United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 17, 2022
Lyle W. Cayce
Clerk

No. 21-30531

Lekendrick Underwood,

Plaintiff—Appellant,

versus

Parker Towing Company, Incorporated,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-14038

Before Higginbotham, Dennis, and Graves, *Circuit Judges*.

Per Curiam:*

Lekendrick Underwood sued his employer, Parker Towing Company, after sustaining a back injury while working onboard a vessel. The district court granted summary judgment to Parker Towing as to all of Underwood's claims. Underwood appealed. We affirm.

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

I.

Underwood began working as a deckhand for Parker Towing in 2008, primarily onboard the towboat M/V Miss Morgan. He was supervised by the ship's captain. Parker Towing provided training for Underwood through a deckhand school and on-the-job training, including safe lifting technique training. Parker Towing also required Underwood to take continual back safety tests and a physical examination, which included having to carry an 80-pound weight over a distance of 200 feet.

On October 31, 2019, the captain directed Underwood to pump rainwater out of the open cargo hold of a barge that was being towed by the Miss Morgan. This was a routine task which Underwood had performed before. Underwood carried a water pump from the Miss Morgan onto the barge, placed the pump on the deck of the barge, and then draped the pump's hose over the wall of the barge's cargo hold to reach the water in the bottom of the hold.

A deckhand would often use a two-inch pump to perform this task, but there were no two-inch pumps available on the Miss Morgan. So, Underwood used a larger three-inch pump. Due to the height of the wall around the barge's cargo hold, a standard pump hose could not reach the water in the bottom of the cargo hold; this problem would typically call for the use of an extension hose. However, the only extension hose available had a hole in it. Instead, Underwood placed the pump on an overturned bucket, giving the pump sufficient height to reach the bottom of the cargo hold without an extension hose. Underwood claims that a Parker Towing captain previously showed him this workaround method. Underwood was able to use safe lifting techniques to place the pump on the bucket without incident.

When the pumping concluded, Underwood removed the 57-pound pump from the top of the bucket. Underwood claims that the height of the

pump on the bucket prevented him from using safe lifting techniques and that he twisted his back while lifting the pump off the bucket and felt a sharp pain in his back. Underwood did not tell his captain about the pain or report the incident on his departure report at the end of his shift. In the following days, Underwood reported having back pain and later required back surgery. Parker Towing approved and paid for the surgery under its cure benefits and provided maintenance payments.

Underwood sued Parker Towing seeking damages and arguing that his injury was due to the negligence of Parker Towing and its failure to provide a seaworthy vessel. Parker Towing moved for summary judgment, which the district court granted. Underwood timely appealed.

II.

We review *de novo* a district court's grant of summary judgment.[1] "We must view all facts and evidence in the light most favorable to the non-moving party when considering a motion for summary judgment."[2] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[3] A summary judgment ruling "will be affirmed by this court when the nonmoving party fails to meet its burden to come forward with facts and law demonstrating a basis for recovery that would support a jury verdict."[4]

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[1] *Terral River Serv., Inc. v. SCF Marine Inc.*, 20 F.4th 1015, 1017 (5th Cir. 2021).

[2] *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 433 (5th Cir. 2013).

[3] Fed. R. Civ. P. 56(a).

[4] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 (5th Cir. 1994).

III.

Underwood argues that Parker Towing was negligent in its failure to provide a reasonably safe work environment by not giving adequate guidance or training as to the maximum weight its employees should lift and that this caused Underwood's injury.

Under the Jones Act,[5] "[a] seaman is entitled to recovery . . . if his employer's negligence is the cause, in whole or in part, of his injury."[6] An employer may be held liable where its negligence caused the seaman's injury in "even the slightest" way.[7] While an employer is obligated to provide a reasonably safe work environment, a seaman is obligated to act with the ordinary prudence of a reasonable seaman in like circumstances, including one of similar training and experience.[8] Thus, comparative negligence bars a seaman from recovering under the Jones Act for damages sustained as a result of his own fault.[9] Additionally, "the employer must have notice and the opportunity to correct an unsafe condition before liability attaches. The standard of care is not what the employer subjectively knew, but rather what it objectively knew or should have known."[10]

Underwood does not contest that Parker Towing's Deckhand Manual instructed deckhands to ask for help if a load was too heavy, that Parker

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[5] 46 U.S.C. § 30104.

[6] *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc).

[7] *Id.*

[8] *Id.* at 339.

[9] *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[10] *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 374 (5th Cir. 1989) (internal citations removed).

Towing routinely trained him on safe lifting techniques, and that he failed to use those techniques when lifting the pump. Instead, he alleges that Parker Towing should not have assigned him the task of lifting the pump without first establishing a clear limit as to the number of pounds he should lift.

We cannot conclude that Parker Towing created an unsafe work environment by assigning Underwood the task of moving the 57-pound pump without establishing a numerical lifting limit for its employees. Parker Towing could rely on Underwood to exercise reasonable care, and "a seaman may fail to observe proper care for his own safety in failing to seek the help of others aboard ship, once he realizes or should realize that an assigned task is beyond his individual physical capacity."[11] A deckhand with training on how to safely lift objects and ten years of experience routinely dealing with similar equipment should have realized if this task was beyond his capacity.[12] Underwood also admits that he could have told the captain if he assessed that lifting the pump posed a danger, but he did not do so.

It was not the weight of the pump alone that caused the injury, as Underwood was initially able to lift the pump onto the bucket without incident. Rather, the weight was made dangerous by Underwood's unsafe lifting technique, which he used despite Parker Towing's policy requiring safe lifting techniques.

Underwood also contends that the danger arose because he employed the workaround method of using the bucket—a method a Parker Towing captain taught him—and that once the pump was on the bucket, he could not use safe lifting techniques. But the bucket method was not inherently dangerous as it is undisputed that Underwood had used this method before.

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[11] *Moschi v. S. S. Edgar F. Luckenbach*, 424 F.2d 1060, 1061 (5th Cir. 1970).

[12] *See Thomas v. Diamond M Drilling Co.*, 569 F.2d 926 (5th Cir. 1978).

Again, it was the use of unsafe lifting techniques that made the bucket method dangerous here. And if Underwood determined that he could not use safe lifting techniques to get the pump off the bucket, he could have told his captain or asked for assistance, but he did not.

Given the training and prior execution of this task by Underwood without injury and the available assistance, Parker Towing had no reason to know there was a danger to Underwood. Parker Towing was not negligent giving its deckhands discretion to determine personal lifting limits rather than designating a numerical limit. As Underwood failed to establish a genuine issue of material fact as to whether Parker Towing failed to maintain a reasonably safe work environment, the grant of summary judgment to Parker Towing was proper.

IV.

Underwood also argues that the Miss Morgan was unseaworthy. "For a vessel to be found unseaworthy, the injured seaman must prove that the owner has failed to provide a vessel, including her equipment and crew, which is reasonably fit and safe for the purposes for which it is to be used."[13] Unseaworthiness can arise from a number of circumstances, such as defective equipment, appurtenances in disrepair, or an unfit crew.[14] "To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either

[13] *Jackson v. OMI Corp.*, 245 F.3d 525, 527 (5th Cir. 2001).

[14] *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971).

a direct result or a reasonably probable consequence of the unseaworthiness."[15]

Underwood argues that Parker Towing's failure to keep a smaller pump or equipment to repair the extension hose rendered the Miss Morgan unseaworthy. But these claimed defects did not render the Miss Morgan unseaworthy; the vessel was still reasonably fit for its intended purpose of towing and tending to the barges in Parker Towing's custody. Although the extension hose for the three-inch pump was damaged, the function of the ship could still have been safely undertaken had Underwood engaged in safe lifting techniques or asked for assistance. While a jury could have found that a working extension hose or two-inch pump would have presented an easier method of removing the water, that is insufficient to raise a question as to whether the method used by Underwood rendered the Miss Morgan unseaworthy.[16] As Underwood failed to establish a genuine issue of material fact as to whether the Miss Morgan was unseaworthy, the grant of summary judgment to Parker Towing was proper.

V.

We AFFIRM the grant of summary judgment to Parker Towing.

[15] *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988).

[16] *Phillips v. W. Co. of N. Am.*, 953 F.2d 923, 929 (5th Cir. 1992).