UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 92-3480

ANITA MARIE JONES,

Plaintiff-Appellant,

VERSUS

BAYOU STEEL CORPORATION, (OF LAPLACE), ET AL.

Defendants,

JOHN DEERE DUBUQUE WORKS OF JOHN DEERE AND COMPANY,

Defendant-Appellee.

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JULIA JACKSON JONES, Widow of Clarence Jones, Individually and in her capacity as natural tutrix and for and on behalf of administratrix of the estate of the minors Stephanie Jackson Jones, Michelle Jackson Jones, Sheila Jackson Jones and Mark Jackson Jones,

Plaintiff-Appellant,

VERSUS

SCIONEAUX, INC., ET AL.,

Defendants,

JOHN DEERE DUBUQUE WORKS OF JOHN DEERE AND COMPANY,

Defendant-Appellee.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CA 86 38 G c/w CA 86 39 G)

July 20, 1993

Before WISDOM and DUHÉ, Circuit Judges, and HAIK*, District Judge.

PER CURIAM:**

This wrongful death action has been tried twice to a jury and each time the District Court entered judgment as a matter of law[1] or in the alternative a new trial. This Court reversed the first judgment as a matter of law and remanded for a new trial. We AFFIRM the second judgment as a matter of law.

Clarence Jones, Jr., an employee of Binnings Construction Company, was working at the Bayou Steel Mill in LaPlace, Louisiana on the morning of March 28, 1981. A John Deere 690B excavator needed to be refueled, and because the regular oiler who would have acted as signalman had not shown up for work, Jones either volunteered or was asked to assist.

The driver of the excavator, James Bibbins, believed he needed to move the excavator in a rearward direction.[2] He realized that a blind spot restricted his vision while moving rearward; therefore, he instructed Jones to act as signalman. Bibbins

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* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5.1 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Prior to December 1, 1991, this was known as J.N.O.V.

[2] Because the excavator articulates 360 degrees it moves in a rearward direction rather than in reverse.

proceeded to drive the excavator. It was moving at a very slow speed--much slower than a normal walking gait. At some point Bibbins lost sight of Jones and stopped the machine. Tragically, Bibbins had run over Jones, who died on April 2, 1981.

In the first trial the plaintiffs, Jones's widow and daughter, contended that the excavator was defective and that Deere failed to give an adequate warning about the dangers of moving the excavator in a rearward direction. The jury found that the machine was defective, although it also found that this was not the proximate cause of the accident. The jury also found that there was a failure to warn. The District Court entered J.N.O.V. or alternatively a new trial.

This Court in a two paragraph per curiam opinion reversed the J.N.O.V. but affirmed the grant of a new trial.

The appeal was not based on defective design. The second trial therefore focused exclusively on failure to warn. The jury once again returned a verdict for the plaintiffs. The District Court once again set aside the jury verdict and entered judgment as a matter of law or alternatively a new trial.

The standard of review of a judgment as a matter of law is the well-known Boeing standard that "if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men cannot arrive at a contrary verdict, granting [or affirming] the motion is proper . . . There must be a

conflict and substantial evidence to create a jury question"[3].

Bibbins testified at trial that he knew his vision was restricted. Jones too, presumably, should have known about the blind spot since he was acting as a signalman precisely because the driver's vision was restricted. The District Court accurately stated, "It is clear to any reasonable mind that the hazard presented was open and obvious to Jones and that no additional warning in this case was necessary" (emphasis in original). As the District Court correctly observed, Jones was working with this machine; he was directing it. "Although a point of hazard decal could be important to another plaintiff, a reasonable mind could not find that a point of hazard decal could have changed the outcome for this one."

We remanded the first judgment for new trial holding that the District Court's decision that the verdict was against the great weight of the evidence was not an abuse of its discretion. After a careful review of the two transcripts, we conclude that the plaintiff's presented no additional evidence with which to support a verdict. Therefore, we hold that the District Court's judgment as a matter of law should be AFFIRMED.

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[3] Boeing v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).