down closely. He stated that he observed the three chains hanging down from the

Mooney, from inside the Sterling Aircraft waiting room.

Question: But you didn't go over close and inspect them?

Answer: I never went over to the Mooney. No sir.

Question: You didn't know how it was hooked, or how it was fastened or tied?

Answer: No. (R. 148).

Witness Parry further stated in answer to a query by the Court, as to this specific tie-down:

> "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 in saying that I inspected it and got down and checked it and made sure, I can't, because I didn't —. It was just a running glance." (R. 133).

ARGUMENT

POINT No. 1

THERE WAS SUFFICIENT EVIDENCE OF NEGLIGENCE PRESENTED BY PLAINTIFF UPON WHICH THE JURY COULD BASE A VERDICT IN FAVOR OF PLAINTIFFS AND AGAINST THE DEFENDANTS.

The tie-down chains were placed on the airplane for the purpose of securing the airplane. They were placed, not to come loose, but placed to stay tied. (R. 120). Further, the airplane was tied down to protect it not just from small winds, but from strong winds also. (R. 121).

The airplane is tied down so that it would be so secure that if too much stress is put on it, parts of the airplane would break to which the chain is tied, before the tie-down chains would loosen or break. The tail tie-down ring was not broken or damaged. (R. 90). Had the airplane been secured properly, all three tie-down chains would have remained secure, as did the tie-down chains of all other airplanes at the Salt Lake Airport. This was the only airplane at the Salt Lake Airport which blew over. (R. 91).

It is the Respondent's position that the velocity of the wind did not have anything to do with the loosening of the chains, if they had been properly tied. The chains should have stayed tied until they broke. The left gear chain broke, but it did not break prior to the plane inverting; the other two never did break, but came loose. The third stayed knotted until the plane went over, and the pictures show it was not tied, just looped. (R. 87). The chains came loose here because there were no sceuring devices on the end of the chain, or if there were securing devices, they were not used in accordance with the tie-down standards testified to by the experts. In order to properly chain an airplane securely, Plaintiff's and Defendant's experts testified that there must be something on the end of the chain such as a bolt, a snap, a "C" hook or an "S" hook, by which the end of the chain is secured to another part of the chain.

MacDonald testified that the customary way of tying the chains is that "they usually fasten the ends so that they cannot come undone", and that it is not a matter of custom, and it is dangerous to just tie the chains without securing the ends. (R. 125).

J. Galbraith testified that sometimes he placed a small bolt through the chain and bolted it together. That some chains had a snap on them. (R. 99).

The Appellant's own witness, Herb Smith, stated that in the airplane industry, generally, an "S" hook is used to fasten the end. (R. 142). He stated that he had been in Los Angeles, San Francisco, Chicago and around the country, and that this was customary. That a securing link or device is customary in the industry was also testified to by the witness, Herb Smith, when the Court asked him. (R. 143):

> The Court: Are chains ever tied?
>
> The Witness: Yes sir. I have seen chains tied. Yes sir.
>
> The Court: Is that a common useage among airplane people?
>
> The Witness: No sir.
>
> The Court: Did you say that it was a useage?
>
> The Witness: Well, if you don't —. I would say if it was a useage, it would be a case of get by, because the proper facilities wasn't there. In other words, there would

> be no "S" hook. There would be no harness hook. There would be no "C" hook. There would be no spring loaded clamp. In other words, it would be in . . . not a complete chain for use for such purpose. (R. 144). Then I have even tied them myself.

The man in charge of the Defendant's facility at the time, Mr. Parry, stated that the proper way to tie-down the airplane is to put an "S" hook in the chain. (R. 130, 131).

It is clear from the testimony of all witnesses familiar with the handling of airplanes that to properly secure an airplane being tied down with chains, it would have to be secured by a securing device on the end of the chain. This is the standard of care required of Defendant. Safety precautions known, or taken by another, or a group of others, is probative evidence of the standard of care. *De Weese vs. J. C. Penney Co.*, 5 U.2nd 116, 297 P.2d 898. Also evidence of precautions taken by the Defendant, under the same or similar circumstances on previous occasions was admissible as bearing upon the negligence of the Defendant. But there is a conflict in the evidence as to whether or not the chains, which were supposed to secure the Mooney airplane had "S" hooks on the ends of the chain, which conflict required the trial judge to submit the case to the Jury as the trier of facts. That there was a conflict was noted in Appellant's Brief on page 17:

"There is conflicting testimony as to this, but were there not there is no showing of 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."

This conflict, as to whether or not the Defendant and Appellant had met the tie-down standard of care in assuming the responsibility of securing and tying down the Mooney was also noted by the trial Judge during the trial.

Referring to the testimony of Parry:

"They are open link chain, is what it is. It is an open link chain and was threaded through the chain again with one link and on the other side of the chain, after it is threaded through, you put this "S" hook in the chain so that it is impossible to pull this out.

The Court: Well, now, did you have this kind of a mechanism on these chains?

The Witness: This is the way it was tied down.

The Court: So that there is a difference of opinion then between you and Mr. MacDonald as to whether or not there were "S" hooks on the end of these chains?

The Witness: Right." (R. 131)

The pictures in Exhibit "A" also quite clearly show the chains. The Jury could have based their verdict on the testimony of MacDonald alone. (R. 124 and 129), but they were substantially aided by what the pictures show about the chains, and could

find that with both ends of the chain showing on the right wheel, that no "S" hook showed in the picture. In addition, the Jury could have based its verdict upon the inference that since two of three chains had come loose before the accident, as testified to by Parry, that even if there were "S" hooks on the end of the chains to secure chains, that they were not used. In *Hewitt vs. General Tire and Rubber Co.*, 284 P.2d 471, this Court discusses the legal validity of an inference upon an inference.

Negligence need not be proved by direct positive evidence, but may be proved by facts reasonably and naturally inferable. *Crouch vs. Wycoff* 107 P.2d 339, *Fredrickson vs. Maw*, 227 P.2nd 772.

Appellants try to make an inference that the landing gear handle was not in a locked position from the fact that two of the landing gears collapsed after the chains came loose. This hurts Appellant's position because the landing gear handle was locked when the plane landed at the Salt Lake Airport. J. Galbraith stated that it is impossible to land a Mooney on its wheels or taxi a Mooney without the gear handle being locked. (R. 166). This is because the landing gear must sustain the weight of the plane. (R. 166).

R. A. MacDonald also testified that when he parked the Mooney and turned it over to Defendant, the gear handle was locked. (R. 165). Thereafter, Defendant's agents were the only ones who moved and handled the Mooney.

However, the Jury obviously believed MacDonald who testified as follows:

> Question: Immediately after the accident did you look at the gear handle?
>
> Answer: Yes I did.
>
> Question: What was its position?
>
> Answer: It was still in the down and locked position. (R. 165)

He then testified that the actuating mechanism was broken, but that the right gear was still intact. (R. 165). Because the wheels work together, the other two had to have been locked before the tie-down chain came loose.

The Plaintiffs claim a second theory of negligent conduct against the Defendant, which was not submitted to the Jury, but which Respondent claims was negligent. This theory was contained in Plaintiff's Requested Instructions 6, 7 and 8. Failure to submit this to the Jury was prejudicial to the Respondent and therefore to be considered for the purpose of this Appeal, on the question of whether Respondents were entitled to go to the Jury. Plaintiffs claimed that after the tie-down, the Defendant's agents failed to exercise reasonable care for the airplane under the circumstances. In other words, however the airplane was tied down, the responsibility of the Defendant did not end there. There was a continuing duty. Parry testified that he was supposed to be checking airplanes every five minutes.

(R. 115). He also testified that it was his duty to check the airplanes to see that they were properly tied down. He testified that he made rounds for this purpose. (R. 112). That as the weather deteriorated, he did this prior to the time of the big gusts. But he did not specifically, carefully check this airplane. He stated that he assumed that it was properly tied, because he saw the chains, but at no time did he inspect closely to see if it was tied securely. He had one whole hour to do this, because he came on duty at 2:00 o'clock and the big gusts did not occur until 3:05. In addition, during the critical period, Parry was not at his post. He was inside the office, and when, from the inside, he observed the Mooney moving, Herb Smith had to push him out of the door. Further, Parry stated that he didn't have time to carefully check each airplane, because he was the only man on the line. (R. 112, R. 114). This puts the Defendant on the "horns of a dilemma". If one man couldn't properly check the airplanes, then the Defendant was negligent for not having sufficient help on the line.

Herb Smith testified he checked his own airplane.

The defective tie-down could have been discovered upon reasonable inspection, and certainly reasonable men could infer, based upon the fact that two of the chains came loose, before the plane went over, that the tie-down was defective. Viewing the evidence and all inferences therefrom in the light

most favorable to the verdict, as this Court must do on this appeal, the verdict must stand. *Bates vs. Burns*, 281 P.2d 209.

POINT No. 2

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CONCLUSION OF PLAINTIFF'S PRESENTATION OF THE EVIDENCE.

The time when the trial Judge grants or denies the motions of the various parties during the trial is, by necessity, discretionary with the trial court in his attempt to see that the parties have a fair hearing on the issues and that justice is ultimately done in the case.

POINT No. 3

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

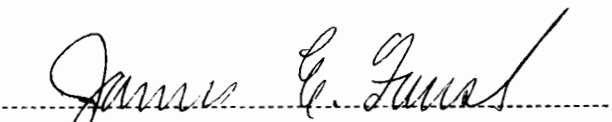
It was the trial court's duty in considering Defendant's Motion for Judgment Notwithstanding the Verdict, to review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the Plaintiff. *Bates vs. Burns*, 281 P. 2nd 209. Applying this rule to this case it will be remembered that during the trial, the trial court noted in the record that there was a conflict in the evidence on the question as to whether the Defendant had met the standard of care required of the Defendant in caring for Plaintiff's airplane. This

conflict was acknowledged by Appellants in their Brief, and required that the case be sent to the Jury as the trier of the facts, to resolve the conflict. Dissatisfaction on the part of the Appellants, with the finding of the Jury is understandable, but it is not a basis for a reversal.

CONCLUSION

Respondents respectfully request that this Court affirm the Jury verdict for the Plaintiffs and the Judgments entered thereon.

Respectfully submitted,



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