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Mavis H. Middleton Administratrix of the Estate Of James L. Middleton, A/K/A James Lamont Middleton, Deceased v. Adele R. Cox, Administratrix of the Estate Of Elmyrrh Leany Cox, Deceased : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAVIS H. MIDDLETON, Administratrix
of the Estate of James L. Middleton, a/k/a
James LaMont Middleton, deceased,
Plaintiff-Appellant,

vs.

ADELE R. COX, Administratrix of the
Estate of ElMyrrh Leany Cox, deceased,
Defendant-Respondent,

BRIEF OF APPELLANT

Appeal from the Judgment of the
Fifth Judicial District Court
for Iron County, Utah

HONORABLE C. NELSON DAY, J.

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Plaintiff-Appellant,

vs.

ADELE R. COX, Administratrix of the
Estate of ElMyrrh Leany Cox, deceased,

Defendant-Respondent,

Case No.

. 11785

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action for the wrongful death of Plaintiff's intestate, James L. Middleton, who was killed in an airplane crash on the 13th day of June, 1965, along with another passenger and ElMyrrh Leany Cox, deceased, the pilot of the aircraft. The surviving widow, Mavis H. Middleton, brings this action to recover damages for the wrongful death of her husband.

DISPOSITION IN LOWER COURT

Defendant motioned for summary judgment contending that the facts herein are not sufficient to take this case to the jury. The Trial Court found in favor of the defendant and dismissed the complaint of plaintiff, with prejudice, upon the merits.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the trial court's summary judgment in favor of the defendant.

STATEMENT OF FACTS

On or about the 13th day of June, 1965, plaintiff's intestate, James L. Middleton, while acting as a volunteer for the Civil Air Patrol, was killed in a plane crash ElMyrrh Leany Cox, deceased, owned and piloted the plane, and James Miles, deceased, was an observer.

The Civil Air Patrol is an auxiliary arm of the United States Air Force, and its main function consists of search and rescue operations. On the day of the fatal crash, the Utah wing of the Civil Air Patrol had been authorized to search a certain "grid" area in Southern Utah and subsequent to this authorization, Dr. Cox was assigned a certain "grid" area and he accepted this assignment and took with him two observers, including plaintiff's intestate.

Dr. Cox's plane was having generator trouble before he took off on the morning of June 13th, 1965, and

he had, in fact, ordered a new generator from one Byron Jensen of Provo, Utah. (Statement of Blaine D. Wood, 8) At the time of the "take off," it was understood by those connected with the incident, that there would be two planes, each assigned to a specific grid area, and said planes would cover their respective grid areas, meet in Zions Park, and then return to St. George, Utah. (Statement of Chester Wesley Whitehead, 10).

While in flight, the two planes had radio contact and then searched their respective grid areas, after which, the two planes flew side by side, could not make radio contact, and Dr. Cox held up his radio mike and waved it back and forth indicating to Whitehead and Johnson that his radio was dead. (Statements of Chester W. Whitehead, 10 and James C. Johnson, 6 and 7).

Shortly after this time the two planes landed at the Bryce Canyon Airport, where they refueled and prepared for the trip back to St. George. It was there determined that the battery was dead in the plane flown by Dr. Cox and that the generator was inoperative. (Statement of James C. Johnson, 8). At the time of the fueling of the aircraft belonging to Dr. Cox, one of the crew members of said plane stated that they were having battery trouble and asked a certain Jerome Bartlett if he could arrange for a battery charge. Mr. Bartlett stated that this man was the pilot. (Statement of Jerome Bartlett, 5).

Dr. Cox chose not to have the battery of his aircraft charged and it was started by a method known as hand-

cranking. (Statement of Chester W. Whitehead, 12). On that same day, one John Hancock, of Bryce Canyon, Utah, Electronics Technician for the Federal Aviation Agency, was summoned to the Bryce Canyon Airport on the report that someone was having trouble starting their plane, but before he arrived at the airport, he saw what he recognized to be a Bellanca airplane, take off from said airport. Mr. Hancock continued over to the airport where he was informed that the plane in need of assistance had a dead or weak battery. (Statement of John Hancock, 2, 3, 4 and 5).

After the two planes were started at Bryce Canyon Airport, they initiated their respective takeoffs and proceeded back to St. George by alternative routes. The day was clear, the sun was shining and the temperature was warm to quite hot. Dr. Cox's plane is a light aircraft, brand name, Bellanca, and it proceeded on a direct route back to St. George from Bryce Canyon Airport, where it crashed in the mountains on the 13th day of June, 1965.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT PLAINTIFF'S INTES-TATE WAS A GUEST UNDER SECTION 2-1-33 UTAH CODE ANN. (1953).

This matter comes before the Supreme Court on summary judgment in favor of defendant. The first question to be considered is whether plaintiff's intestate

was a guest under Section 2-1-33 Utah Code Ann. (1953), which determination is ordinarily reserved for the jury.

Section 2-1-33 Utah Code Ann. (1953).

No person riding in an aircraft as a guest, without payment for the ride or transportation, nor his personal representative in the event of the death of such guest, shall have a cause of action against any pilot or crewman of such aircraft or its owner or his employee or agent for injury, death, or loss, in the case of accident, unless the accident was caused by the intoxication or wilful misconduct of the pilot or crewman of such aircraft or its owner or his employee or agent and unless such intoxication proximately resulted in the injury, death or loss for which the action is brought.

The purpose of the Civil Air Patrol is that of search and rescue; its most ordinary duty is attempting to find aircraft which are reported to be lost. To effect this purpose, it is the custom of the Civil Air Patrol to enlist the help of pilots and owners of planes to aid in said search and rescue operations. Observers, too, are a usual and necessary part of this operation, and it was in this capacity that plaintiff's intestate, James L. Middleton, was aboard the aircraft of ElMyrrh Leany Cox at the time of the fatal accident. The fact is that pilots and owners of planes are compensated by the Civil Air Patrol for certain communications expenses and also for fuel, and while observers are not compensated, they are necessary to the operation because they look for downed air-

craft while the pilot flies the plane. (Statement of Chester K. Whitehead, 3 and 8)

It is the contention of plaintiff, that although James L. Middleton did not give Dr. Cox any money to ride with him, that said Middleton was a paying guest for the cause and reason that he provided services which were a necessary part of the Civil Air Patrol operation and were necessary for said Cox to reap compensation for his communications and fuel expenses.

The State of California has a "guest statute" comparable to ours and in *Whittemore v. Lockheed Aircraft Corporation*, 51 Cal. App. 2d 605, 125 P.2d 531 (1942), the court pointed out that the compensation contemplated by the statute might consist of any benefit of a tangible nature received as a consideration for the ride, and that such compensation might consist of a business advantage or benefit accruing to the operator of the airplane.

There are relatively few cases interpreting the airplane "guest statutes," but the guest statute concerning automobiles is correlative and applicable.

The purpose of the automobile guest statute according to *Jensen v. Mower*, 4 U.2d 336, 294 P.2d 683 (1956), is to relieve the hardship which is visited upon a generous driver who is sued by an invited rider for ordinary negligence of the driver when the rider gave nothing to compensate the driver for the transportation. The contention has also been proffered that the guest statute relieves the insurance company of the disadvantage it

would otherwise suffer and avoids fraud and collusion. If we assume the same purposes behind the airplane "guest statute," we can see the purpose and intent of the statute is not applicable to the instant case and because this statute is in derogation of the common law, it should be strictly construed. James L. Middleton compensated ElMyrrh Leany Cox by his services as an observer, which services were needed by Dr. Cox to complete his mission for the Civil Air Patrol.

In *Smith v. Franklin*, 14 Ut.2d 16, 376 P.2d 540 (1962), the Supreme Court said that the determination of whether a passenger in an automobile was a guest within the guest statute or a passenger for hire, should be made on the basis of what the chief inducement was for giving the ride. The Court went on to say that where payment for the ride is the main inducement, the fact that there may also exist some social incentive which makes giving the ride enjoyable or desirable for the driver, would not change its character to that of host and guest. The Court concluded by saying where a dispute exists concerning the status of the plaintiff under the law, that Rule 50 (b) U.R.C.P. was obviously designed to encourage the submission of controverted issues to the jury whenever there is any doubt about the matter.

In the present case, the chief inducement for taking James L. Middleton, deceased, on that certain search and rescue mission of June 13th, 1965, was the fact that said Middleton would contribute to the operation by performing necessary services as an observer. If the above

cannot be stated as a matter of law, then it is for the jury to decide in accordance with the letter and spirit of Rule 50 (b) U.R.C.P.

POINT II

THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT DEFENDANT'S INTESTATE WAS NOT NEGLIGENT UNDER THE FACTS OF THIS CASE.

The plaintiff contends that her intestate, James L. Middleton, was not a passenger and therefore, was owed the duty of ordinary care and prudence, but in the alternative, that if plaintiff's intestate is found to be a passenger by this court, then and in that event, plaintiff contends that ElMyrrh Leany Cox can be found to have been wilfully negligent in the present case. The plaintiff's proof depends on the negligence of defendant and the doctrine of *Res Ipsa Loquitur*.

It can be generally stated that the doctrines of *Res Ipsa Loquitur*, where it is recognized and applied in the particular jurisdiction, depends on two propositions:

1. That the aircraft was under the exclusive control and management of the defendant.

2. The accident was of a kind of character that does not ordinarily happen if due care is used. 6 ALR 2d 528. *Angerman Co. v. Edgemon* 76 Ut. 394, 290 P. 169.

In *Norden v. U. S.* (DC RI) 187 F. Supp 594, an action for property damage was sustained where pilot defendant's airplane, in attempting to execute a low

pass, crashed on plaintiff's real estate, and it appearing that the day of the crash was a clear one and ideal for flying, the doctrine of *res ipsa loquitur* was applied. The facts in the instant case indicate that the day was clear and sunny and there was no interference by weather conditions which were unknown or could not be expected. Dr. Cox, an experienced pilot, knew that a light plane, flying at high altitudes, could confront dangerous atmospheric conditions. Dr. Cox chose to ignore this and, in fact, stated that he would take the fastest and most direct route to St. George. (Statement of James C. Johnson, 8) In *Genero v. Ewing*, 176 Wash. 78, 28 P.2d 116 (1934), the defendant cranked his airplane without blocks in front of the wheels and with no one at the controls; the plane then moved rapidly toward plaintiff's hanger, where it crashed. The court said that in this case the doctrine of *res ipsa loquitur* would be enough to get the plaintiff by a nonsuit and to the jury.

In the case of *Herndon v. Gregory*, 190 Ark. 702, 81 S.W.2d 849 (1935), the pilot of a private aircraft allowed his son to operate the controls, whereupon, said aircraft crashed. The court said the fact that there was no negligence shown removed this case from the rule of *res ipsa loquitur*, but the court went further, stating that if the plaintiff had alleged a fact over which human conduct had control, then the doctrine of *res ipsa loquitur* could be applied.

In the present case, Dr. Cox had complete control and management of the aircraft of a warm sunny day,

but in addition, he wilfully disregarded a dead battery and inoperative generator and flew his plane on a route which presented known hazards to a heavily loaded aircraft at high altitudes.

Blaine D. Wood, experienced pilot of seven years at the time of this statement, indicated that a light plane flying at high altitudes with three passengers, would have a density altitude problem. Mr. Wood explained:

"Well, on a hot day your air is thinner so the aircraft doesn't function as though it would on a cool, moist day; and then you had wind blowing from one direction or the other and you're on the wrong side of the hill and too low, you'd have a downdraft problem." (Statement of Blaine D. Wood, 9)

At the Bryce Canyon Airport, it was indicated to a Mr. Jerome Bartlett that a certain Bellanca airplane was having battery trouble and one of the crew members, Dr. Cox, asked said Bartlett to charge the battery on the aircraft. According to Mr. Bartlett, the following conversation took place, see page 5 of the statement of Jerome Bartlett:

Q. All right, now what did he say with respect to the battery, as near as you can recall.

A. Well, his remarks were that the battery was weak and they weren't able to use their radio and he was in kind of a quandry whether his instruments would work properly, either that they needed the energy from the radio or from the battery. And he asked me if I could charge it for him. And I told him I didn't

have the charger there at the airport but that I could come back over here and get the charger I used for automobiles. And his decision was made immediately — wasn't made immediately, but, oh, I would say in a space of five or ten minutes. He told me that they only had to go to St. George and he believed that he wouldn't have any trouble getting there, rather than waste the time. It would have taken a couple of hours —

Q. I see.

A. — to come over and get the charger and connect it to an electrical energy source and charge the battery. So rather than do that, he decided to head for St. George.

This court has often stated that summary judgment is a drastic remedy and should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law. *Welchman v. Wood*, 9 Ut.2d 25, 337 P.2d 410 (1959). Reasonable minds would differ concerning whether a prudent pilot would fly a small aircraft loaded with three passengers, on a hot summer day over the airway route hereinbefore mentioned with a dead battery and inoperative generator.

POINT III

THE TRIAL COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT PLAINTIFF'S EXCLUSIVE REMEDY LIES WITHIN THE WORKMEN'S COMPENSATION ACT.

Plaintiff does not contend that her intestate was employed by the Civil Air Patrol or by defendant's

intestate, but does allege that James L. Middleton, deceased, was a functionary on the flight and did perform services as consideration for his presence; however, the court should find that James L. Middleton was employed on the fatal flight, then plaintiff would contend that her intestate was employed by defendant's intestate who was an independent contractor. When the question of an independent contractor is considered, the Court should note that there is no sufficient evidence here to evaluate such a proposal as the status of an independent contractor depends on control, supervision, use of equipment and other factors necessitating determination of facts which are not before this court. *Parkinson v. Industrial Comm.*, 110 U. 309, 172 P.2d 136 (1946), accord *Ewer v. Industrial Comm.*, 112 U. 538, 189 P.2d 950 (1948).

In addition neither defendant's intestate nor the Civil Air Patrol have complied with the Workmen's Compensation statutes and therefore, cannot rely on Section 35-1-60, Utah Code Ann. (1953) but are precluded from such reliance by Section 35-1-57, Utah Code Ann. (1953) which follows:

"Employers who shall fail to comply with the provisions of Section 35-1-46 shall not be entitled to the benefits of this title during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrong-

ful act, neglect or default of the employer or any of the employer's officers, agents or employees,

and also to the dependents or personal representatives of such employees where death results from such injuries. In any such action the defendant shall not avail himself of any of the following defenses: the defense of the fellow-servant rule, the defense of assumption of risk, or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. And such employers shall also be subject to the provisions of the two sections next succeeding.

As heretofore contended, sufficient facts are not before the court to determine whether the employer-employee relationship existed, and certainly when the facts present are examined in the light most favorable to the plaintiff, genuine issues of fact are abundant and should be reserved for the jury. However, if an employer-employee relationship is found, then in that event, Dr. Cox was an independent contractor and plaintiff has properly sought a civil remedy in accordance with the foregoing section.

CONCLUSION

The Trial Court, when viewing these facts in the light most favorable to the plaintiff, should have recognized genuine issues of fact and left said issues for a

jury determination. To do otherwise is error and the Trial Court should be reversed.

Respectfully submitted,

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