1969

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 Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

MAVIS H. MIDDLETON,
Administratrix of the Estate of
James L. Middleton, aka
James LaMont Middleton,
Deceased,
Plaintiff-Appellant,

vs.

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

Case No.
11788

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fifth Judicial District Court
Washington County, Utah
HONORABLE C. NELSON DAY, JUDGE

BRYCE E. ROE
RALPH L. JERMAN
ROE, JONES, FOWLER, JERMAN & PARK
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Respondent

J. HARLAN BURNS
BURNS AND PARK
98 North Main Street
Cedar City, Utah 84720
Attorneys for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

Page

CASES

TEXTS AND TREATISES

IN THE SUPREME COURT OF THE STATE OF UTAH

MAVIS H. MIDDLETON,
Administratrix of the Estate of
James L. Middleton, aka
James LaMont Middleton,
Deceased,
Plaintiff-Appellant,

vs.

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

Case No.
11785

BRIEF OF RESPONDENT

NATURE OF CASE

This is an action by the widow and administratrix of a passenger against the widow and administratrix of a pilot seeking damages for wrongful death. Pilot, passenger and another all perished during an emergency landing of a light airplane after participating in a search mission for the Civil Air Patrol ("CAP").

DISPOSITION IN LOWER COURT

After plaintiff filed her complaint in March, 196 both parties engaged in extensive investigation and di covery procedures. Defendant served two sets of deta ed interrogatories and requests for admissions up plaintiff and plaintiff served detailed interrogator upon defendant and with a court reporter took ex-par sworn statements of potential witnesses.

After discovery was completed, except for defend ant's requests for admission and plaintiff's reply there to, the matter came on for pre-trial hearing. At th conclusion of the pre-trial, defendant moved for dismissal of the action. The trial court, after taking the matter under advisement, issued a memorandum decision and granted defendant's motion to dismiss, but subsequently granted plaintiff leave to amend her complaint, which she did in January, 1968, by re-alleging in substance, the matters contained in her original complaint and adding a count based on *res ipsa loquitur*. Thereafter, defendant served requests for admissions upon plaintiff and after receiving a reply thereto, filed a motion for summary judgment upon the basis that the pleadings, answers to interrogatories and admissions on file showed that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. After argument on the motion during which the plaintiff presented and the court considered the statements taken by plaintiff, the court issued a second memorandum decision and granted de-

fendant's motion for summary judgment. Judgment dismissing the action with prejudice was entered on July 17, 1969.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the trial court's summary judgment in her favor.

STATEMENT OF FACTS

Plaintiff has omitted many pertinent matters, and has overemphasized the fact that Dr. Cox experienced problems with his generator and battery. The emphasis is not warranted because plaintiff, although repeatedly called upon to do so, has failed to point out any way in which such problems could have caused or contributed to the accident. Moreover, plaintiff has included, within her argument, certain factual statements which are either erroneous or misleading. First she creates the impression that Mr. Middleton was flying with Dr. Cox for the latter's benefit and at his insistence, but the fact is that Mr. Middleton had sought the ride, apparently in lieu of a Sunday ride with his wife (R. 74), and Dr. Cox received no personal benefit from providing the ride. All that he and other CAP pilots receive for their volunteer search efforts is reimbursement for some of their out-of-pocket costs. See CAP regulation at Appendix I.

As stated by plaintiff, one of the main volunteer functions of the CAP is to conduct search and rescue operations. On the day in question the decedents and others were participating in a search for a private aircraft which had crashed in a flight between California and New Mexico (R. 83). None of the participants was to receive any compensation (except fuel cost reimbursement) for his services or the use of his aircraft (R. 116). They were in fact required to stand the expense of any food or lodging in connection with the mission (R. 116). Observers might be anyone who *volunteered* their services as such (R. 72).

When Dr. Cox's and Commander Whitehead's planes attempted to make radio contact near the end of their search, it was determined that Dr. Cox's radio microphone was inoperative. Shortly thereafter, the two planes landed at Bryce Canyon airport to refuel (R. 123). Dr. Cox and his two observers knew the aircraft's battery was dead (R. 123). While at the Bryce airport, Mr. Middleton telephoned plaintiff and told her "everything had gone out" (R. 21), but declined her offer to come after him, apparently stating that they had been told they could make it home. (R. 21).

When the planes left Bryce Canyon the actual search had been concluded and the parties were on their way home (R. 126). The return route taken by Commander Whitehead and Dr. Cox was the most direct route between the airport and St. George, and one that other CAP members had flown over many times (R.

... known as the "Airways Route" it was the usual route from Bryce Canyon to St. George (R. 88). As long as the pilot kept a normal altitude, there were no less hazardous or easier routes (R. 88-89).

The search mission was under the direction and control of Wesley Whitehead, the local CAP commander, who was in another aircraft (Request for Admission No. 9). The physical conditions after the accident suggest that Dr. Cox was attempting to land his aircraft in a meadow when the aircraft was consumed by fire (Request for Admission 12, 14 and 15). At the time of the accident the aircraft was in an upright position with the wheels retracted (Request for Admissions No. 14). On April 19, 1965, the aircraft had received an inspection and was found to be airworthy (Request for Admission No. 18).

Commander Whitehead assisted in handcranking Dr. Cox's airplane so they could get it started to return to St. George (R. 123). He did not expect it to have any problems making it home (R. 124). In this regard it should be noted that most planes, including the Bellanca owned by Dr. Cox, run on a magneto and neither generator nor battery is required to maintain flight.

ARGUMENT

I

PLAINTIFF'S RECOVERY IS PRECLUDED BY THE AIRCRAFT GUEST STATUTE.

AND THE TRIAL COURT WAS CORRECT IN SO HOLDING AS A MATTER OF LAW

At the time of the accident there was in effect in this state an aircraft guest statute (2-1-33 Utah Code Annotated 1953), set forth in plaintiff's brief. The statute precludes a person riding in an aircraft "as a guest without payment for the ride or transportation, and his personal representative in the event of death of such guest, from recovering against the pilot for the injury, death or loss of such guest, unless the accident was proximately caused by the intoxication or willful misconduct of the pilot. This statute, while similar in content to the automobile guest statute (41-9-1 Utah Code Annotated 1953), requires *payment* for the ride or transportation rather than *compensation.*

The evidence that plaintiff has produced, or shown that she would be able to produce, in the present case clearly establishes that Mr. Middleton paid nothing to Dr. Cox for the ride in his aircraft. Plaintiff attempts to circumvent this serious defect in her case with the contention that Mr. Middleton was a "paying guest for the reason that he provided services (albeit strictly as a volunteer and for his own enjoyment) as an observer in connection with the flight. Dr. Cox was benefited, the plaintiff argues, because he would have been entitled to obtain reimbursement for some of his out-of-pocket expenses incurred in connection with the flight. The evidence shows, however, that Dr. Cox (and others like him) donate not only time, skill and aircraft for

the humanitarian purpose of searching for downed aircraft, but do not receive full reimbursement for their out-of-pocket expenses. He was certainly not, as plaintiff states in her brief, *reaping* compensation for his effort. He was the giver, not the receiver.

In any event under the guest statute there must be something more than the minimal and incidental inducement suggested by plaintiff. If there was a benefit to Dr. Cox as a result of Mr. Middleton accompanying him on the ride, the benefit was too intangible, too minimal, and too remote to make Mr. Middleton a paying passenger. The evidence indicates, also, that Dr. Cox already had one observer, and that the mission could have been completed without Mr. Middleton's acting as an additional observer.

There appear to be no Utah cases construing the aircraft guest statute, and decisions from other jurisdictions are not abundant. But recent decisions under the automobile guest statute offer some help in construeing the aircraft statute. Under Utah automobile guest cases, the primary consideration has been one of determining the chief inducement for the ride. Even though some incidental consideration should move to the driver, if this were not the chief inducement for furnishing the transportation, the guest statute is applicable and precludes recovery. As stated by this court in *Jensen v. Mower*, 4 Utah 2d 336, 294 P. 2d 683 (1956):

> "* * * the cases turn not on whether money is received or paid as a result of carrying a rider,

> but upon the fact that the money or other compensation was *given to the driver*, not as a gratuity or in appreciation but rather as an *inducement for making the trip for the rider* or furnishing carriage for the ride." [Emphasis added.]

Plaintiff's statement that the guest statute is in derogation of the common law and should be strictly construed (assuming that it is in derogation of the common law) is in derogation of 68-3-2 Utah Code Annotated 1953, which provides, in part:

> "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state * * *"

That a nebulous or insignificant consideration or inducement is not sufficient to transform a guest into a paying passenger for the purpose of the guest statute is shown in *Smith v. Franklin*, 14 Utah 2d 16, 376 P. 2d 541 (1962). The plaintiff's decedent had contributed two dollars towards gas used for the trip in which he was killed. The court therein stated:

> "The test is simple to state and under most circumstances easy to apply: a passenger for hire is one who pays for his ride; a guest is one who is furnished a ride free of charge. The former is in the nature of a business transaction for money; whereas the latter is motivated by other considerations, usually of a social nature."

The court further said that the phrase "compensation therefor" as used in the statute meant compensation for the ride:

> "Therefore, the compensation would have to be sufficient money (or other thing of value) that it reasonably could be supposed that the parties so regarded it."

The court concluded by saying:

> "From our consideration of this subject and authorities which have dealt with it, we are pursuaded that the sound and practical view is that the determination should be made on the basis of which was the chief inducement for giving the ride."

In the present case it can hardly be said that the chief inducement for Dr. Cox giving Mr. Middleton the ride was so Dr. Cox could obtain reimbursement for gasoline used by him in the flight. Any benefit from Mr. Middleton's acting as an observer inured primarily to the CAP and to the public at large, not to Dr. Cox. Statements introduced by plaintiff herself show that it was Mr. Middleton who solicited the ride— not Dr. Cox who solicited the "service".

In *Eyre v. Burdette*, 8 Utah 2d 166, 330 P.2d 126 (1958), plaintiff's decedent had ridden with defendant driver from Salt Lake City to Denver to pick up some eggs at decedent's ranch, intending to sell the eggs to the driver and others. The plaintiff tried to establish that the purpose of the trip was to gather eggs for the defendant driver and therefore there was a consideration passing for the ride. This court rejected such contention stating:

> "There is no evidence that defendant's car was used because of any compensation given by decedent.
>
> "* * * The record discloses that Mr. Eyre paid nothing for the ride and there is no evidence that defendant ever requested decedent to go with him or that he received any tangible benefit from the decedent, monetary or otherwise, which was a motivating influence for furnishing the transportation."

The court pointed out that the burden was on the plaintiff to establish that the decedent was a paying passenger and not a guest, and she had failed to carry the burden.

A California case cited by plaintiff, *Whittmore v. Lockheed Aircraft Corp.*, 125 P. 2d 531, 31 Cal. App 2d 605 (1942) is readily distinguishable from the present case. The plaintiff's intestate was the vice president of an airline which purchased planes from the defendant, and had been personally responsible for the purchase of a number of planes from it. The court, holding that it could not be said as a matter of law that plaintiff was not a guest, noted that it was in the interest of defendant (who was the owner of the plane and the pilot's employer) that decedent be given what was, in effect, a demonstration ride in the airplane. Thus, there was a direct business benefit *inuring to the owner and operator of the aircraft*, while in the present case no such benefit accrued to the owner and pilot. Moreover, the California statute differs from the Utah statute in

that it uses the words "without giving compensation for such ride," a somewhat broader statement than Utah's "without payment for such ride or transportation."

A case in which the California statute was applied to exclude recovery was *Stiles v. American Trust Company*, 137 Cal. App. 2d 473, 290 P. 2d 614 (1955). Defendants intestate had called a friend (Stiles) and told her that he would take her for a ride in his airplane if she would drive him on some errands around town. She consented and after completing the errands they ran across a friend (Dunn) who had come to visit her. She asked whether the pilot would also take Dunn for a ride and he agreed. Shortly after takeoff the plane crashed killing the pilot and plaintiff Stiles' baby, and injuring Stiles and plaintiff Dunn. The trial court directed verdicts in favor of defendant on Dunn's claim on the basis that as a matter of law he was a guest and the appellate court affirmed stating:

> "There was no evidence from which it could be reasonably found that respondent Dunn, or anyone in his behalf, gave 'compensation' to the deceased Dave Holder for respondent Dunn's ride.
>
> * * * Respondent Stiles furnishing Holder with the use of her mother's car could not constitute 'compensation' for the ride for respondent Dunn. At the time that Holder, according to Stiles, promised to give respondent Stiles a ride if she would drive him around, none of the parties contemplated that, unforeseeably, respondent Dunn would accompany them. There was no

evidence from which it could be inferred that the use of the car was conditioned upon Holder giving a ride to respondent Dunn or anyone other than respondent Stiles. * * * Holder did no more than to acquiesce in respondent Stiles' suggestion that respondent Dunn also be taken up. The trial court correctly held that, as a matter of law, respondent Dunn was a guest."

In *United States v. Alexander*, 234 F. 2d 861 (4 Cir., 1956), the federal court, in applying an Indiana guest statute, held that a golfer who was flying in a CAP plane to promote the activities of the CAP was a guest within the meaning of the statute, hence the United States was not liable under the Tort Claims Act. The court stated:

"There would seem to be no doubt that Alexander was a guest at the time of his accident within the meaning of this statute as it has been interpreted by the courts of the state. It has been suggested that he was not being transported without payment because of the possibility that the courtesy extended to him would contribute to the formation of a beneficial arrangement which would increase the financial resources of the CAP. It has been held in Indiana, however, that the mere possibility of benefit to the owner of the vehicle is insufficient to exclude the guest relationship. Albert McGann Securities Co. v. Coen, 114 Ind. App. 60, 48 N.E. 2d 58, 1000; Liberty Mut. Ins. Co. v. Stitzle, 220 Ind. 180, 41 N.E. 2d 133; Ott v. Perrin, 116 Ind. 315, 63 N.E. 2d 163. The mere possibility that the flight would result in material gain to the CAP in connection with an enterprise which was still

in the tentative stage was too insubstantial to alter the status of Alexander as a non-paying guest."

Even if it might be argued that Mr. Middleton was not a guest when acting as an observer, plaintiff's statements establish that at the time of the accident he was no longer acting as such. As stated by Commander Whitehead, in the statements submitted and adopted by plaintiff's (R. 120):

> "Coming back we were not observing. We were not searching coming back because our search grid had been covered; our assignment had been fulfilled. We were on our way home."

Before boarding the airplane to return to St. George after concluding the search mission, Mr. Middleton could have got home any way he wanted. In fact he considered other means and rejected them.

There is no suggestion in the present case of intoxication on the part of Dr. Cox, and although "willful misconduct" was alleged in the complaint, there is absolutely no evidence to support such allegation, and plaintiff seems to have abandoned the claim in her brief on appeal. Plaintiff's action, therefore, is precluded by the provisions of the aircraft guest statute. None of the facts regarding this issue are in dispute. The question of law was correctly determined by the trial court.

II

IF PLAINTIFF'S INTESTATE WAS NOT A GUEST AT THE TIME OF THE ACCI-

DENT, HE WAS A CO-EMPLOYEE OR FEL-
LOW SERVANT AND PLAINTIFF'S AC-
TION IS BARRED BY THE PROVISIONS OF
35-1-60 UTAH CODE ANNOTATED 1953.

Defendant submits that the pleadings, answers to interrogations, admissions, and statements placed in the record by plaintiff conclusively establish that at the time of the accident Mr. Middleton was a guest in Dr. Cox's aircraft and this should decide the matter. If it should be concluded, however, that Mr. Middleton was not a guest, the only other possible relationship would be that of co-employee or fellow servant of Dr. Cox, inasmuch as both were working for the Civil Air Patrol at the time of the accident, and plaintiff's exclusive state court remedy lies under the Workman's Compensation Act, particularly 35-1-60 Utah Code Annotated 1953, which provides:

> "The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in

> any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. . .

Plaintiff attempts to meet this contention by a unique contradiction. She states that Mr. Middleton was not employed by Dr. Cox but if the Court should find he was employed on the fatal flight, she would contend that he was employed by Dr. Cox, and that Dr. Cox was then an independent contractor. But there is absolutely no evidence in the present case from which it could be found that Dr. Cox was an independent contractor. At the time of the accident, he was in the service of the CAP, a corporation one of the purposes of which is to aid in Air Force search and rescue missions; and, as admitted by plaintiff in her reply to defendant's request for admissions, the flight was part of a CAP search mission under the direction and control of Mr. Wesley Whitehead the local commander, who also participated in the mission in another aircraft (Requests for Admission 8 and 9).

Plaintiff had ample notice of defendant's contention regarding the workmen's compensation issue, and she cannot for the first time on appeal raise such a contention. She asserts that there is not sufficient evidence to determine whether an independent contractor relationship existed. If she had the facts to support this

contention, she should have mentioned them at the time of the summary judgment motion.

Plaintiff's only other rebuttal to the above argument, is that 35-1-57 Utah Code Annotated 1953 negates the exclusive remedy provision because the CAI had not complied with the workmen's compensation statute. But that statute deprives only non-complying *employers* of the benefits of the act, not other employees. The section specifically provides that only the employer is liable in a civil action. To penalize an employee because of his employer's failure to comply with the Workman's Compensation Act would lead to an absurd result. See *Buhler v. Madison,* 105 Utah 39, 140 P. 2d 933 (1943).

III

THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT AND THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE ISSUE OF NEGLIGENCE.

Because of the guest statute the issue of simple negligence should not be involved in this case at all, but if Mr. Middleton was not a guest in Dr. Cox's aircraft, plaintiff must fail nevertheless. In the four years that this lawsuit has been pending, plaintiff has been unable to point to any negligence on the part of Dr. Cox which proximately caused Mr. Middleton's death. Although

she claims Dr. Cox operated his aircraft with a dead battery and an inoperative generator, she has been unable to show that this led to the emergency landing and consequent death of Mr. Middleton. He had conducted the search with the same conditions existing, and, as Commander Whitehead stated, there should have been no problems on the return flight (R. 123).

Plaintiff also makes the claim that Dr. Cox chose the mountainous route during hot weather. However, this is the usual airway route (R. 88) and no more hazardous than any other mountain flying. The cause of the accident is unknown as shown by plaintiff's answer to defendant's interrogatories. Attempts to determine the cause must be based on pure speculation. All that is known about the accident is that Dr. Cox attempted a landing in a flat meadow and unfortunately struck a lava outcrop, which could not be observed from the air. The reason for the emergency landing probably can never be known.

Concerning the issue of negligence and the causal relationship thereof to the accident, defendant served a number of interrogatories upon plaintiff. Asked to describe any defective condition of the aircraft existing before the accident and its causal relationship to the accident (R. 7) defendant merely replied:

> "Direct causal relationship under the conditions and circumstances of the operation of the operation (sic) of said aircraft under prevailing weather conditions, terrain and altitude."

Asked to detail the facts relied upon by her to support her claim that the aircraft was not airworthy at the time of the flight and the causal relationship between the condition and the accident (R. 8) plaintiff did nothing but refer back to the above "answer".

Asked to detail the facts on which she relied to support her averment that the negligent, willful and reckless conduct of Dr. Cox while operating said aircraft under the conditions claimed caused the accident, plaintiff again referred back to her prior response in which she claimed, *ipse dixit*, that there was a causal relationship (R. 19).

In subsequent interrogatories the plaintiff was asked to identify each person having knowledge or information that Dr. Cox knew in fact that the aircraft was not properly equipped for the conditions of said flight (R. 10). She replied that the person having such information was Dr. Cox. Plaintiff could certainly prove no facts from this source.

While plaintiff has made a number of changes regarding the condition of the aircraft and the flight taken by Dr. Cox, nowhere during the course of this litigation has she been able, to give any indication as to the manner in which these factors constituted negligence or how they contributed to the accident. Some of the conditions she no longer mentions, apparently having abandoned them. Further, plaintiff took a number of statements from people most familiar with the aircraft and the fatal flight and none of the persons suggest any

negligence on the part of Dr. Cox. On the contrary they indicate that they can do no more than the rest of us, that is, speculate regarding the cause of the accident.

Plaintiff invokes the rule that summary judgment should be granted only when the facts, viewed in the light most favorable to plaintiff, show she could not recover as a matter of law and suggests that reasonable minds would differ concerning whether a prudent person would make a flight in a small aircraft loaded with three passengers on a hot summer day over the airway route with a dead battery and inoperative generator. Conceding the rule, plaintiff is at least required, in meeting the motion for summary judgment, to show that she has some evidence indicating that a prudent person would not do so and hence that this constituted negligence on the part of Dr. Cox. This she has not done.

At the hearing on the motion for summary judgment, plaintiff's counsel conceded that plaintiff has submitted to the court all of the evidence that she has to establish negligence. Such evidence is not sufficient when viewed in any light to enable plaintiff to support her claims. Thus summary judgment in favor of defendant was proper. As stated in 3 Barron & Holtzoff, *Federal Practice and Procedure*, §1235:

> "Under these principles, what showing must be made by the party opposing a summary judgment? It is clear that a hearing on a summary judgment motion is not a trial on the merits, and

> that a court on such motion should not attempt to resolve conflicting contentions of fact; the party opposing the motion is required to show only that there is a genuine issue to be tried and not that he will prevail at the trial. On the other hand, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists, without any showing of evidence. "In other words, the opposing party must show a plausible ground for his claim or defense. Facts set out in the moving parties' affidavit showing that he is entitled to judgment must be accepted as true when not met by counter-affidavits or testimony. The mere denial of the moving parties' contentions, without showing any facts admissible in evidence, raises no issue of fact. The opposing party must show how he will support his contentions that issues of fact are present. But he need not submit all his evidence and it is sufficient if he shows that he has evidence of a substantial nature, as distinguished from legal conclusions, to dispute that of the moving party on material factual issues.

This court has on a number of occasions used similar language in upholding summary judgment. For example, in *Continental Bank and Trust Company v. Cunningham*, 10 Utah 2d 329, 353 P 2d. 168 (1960) it said:

> "Under Rule 56(c), Utah Rules of Civil Procedure, having to do with summary judgment, the facts pleaded in the counterclaim created a situation something akin to a presumption that disappears on production of indisputable or admitted antithetical facts. The rule permits an

> excursion beyond the pleading. If facts discovered in the journey irrefutibly disprove facts pleaded, summary judgment is appropriate on motion therefor. The rule has been interpreted more articulately by eminent authorities on the subject who suggest that the rule permits us to pierce the pleading, resulting in a summary judgment, if an examination of facts developed under the discovery procedure by affidavit, deposition, admission and the like, make it appear that no genuine issue of fact is presentable. To travel beyond that point would be a waste of time, energy and cost."

Plaintiff, in her brief, appears to recognize the inadequacy of the evidence to sustain her claim of negligence. While she talks of flying with a weak battery and inoperative generator, these would not influence the operation of the aircraft on a visual flight. There is certainly no evidence that this contributed to the accident. Plaintiff has made some allegation that Dr. Cox knew the aircraft was not properly equipped and the propeller was faulty and not properly tested. She says, however, that the only person having knowledge that Dr. Cox knew that the aircraft was not properly equipped or that the propeller was faulty and not properly adjusted was Dr. Cox himself. Thus, it will be impossible for plaintiff to show that he knew of such defects and consequently cannot prove negligence on such basis. She does not even mention them in her brief. The only other specific negligence plaintiff has attempted to show was that Dr. Cox chose an unsafe route. However, the statements taken by her counsel show that

there was nothing unusual about the route or that there was anything unsafe about it.

IV

RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

The doctrine of *res ipsa loquitur* permits an inference of negligence only if the instrumentality which caused the injury was under the exclusive control of the defendant, and the occurrence was one that does not happen in the ordinary course of events if due care has been exercised. Where these factors are present, the fact of injury is sufficient to support a recovery by the injured party unless the defendant presents some explanation tending to show that the injury was not caused by lack of due care. *Curby v. Bennett Glass & Paint Co.*, 99 Utah 80, 103 P. 2d 657 (1940).

The defendant can avoid the application of *res ipsa loquitur* if he shows, for example, that the occurrence was caused by an outside agency, or that it is of a type which does in fact occur without negligence on the part of anyone. Prosser, *Law of Torts* (2d Ed) §43.

The accident from which this case arose is of a type which does occur in the absence of negligence on the part of anyone. In any event there are numerous persons other than Dr. Cox to whose negligence the accident might be attributable.

Plaintiff's brief gives the misleading impression that *res ipsa loquitur* is an appropriate theory even in a case involving only a duty to refrain from willful misconduct. On page 8 of her brief, she states:

> "* * * If plaintiff's intestate is found to be a passenger * * * then * * * plaintiff contends that ElMyrrh Leany Cox can be found to have been willfully negligent * * *. The plaintiff's proof depends on the negligence of defendant and the doctrine of Res Ipsa Loquitur."

It is well settled that willful misconduct cannot be established by the use of *res ipsa loquitur*. The rule is stated by Prosser, §42:

> "Res ipsa loquitur leads only to the conclusion that the defendant has not exercised reasonable care, and is not in itself any proof that he was under a duty to do so * * *. [I]f a guest statute requires willful or wanton misconduct, res ipsa loquitur furnishes no proof of it.:

Another statement of the rule is found in *Phillips* v. *Noble*, 50 Cal. 2d 163, 323 P. 2d 385, 387 (1958):

> "Obviously res ipsa loquitur, which permits the drawing of an inference that ordinary care was not used, cannot serve as a means of establishing intoxication or willful misconduct."

Numerous cases on this point are gathered at 23 A.L.R. 3d 1083.

As was stated above, in order for the *res ipsa loquitur* inference to be drawn, even in the absence of a host-guest relationship, the accident must be of a type

which does not ordinarily occur if due care has been exercised.

In *Morrison v. Lee Tourneau Company*, 138 F. 339 (5th Cir., 1933), a plane being operated in mountainous territory was occupied by the plaintiff's and defendant's intestate, defendant's intestate ostensibly being the pilot. The mountains were shrouded with fog, mist and clouds and there was nothing to show what caused the accident except that witnesses saw the plane plummeting toward the ground. The court observed that:

> "* * * the cause of the crash is as enshrouded in doubt as was Beaverdam (Mountain) in the fog, cloud and mist that the northeast winds whirled around the scrub-pine that thatched its dome that morning."

declared:

> "The doctrine of res ipsa loquitur cannot apply in cases of this sort, because there is no showing that accidents of this nature cannot happen to the most skillful pilots in planes of the finest type and condition."

In *Cohn v. United Airlines Transport Corporation*, 17 F. Sup. 867 (D.C. Wyo., 1937), an aircraft being operated on a test flight crashed, killing plaintiff's intestate. The court expressed doubt as to whether the doctrine could be applied in the case of the fall of an airplane from an unexplained cause even where the plaintiff was a passenger for hire, said:

> "Our daily newspapers are replete with airplane accidents, the solution of which will never be known, as in the case at bar. The Department of Commerce, through its Bureau of Air Commerce, has published documents purporting to deal with accidents in the air and their causes. In publications of July and August, 1935, the causes of accidents attributable to carelessness or negligence are but a small percentage of all the causes which are known in this young but growing enterprise. It is definitely known that the presence of air pockets, cross currents, clouds, fog, mist and a variety of climatic conditions, bring about disaster for which no one is responsible, except it might be said that he who assumes to fly must look well to his own fate * * * How can the court legitimately say under all the circumstances that a fall of an airplane upon a test flight was through an exclusion of all other causes, attributable to the negligence of the ones engaged in the operation? And in the face of this, the law tells us that the doctrine of res ipsa loquitur shall not be applied if there is any other resonable or probable cause from which it might be inferred that there was no negligence at all."

Recently in *Jackson v. Stancil*, 253 N.C. 291, 116 S. E. 2d 817, 821 (1961), the North Carolina Supreme Court had occasion to deny the applicability of *res ipsa loquitur* to airplane accidents:

> "Liability of a carrier of passengers by aircraft must be based on negligence. Such carrier is not an insurer of the safety of its passengers * * * [Citing cases]. In a case involving an airplane crash the doctrine of *res ipsa loquitur* does not

> apply, 'it being common knowledge that ac planes do fall without fault of the pilot.' F thermore, there must be a casual connection tween the negligence complained of and the jury inflicted. [Citing cases]."

As appellant notes, some cases have applied doctrine of *res ipsa loquitur* in airplane accidents, the most frequent application has been against comm carriers for injury or death of passengers. There good reason to distinguish common carriers from pr vate aircraft, not only because of the difference in d gree of duty, but because of the complete control co mon carriers customarily exercise over all aspects operation, care, and maintenance.

A common carrier is held to "the highest degree care consistent with the practical operation of its pla for the safety of its passengers." *Arrow Aviation v. Moore*, 266 F. 2d 488, 73 A.L.R. 2d 337, (C.A. 8t 1959).

As stated above, application of *res ipsa loquitur* re quires that the accident be such as does not ordinarily occur if due care is exercised. Even today it is not u common to hear of the crash of a plane operated by on of the great common carriers. Unfortunately, it is ver common to hear of the crash of a small private airplan and it is especially common for small aircraft to be los in the southeastern portion of Utah where Dr. Cox an Mr. Middleton lost their lives. There are numerou climatic conditions which could have caused the cras

the Cox plane. The statement of Blaine W. Wood (R. 78) indicates that the plane may have encountered density-altitude problem or a downdraft. The statement of James Carlton Johnson (R. 89) indicates that the day was quite hot, and as indicated by Mr. Wood (R. 78) density altitude problems occur on hot days. In *Kildsen v. Brimmer*, 79 Wyo. 152, 331 P. 2d 825 (1958) the Wyoming Supreme Court in dealing with an aircraft accident had occasion to indicate that a downdraft is an Act of God for which the pilot is not responsible:

> "The statements in evidence which were quoted in appellee's brief as being made by both deceased, 'that the plane had hit a downdraft and had gone out of control' was in evidence that an elemental force was involved in the crash. This warranted an instruction regarding an Act of God and probably it should have been given, as this was the theory of the defendant, and the jury was entitled to be instructed upon it • • •"

It is possible that the fuel obtained at Bryce Canyon Airport contained water, which forced the crash landing. There is some evidence to indicate that one of the passengers was sick before landing at Bryce Canyon Airport (R. 107). Perhaps he became sick again and the three decided to land because of this. No one knows for sure and no one will ever know. It cannot be shown that the emergency landing would not have been attempted if due care had been used. There has been no claim of negligence in the manner of making the emergency landing.

In *Herndon v. Gregory*, 190 Ark. 702, 81 S. W. 849, the court refusing to apply the doctrine of res ipsa loquitur to an unexplained airplane accident said:

> "This accident may have been caused by one or more of a number of reasons over which the owner and operator of the airplane had no control; and therefore, if it be left in doubt what the cause of the accident was or if it may as well be attributable to the act of God or unknown causes as to negligence there is no such presumption."

Negligence cannot be presumed from the known facts in this case because it is just as plausible that the injury resulted from an unavoidable cause.

> "* * * [N]egligence will not be presumed from the mere fact of injury, when that fact is as consistent with a presumption that it was unavoidable as it is with negligence, and therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes as to negligence there is no such presumption."

Curby v. Bennett Glass & Paint Co., supra., p. 659 citing 20 R.C.L. p. 185.

V

PLAINTIFF'S INTESTATE ASSUMED THE RISK OF ACCIDENTAL INJURY OR DEATH.

If it is decided that Dr. Cox could have been negligent in the ways suggested by plaintiff, then defendant contends that plaintiff's decedent assumed the risk in flying with Dr. Cox.

Defendant contends that any defect in the generator or battery of the airplane could have had no effect upon the airplane's airworthiness. However, assuming *arguendo*, that such conditions could have affected the plane's flying ability, it becomes important that all three persons aboard the plane were well aware of the battery and generator defects. They were unable to use the radio and had needed to hand-crank the plane in Bryce Canyon, thus it could hardly be contended that Dr. Cox knew something about the aircraft's condition which was unknown to the others:

Assumption of the risk applies when:

> " . . . [T]he plaintiff knew of and appreciated a danger, and had a reasonable opportunity to make an alternative choice, but nevertheless voluntarily exposed himself to the danger in question." *Hindmarsh v. O. P. Skaggs Foodliner*, 21 Utah 2d 413, 446 P. 2d 410, 412 (1968)

If there was some danger here, it was slight and the three persons aboard the plane were all equally aware of whatever danger may have existed.

Plaintiff's decedent had an available alternative. He need not have accompanied Dr. Cox on the return trip from Bryce Canyon. Mavis H. Middleton stated

that decedent called her from Bryce Canyon and she offered to drive there so that the return trip might be made by automobile. This offer decedent declined. (R. 20).

CONCLUSION

This case can and should be decided upon the basis that as a matter of law Mr. Middleton was a guest within the meaning of the aircraft guest statute, at the time of the fatal accident. There being no evidence of intoxication or willful misconduct, the trial court's summary judgment should be sustained.

If he was not a guest, the only other plausible relationship is that of fellow servant and the action is precluded by the provisions of the Workmen's Compensation Act.

In any event, plaintiff, in the four years since the suit was instituted, has failed to come up with any specific acts of negligence which she can show in any way resulted in the unfortunate accident. No one knows or will be able to know what happened on the fatal day that resulted in the deaths of the three deceased members of the search mission.

Since the accident could have been caused by any number of things other than the negligence of Dr. Cox the doctrine of *res ipsa loquitur* is not available.

Though plaintiff attempts at this point to raise issues, she has, as her counsel admitted at the hearing for summary judgment, disclosed all evidence available to her, and the showing she has made plainly indicates that there is no genuine issue as to any material fact and that defendant was entitled to summary judgment as a matter of law.

Respectfully submitted,

BRYCE E. ROE
RALPH L. JERMAN
ROE, JONES, FOWLER,
JERMAN & DART

340 East Fourth South
Salt Lake City Utah 84111

APPENDIX

PART 832 EMPLOYMENT OF CIVIL AIR PATROL

Sec.

AUTHORITY: The provisions of this Part 832 issued under sec. 8012, 9441, 70A Stat. 488, 572, 10 U.S.C. 8012, 9441.

SOURCE: The provisions of this Part 832 appear at 29 F.R. 13807, Oct. 7, 1964, unless otherwise noted.

832.1 Purpose.

This part explains the Civil Air Patrol (CAP) services that the Air Force will use to fulfill its non-combatant mission in peace and during a military emergency.

§ 832.2 What the CAP is.

Title 10, U.S.C. 9441, establishes the CAP as a volunteer civilian auxiliary air organization trained and equipped to assist in national and local emergencies. Besides conducting a Nation-wide program of aerospace education, its senior members operate and maintain light aircraft, mobile land rescue teams, and a Nation-wide radio communications network. The Air Force is authorized to use these services in fulfilling its non-combatant mission.

§32.3 How CAP services are obtained and supported.

Since CAP participation in any mission is voluntary, it must be formally requested, rather than directed, by competent Air Force authority. The Air Force will supply the CAP with fuel and lubricants when it requests CAP's participation in specific missions.

§32.4 Use of the CAP.

The CAP may be used by the Air Force in the following missions:

(a) *Air search and ground rescue.* CAP voluntarily supports the national search and rescue mission by conducting search and rescue operations. Air Rescue Service (MATS) through its Rescue Coordination Centers (RCC) and the Air Force commanders in Alaska, Puerto Rico, Hawaii, and the Commander CAP-USAF may request the voluntary assistance of the CAP and authorize, coordinate, supervise, and control CAP resources in assisting the Air Force in its air search and ground rescue activities.

(b) *Air Force Reserve Recovery units.* CAP resources may be used by the Air Force in the support of the U.S. Air Force Survival, Recovery and Reconstitution Plan (USAFSRR Plan). Each CONAC (Continental Air Command) Air Force Reserve Region is authorized through its Reserve Recovery unit commanders to consummate agreements with CAP wing and squadron commanders for the use of CAP resources within their geographic areas.

(c) *Domestic emergency and disaster relief.* CAP resources may be used to assist the Air Force in fulfilling its authorized emergency and disaster relief missions. In the CONUS (Continental United States), CONAC, through its Air Force Reserve Regions may

request, authorize, and coordinate the use of C capabilities.

(d) *Civil Defense assistance.* To help the Air F accomplish its responsibilities during a Civil Def emergency, CAP will be employed under Civil Def direction, consistent with its other missions as a civ auxiliary of the Air Force. CAP civil defense trai and emergency responsibilities and tasks include, are not limited to:

(1) Aerial radiological monitoring,

(2) Courier and messenger service,

(3) Aerial surveillance of surface traffic,

(4) Light transport flights for emergency p sonnel and supplies,

(5) Reconnaisance flights, and

(6) Radio communications.

(e) *Support of Air Force installations.* The CON AC Air Force Reserve Region commanders, the A Force commander in Alaska, Hawaii, and Puerto R and the Commander, CAP-USAF, or his designat representative may request and authorize the partic pation of CAP units in Air Force missions in suppo of Air Force installations.

§ 832.5 What funds are used.

(a) Appropriated funds will be used only to fu nish CAP members with or reimburse them for:

(1) Fuel and lubricants used in actually perform ing a mission,

(2) Communications expenses incurred in aler ing or controlling CAP members participating in mission.

(b) Appropriated funds will not be used for:

(1) Reimbursing CAP members for depreciation of privately owned equipment,

(2) Establishing indemnity provisions for damage to aircraft or vehicles, or for personal injury or death of CAP members as a result of participating in an Air Force mission,

(3) Establishing indemnity claims for aircraft, vehicles, equipment, facilities used by the CAP or its members and obtained from private owners by loan, lease, contract, or otherwise,

(4) Paying personal services of CAP members engaged in Air Force missions.

§32.6 Training assistance authorized.

Although the Air Force assumes no direct responsibility for the training of CAP members, commanders may furnish advice and provide available training literature.