

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-3279  
Summary Calendar

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CAROLYN DEAN,

Plaintiff-Appellant,

v.

MARITIME OVERSEAS CORPORATION, ET AL.,

Defendants,

SECOND SHIPMOOR ASSOCIATES, INC.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA 90 1022 N)

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(December 18, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.\*

EDITH H. JONES, Circuit Judge:

Following a bench trial, the district court rejected appellant Dean's claim that she was injured by an aggravation of her asthmatic condition, which caused her to faint, and to slip and fall and hurt her back, after inhaling fumes vented from the S/S OVERSEAS OHIO during cold water washing operations carried out in

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

New Orleans on August 31, 1989. The court found both that the appellee's venting operation did not cause plaintiff's fainting spell and that the operation was not conducted negligently. On appeal, Dean challenges both these findings. The first one is dispositive, and we affirm on that basis.

Dean's appellate brief no longer contends that she fainted because she was inhaling toxic fumes. The court rejected this contention because of Dean's history of fainting spells, expert testimony that fumes do not cause fainting, and the fact that Dean was located over 650 yards from where the ship was docked on August 31. Instead, Dean now contends that she fainted because she experienced anxiety at the thought of an oncoming asthma attack and hyperventilated. She contends that the district court overlooked this theory of recovery.

Having reviewed the pertinent parts of the record, it is clear that the district court could not have overlooked this theory, because Dean did not assert it at trial. Her contention was that these fumes were toxic and harmful as well as malodorous and that their inhalation caused her to faint. This theory was maintained consistently in her original complaint, her pretrial memorandum, and in her trial testimony, where she specifically denied that the asthmatic condition had ever caused her to faint. She did not testify to suffering anxiety because of the fumes. The expert testimony of Dr. Simonson, her longtime personal physician, and Dr. Weill offer no support for the theory that anxiety concerning an oncoming asthmatic attack could have caused appellant

to faint. Dr. Simonson stated that he did not know what caused her to faint, and Dr. Weill said it would be extremely uncommon for an asthmatic to faint from anxiety or from inhaling fumes.

The findings of the trial court that the fumes vented from the barge did not cause appellant's injury are not clearly erroneous. Because the defendant's conduct of venting the tanks was not a cause in fact of her injuries, the trial court correctly denied relief. See Lejeune v. Allstate Insurance Company, 365 S.2d 471 (La. 1978).

For this reason, the judgment of the district court is **AFFIRMED.**