UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4960
Summary Calendar

ROLAND CAMPBELL,

Plaintiff-Appellee,

DANOS & CUROLE MARINE CONTRACTORS, INC., ET AL.,

Intervenors-Plaintiffs-Appellees,

versus

TENNECO OIL CO.,

Intervenor-Defendant-Appellant,

OPERATORS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana
(CA-89-1422)

(April 23, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

Tenneco Oil Company and Operators, Inc. appeal an adverse judgment on jury verdict and rejection of their posttrial motions. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Roland Campbell worked as a roustabout for Danos & Curole Marine Contractors who dispatched a crew, including Campbell, to a Tenneco offshore platform at the request of Offshore, a wholly-owned Tenneco subsidiary. Operators conducted the production activities on the platform. Tenneco had hired Solar Turbines to work on a compressor on the platform. An Operators supervisor, Charles Larriviere, directed Campbell to assist a Solar mechanic and other Operators personnel with the compressor. Campbell was directed to change the oil, a process which resulted in oil spills.

The compressor was mounted on four I-beams in such a way that the beams formed a drip pan which was supposed to contain any oil leak or spill from the compressor. There were at least four such spills while Campbell was working on the compressor -- when the compressor was drained, when the drain hose was removed, when the oil filters were changed, and when the oil was replaced. The oil was not removed when the compressor work was finished because Campbell was already into overtime at that point. The next morning Campbell was assigned to clean up the compressor room. During the night oil had spread over the floor. Campbell slipped and was seriously injured.

Campbell sued Tenneco and Operators and the jury returned a verdict for $953,000. Operators' liability was based on negligence; Tenneco was cast both for negligence and strict liability under La. Civil Code art. 2317.

Tenneco and Operators timely appealed, contending that they should have judgment as a matter of law or a new trial because: (1) the accident was solely Campbell's fault; (2) Campbell was Operators' borrowed servant; (3) Tenneco should not be held strictly liable for spilled oil; and (4) damages were excessive.

Analysis

Standard of Review

We review the denial of a motion for new trial for abuse of discretion.[1] Grounds for a new trial include the district court's determination that the verdict is against the weight of the evidence or that the damages awarded are excessive.[2] The court's denial of a motion for new trial abuses its discretion only when, viewing the evidence in the light most favorable to the verdict, there is an "absolute absence" of evidence supporting the verdict.[3]

A party is entitled to judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the other] party."[4] If substantial evidence

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[1] **Transoil (New Jersey) Ltd. v. Belcher Oil Co.**, 950 F.2d 1115 (5th Cir.), cert. denied, 113 S.Ct. 90 (1992).

[2] **Smith v. Transworld Drilling Co.**, 773 F.2d 610 (5th Cir. 1985).

[3] **Seidman v. American Airlines, Inc.**, 923 F.2d 1134 (5th Cir. 1991); **Transoil**.

[4] Fed.R.Civ.P. 50.

supports the verdict, we must affirm the denial of the motion.[5] "Substantial evidence is 'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.'"[6]

A finding that there was substantial evidence necessarily precludes a finding that there was an absolute absence of evidence. Thus, if we find the verdict supported by substantial evidence, we should affirm the denial of both the motion for judgment as a matter of law and the motion for new trial.

Campbell's Contributory Fault

Tenneco and Operators challenge the jury's determination that Campbell was not at fault and contend that the evidence required a finding that the accident was caused solely by Campbell's negligence. We conclude that the verdict is supported by substantial evidence. The jury was warranted in finding that given the conditions the defendants permitted, an accident was inevitable. The jury could conclude that the oil-covered compressor room floor was a trap and the accident was not Campbell's fault.

Borrowed Employee Status

Operators contends that Campbell was its borrowed servant and, therefore, his exclusive remedy against it is workers compensation

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[5] **Transoil**, 950 F.2d at 1118.

[6] **Id.** (quoting **Boeing Co. v. Shipman**, 411 F.2d 416, 420 (5th Cir. 1969) (*en banc*)).

under the LHWCA.[7] When determining borrowed employee status we consider the following factors:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
(2) Whose work is being performed?
(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
(4) Did the employee acquiesce in the new work situation?
(5) Did the original employer terminate his relationship with the employee?
(6) Who furnished tools and place for performance?
(7) Was the new employment over a considerable length of time?
(8) Who had the right to discharge the employee?
(9) Who had the obligation to pay the employee?[8]

No single factor is determinative; in many cases, however, this court had considered "control" the central factor.[9]

We cannot say that there was no substantial evidence supporting the jury's verdict on this issue. For example, the evidence on the control issue is conflicting. Larriviere, who generally assigned people to the various tasks being performed on the platform, testified that he did not control the Danos & Curole roustabouts. There is also testimony that Campbell's role in the compressor work was under the supervision of the Solar mechanic.

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[7] See 33 U.S.C. § 905(a); **Doucet v. Gulf Oil Corp.**, 783 F.2d 518 (5th Cir. 1986), cert. denied, 479 U.S. 883 (1987).

[8] **Ruiz v. Shell Oil Co.**, 413 F.2d 310 (5th Cir. 1969).

[9] **Melancon v. Amoco Prod. Co.**, 834 F.2d 1238 (5th Cir.), reh'g granted on other grounds, 841 F.2d 572 (5th Cir. 1988); **Capps v. N.L. Baroid-NL Indus., Inc.**, 784 F.2d 615 (5th Cir.), cert. denied, 479 U.S. 838 (1986).

As we pointed out in **Ruiz**, "[i]n considering whether the power exists to control and direct a servant, a careful distinction must be made 'between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.'"[10] The jury reasonably could have inferred from the evidence that in performing the oil change Campbell and Larriviere necessarily cooperated, but that their work was part of the larger Solar compressor undertaking. In addition, although Operators requested that Danos & Curole dispatch roustabouts, Danos & Curole's contractual agreement was with Tenneco, not Operators. While there may be grounds upon which reasonable persons could reach different conclusions, there is not the persuasive basis required for judgment as a matter of law or new trial.

Article 2317 Liability

Strict liability under Louisiana Civil Code article 2317 requires proof that the plaintiff was injured by a thing in the defendant's custody, that the thing had a vice or defect creating an unreasonable risk of harm, and the plaintiff's harm arose from that danger.[11] Tenneco's liability under article 2317 is based upon its undisputed ownership of the compressor and the defective design of the compressor's oil system which resulted in the oil spills

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[10] 413 F.2d at 313 (quoting **Standard Oil Co. v. Anderson**, 212 U.S. 215 (1909)).

[11] **Ross v. La Coste de Monterville**, 502 So.2d 1026 (La. 1987).

which in turn resulted in Campbell's injuries.

Tenneco contends that the oil spill was a transient condition that cannot support liability under article 2317. "The presence of a foreign substance is not, in and of itself, a defect for purposes of strict liability under La. Civ. Code art. 2317. The reasoning behind this rule is that the presence of a foreign substance does not create a vice or defect inherent in the thing itself."[12] We agree that the presence of oil, alone, on the compressor room floor would be inadequate to support 2317 liability.

Campbell's claim, however, was not that the presence of oil rendered the premises defective, but that the compressor's oil system was defectively designed, allowing oil spills as a matter of course during routine oil changes. Campbell specifically alleged that the compressor was defective in that:

> (1) The oil drain pipe had no valve at its end. The pipe extends beyond the margins of the oil pan and will of necessity during an oil change drip oil between the upstream valve and the end of the pipe.
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> (2) The oil tank provides no means to monitor oil levels during filling. One learns that the oil tank is full when it overflows.
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> (3) The oil pan is not capable of catching oil falling from the oil tank or the oil drain pipe which routinely occurs during an oil change.

Tenneco complains that Campbell offered no expert testimony

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[12] **Mitchell v. Travelers Ins. Co.**, 464 So.2d 404, 406 (La.App. 1985) (citatiaons omitted) (rice on supermarket floor does not render premises defective); **McKinnie v. Dept. of Trans. & Development**, 426 So.2d 344 (La.App.) (no 2317 liability for ice on road), writ denied, 432 So.2d 266 (La. 1983).

regarding the compressor equipment, nor cited any standards the equipment violated. Neither is a prerequisite to establishing liability under 2317.

Tenneco argues that at least one oil spill resulted not from a defect in the oil system but, rather, from the failure to close the upstream valve before opening the drain pipe. Strict liability under article 2317 must be based upon a defect in the thing itself, not the way it is used.[13] If the valve had been shut, less oil would have spilled. The upstream valve was closed, however, when the hose was removed, but oil spilled out of the portion of the pipe and hose extending past the valve. Regardless of the manner in which this operation was done, oil trapped between the end of the pipe and the valve would spill, and such spills would not be caught by the drip pan.

Regarding the defective design of the drip pan, an Operators mechanic testified that the drip pan should be wide enough to catch oil dripping off the compressor. Campbell testified that on other maritime engine installations he was familiar with, the drip pans were wide enough to catch such drippings. Campbell also testified that when refilling the oil tank, there was no way to gauge capacity until it began to overflow. This evidence was not controverted. It is not correct to say that there was not

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[13] **Butler v. Insouth Pipeline**, 655 F.Supp. 587 (M.D.La. 1986) (manner in which bulldozer is transported cannot be 2317 defect); **Goudchaux v. State Farm Fire & Cas. Co.**, 407 So.2d 1317 (La.App. 1981), writ denied, 412 So.2d 1114 (La. 1982); **Gasquet v. Commercial Union Ins. Co.**, 391 So.2d 466 (La.App. 1990), writ denied, 396 So.2d 921 (La. 1981).

substantial evidence supporting the jury's verdict. The jury was entitled to find that a system which produces multiple spills onto walking surfaces during the course of a routine oil change is defectively designed. Based on the evidence presented, Tenneco properly was found liable under article 2317.

Tenneco's Negligence

The jury also found that Tenneco's negligence was a legal cause of Campbell's injuries. There were no Tenneco personnel on the platform; thus, negligence was based on the proposition that Tenneco breached its non-delegable duty to maintain safe premises. "Liability under LSA-C.C. Art. 2315 imposes the same requirements as Article 2317, the difference in the two articles being, under the theory of negligence, plaintiff must show that the owner knew or should have known of the risk, whereas under strict liability, the plaintiff is relieved of proving defendant's scienter."[14]

Whether Tenneco is liable under negligence or under article 2317, the result is the same.[15] "Third party fault under La. C.C. 2317 which contributes to the accident along with fault of the owner-custodian, results in the same solidary liability where that third party fault is not considered to be the sole legal cause

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[14] **Desormeaux v. Audubon Ins. Co.**, 611 So.2d 818, 820 (La.App. 1992) (citing **Eldridge v. Bonanza Family Restaurants**, 542 So.2d 1146 (La.App. 1989)).

[15] Because the article 2317 and negligence theories against Tenneco were based upon the same conduct, we conclude that the jury's allocation of fault as between Operators and Tenneco would not have been different if the jury had exonerated Tenneco of negligence.

of the accident."[16] Comparative fault principles may be applied in a strict liability suit.[17] Thus, comparative fault principles apply to the third-party negligence fault of Operators and to Tenneco's owner-custodian strict liability fault under article 2317.

Damages

Tenneco and Operators contend that the district court also erred in denying their posttrial motion that the jury's damage award was excessive. A jury's determination of damages is entitled to great deference, and will not be reversed unless the jury was influenced by passion or prejudice[18] or upon the strongest of showings of excessiveness. We will disturb a jury award only if the amount clearly exceeds that to which any reasonable person could find the claimant entitled.[19] We find the jury award in this case, though generous, within a reasonable range given the evidence presented at trial.

For the foregoing reasons, we AFFIRM.

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[16] **Lang v. Price**, 447 So.2d 1112, 1117 (La.App.), (citing **Olsen v. Shell Oil Co.**, 365 So.2d 1285 (La. 1978)), writ denied, 450 So.2d 1309, 1311 (La. 1984); see La. Civ. Code art. 2324.

[17] **Marcantel v. Karam**, 601 So.2d 1 (La.App. 1992) (comparative fault may be applied when one tortfeasor's liability is based on La. Civ. Code art. 2322).

[18] **Westbrook v. General Tire & Rubber Co.**, 754 F.2d 1233 (5th Cir. 1985).

[19] **Enterprise Refining Co. v. Sector Refining, Inc.**, 781 F.2d 1116 (5th Cir. 1986).