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NO. COA05-1430

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

BARRY HULON HYDE,
Plaintiff,

v.

Cabarrus County
No. 03 CVS 2520

ROBERT E. ANDERSON, Individually,
LANCASTER AVIATION, INC., a North
Carolina Corporation, GREEN
VALLEY AVIATION GROUP, INC., a
North Carolina Corporation,
LEONARD LANCASTER, Individually,
the CITY OF CONCORD, and the
CONCORD REGIONAL AIRPORT,
Defendants.

Appeal by plaintiff from order entered 17 May 2005 by Judge W.
Erwin Spainhour in Cabarrus County Superior Court. Heard in the
Court of Appeals 11 May 2006.

Robert A. Mineo, for plaintiff-appellant.

*Robert D. Potter, Jr. and Lord, Bissell & Brook, LLP, by J.
David Hopkins, Atlanta, Georgia, pro hac vice, for defendants-
appellees the City of Concord and the Concord Regional
Airport.*

*No brief filed for defendants-appellees Robert E. Anderson,
Lancaster Aviation, Inc., Green Valley Aviation Group, Inc.,
and Leonard Lancaster.*

TYSON, Judge.

Barry Hulon Hyde ("plaintiff") appeals from order entered
granting summary judgment to the City of Concord and the Concord
Regional Airport (collectively, "defendants"). We affirm.

I. Background

Defendant Lancaster Aviation, Inc. ("LAI") has operated a flight school at the Concord Regional Airport since 1994. Plaintiff, an experienced flight instructor, had worked at LAI since 1996. Plaintiff had attained between 1,550 and 1,800 flight hours and held Federal Aviation Administration flight instructor ratings in both single and multi-engine airplanes. Plaintiff was also qualified to give flight instructions in a Comanche aircraft, which held approximately ninety gallons of fuel divided between four tanks.

On 28 May 1998, Defendant Robert E. Anderson ("Anderson") was a licensed pilot but had not flown an aircraft for more than one year. Anderson held private and commercial single and multi-engine airplane and instrument ratings and had accumulated nearly 800 hours of flight time. He rented a twin-engine Comanche to fly to his home in West Virginia.

Anderson attended training at LAI to become qualified to fly a Comanche. Plaintiff trained Anderson to fly a Comanche on 28, 29, and 31 May 1998. Unlike plaintiff, Anderson had not attained ten flight hours in a Comanche as required for solo renters by the LAI insurance policy. Prior to accumulating the required number of hours, pilots may carry another pilot onboard who has qualified to fly the aircraft. Plaintiff agreed to fly with Anderson to his home in West Virginia on 1 June 1998.

Pre-light procedure for a Comanche requires the pilot to remove the caps from each tank, visually observe the level of fuel,

and to verify the fuel gauge indications correspond to the actual fuel quantity. Plaintiff admitted "the proper procedure would have been for [Anderson] to have checked the [fuel tanks] personally." Plaintiff claimed he did not check the fuel in the tanks on 1 June 1998 because Anderson had already started the aircraft's engines when plaintiff arrived. Anderson told plaintiff the Comanche was full of fuel.

Plaintiff and Anderson took off from the airport between 3:30 and 4:00 p.m. and flew toward Lewisburg County, West Virginia. Plaintiff sat in the front right seat in front of the fuel gauges and one set of the dual controls. Plaintiff admitted flying the plane, operating the radios, and preparing to file a flight plan.

Approximately forty minutes after take off, the right main fuel tank ran dry, and the right engine stopped. The flight controller asked for the crew's intentions. Plaintiff advised they would fly the plane to Roanoke, Virginia. Ten minutes later, the left main fuel tank also ran dry and the left engine stopped. The Comanche crashed near Floyd, Virginia, approximately ninety-two nautical miles from Concord and approximately fifty-eight nautical miles from Lewisburg County, West Virginia. Both pilots survived the crash, but plaintiff suffered head injuries in the crash, which resulted in blindness in both of his eyes.

Crash investigators found twenty gallons of fuel in the Comanche's auxiliary tanks following the crash and determined the fuel was sufficient for the Comanche to fly 200 additional miles. However, the fuel selector valves were set in the "main" tank

position, and both of those tanks were empty. Both fuel selector valves operated properly when tested after the crash.

In order to restart a Comanche's engine with fuel from auxiliary tanks, the pilot must switch the fuel selector switch to a tank containing fuel. The aircraft owner's handbook states, "[i]f the engine should stop because a fuel cell is depleted of fuel be prepared to wait a while for the engine to start after changing to a fuel cell with fuel in it."

To save time for LAI, the Concord Regional Airport's nightly employees would frequently "top off" fuel in LAI's single-engine aircraft. LAI and the Concord Regional Airport agreed and presented testimony that no contract to refuel the Comanche existed.

On 10 May 2001, plaintiff filed suit in Mecklenburg County against Anderson, the owner of the aircraft, and defendants alleging negligence.

Defendants answered the complaint, denied plaintiff's allegations, and cross claimed against Anderson. Both moved to transfer the action to Cabarrus County pursuant to N.C. Gen. Stat. § 1-83.1(1), and in the alternative to transfer pursuant to N.C. Gen. Stat. § 1-83.1(2) for the convenience of the parties. The trial court denied their motion on 8 January 2002.

On 15 February 2002, a reconsideration hearing was held, and the court denied defendants' motion for reconsideration. They appealed the final decision to this Court on 8 March 2002. This Court reversed the trial court's decision and remanded the case for

transfer to Cabarrus County. The North Carolina Supreme Court denied discretionary review of this Court's decision. See *Hyde v. Anderson*, 158 N.C. App. 307, 580 S.E.2d 424, *disc. rev. denied*, 357 N.C. 459, 585 S.E.2d 759 (2003).

The trial court granted summary judgment to defendants on 17 March 2005. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred when it granted summary judgment in favor of defendants.

III. Standard of Review

In a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005) (internal citations and quotations omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

IV. Defendants' Duty

_____Plaintiff alleges defendants had a contractual duty to refuel the Comanche and committed negligence when it failed to do so. "It is well established that . . . the essential elements of negligence [are] duty, breach of duty, proximate cause, and damages." *Thomas v. Weddle*, 167 N.C. App. 283, 286, 605 S.E.2d 244, 245 (2004) (citation omitted). Here, we find a lack of any evidence of defendants' duty to be dispositive.

Plaintiff contends, "defendant's liability to the Plaintiff Hyde is predicated upon the Defendant's breach of a contract with Lancaster Aviation to sell fuel and actually refuel the subject aircraft nightly."

This Court has stated:

A duty of care may arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. The contract creates the state of things which furnishe[s] the occasion for the tort.

Olympic Products Co., Div. v. Roof Systems, Inc., 88 N.C. App. 315, 322, 363 S.E.2d 367, 371 (internal quotations and citations omitted), *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 862 (1988).

N.C. Gen. Stat. § 160A-16 (2005) provides, "[a]ll contracts made by or on behalf of a city shall be in writing. A contract made in violation of this section shall be void and unenforceable unless it is expressly ratified by the council."

_____LAI and defendants offered testimony that no such contract existed between them. The owner of the Comanche testified, "[i]t's

the pilot in command's duty to make sure the aircraft is fueled." Plaintiff failed to proffer any evidence that a contract existed between LAI and defendants or that defendants owed LAI a duty to refuel the aircraft.

With regard to summary judgment, our Supreme Court has stated:

Although [d]etermining what, constitutes a genuine issue of material fact is often difficult . . . *an issue is genuine if it is supported by substantial evidence*, and [a]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and *means more than a scintilla or a permissible inference*.

DeWitt v. Eveready Battery Co., Inc., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotations and citations omitted) (emphasis supplied).

_____Plaintiff failed to proffer relevant evidence that defendants owed LAI a duty to refuel the Comanche. Since this essential element is missing, it is unnecessary to, and we decline to consider the remaining elements of negligence. This Court has stated, "These elements of duty, breach, and injury are essentials of actionable negligence. In the absence of any one of them, no cause of action for negligence will lie." *Constr. Co. v. Holiday Inns, Inc.*, 14 N.C. App. 475, 477, 188 S.E.2d 617, 618, *cert. denied*, 281 N.C. 621, 190 S.E.2d 465 (1972).

V. Conclusion

The trial court properly granted summary judgment in favor of defendants. Plaintiff has failed to provide "relevant evidence . . . a reasonable mind might accept as adequate to support a conclusion" that defendants owed LAI a contractual duty to refuel the Comanche. *Id.* The trial court's judgment is affirmed.

Affirmed.

Judges MCCULLOUGH and HUDSON concur.

Report per Rule 30(e).