UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3040
Summary Calendar

JEROME MATTHEWS,

Plaintiff-Appellant,

versus

GRACE OFFSHORE COMPANY, ET AL.,

Defendants,

EXXON CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-90-4014-A2)

(June 18, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Jerome Matthews and his wife Rosie Matthews appeal an adverse summary judgment and the denial of reconsideration of that judgment. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Jerome Matthews was employed as a roustabout by Grace Offshore Co. which, pursuant to a written contract with Exxon Corp., was performing work on Exxon's South Timbalier 54D Platform on the Outer Continental Shelf offshore Louisiana. Matthews was injured while offloading equipment from the M/V ELLA G, a supply vessel owned and operated by Damon Chouest, Inc. which was time chartered to Exxon. During rough seas Matthews attempted to connect a crane to a 9,000-pound Hydril blow-out preventer. The crane was to lift the Hydril from the vessel but the vessel hit a trough and the Hydril tipped over, crushing Matthews' leg.

The Matthewses brought suit against Exxon both as platform owner and time charterer of the vessel, and against Damon Chouest, Inc. as vessel owner/operator.[1] Exxon filed an unopposed motion for partial summary judgment in its capacity as platform owner; that motion was granted. Shortly before the scheduled trial, plaintiffs' counsel was informed by Hilton Boothe, the Exxon company representative on the platform during the offloading, that he had written a supplemental accident report regarding Matthews' accident which had not been provided to plaintiffs. The report indicated that the offloading had taken place in "marginal weather." The Matthewses moved for reconsideration of the partial summary judgment, citing the supplemental accident report as new evidence of land-based negligence on the part of Exxon. The

[1] Rosie Matthews brought a loss of consortium claim. Grace Offshore was also sued but was voluntarily dismissed.

district court denied the motion finding that the supplemental report, if it was new evidence, supported only vessel-related negligence, not platform-related negligence.[2] The Matthewses timely appealed the partial summary judgment in favor of Exxon as platform owner and the denial of reconsideration of that judgment.

Analysis

The Summary Judgment

The Matthewses complain that summary judgment in favor of Exxon, as platform owner, was inappropriate. We review summary judgments *de novo*, our review being limited to the summary judgment record before the trial court.[3] Summary judgment is appropriate if the movant establishes both an absence of genuine issues of material fact and, based upon the undisputed facts, that movant is entitled to judgment as a matter of law.[4]

In its unopposed motion for partial summary judgment, Exxon established that Matthews was employed by Grace Offshore, an independent contractor working on the Exxon platform. As a result Grace, not Exxon, owed Matthews the duty to provide a safe place to work and adequate equipment to perform his assigned tasks.[5] In

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[2] Before trial the Matthewses settled with Damon Chouest and Exxon as time charterer.

[3] **Topalian v. Ehrman**, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992).

[4] See Fed.R.Civ.P. 56(c).

[5] See **Robertson v. Arco Oil & Gas Co.**, 948 F.2d 132, 133 (5th Cir. 1991) ("Where a platform owner hires independent contractors to supply operations and carry out the actual

fact, the appellants admit that they "do not attempt to place fault on the part of Exxon for the negligence of the independent contractor, Grace Offshore Company."

Also in its unopposed motion, Exxon demonstrated that summary judgment was proper for claims against it as platform owner based upon the unloading of the vessel in bad weather. Exxon invites our attention to the fact that on a virtually identical scenario we held, in **Helaire v. Mobil Oil Company**,[6] that the decision to unload cargo from a vessel in poor weather conditions is "traditionally vessel-related."[7] As a result, any liability based upon that decision would be vessel-related, not land-based. Exxon also noted that under the holding of **Helaire**, the presence of the Exxon representative on the platform did not change this result.[8]

In its motion for partial summary judgment Exxon satisfied its burden of demonstrating an absence of genuine issues of material fact.[9] The Matthewses had the burden then, not now, to "come

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drilling, and the owner neither possesses nor exercises actual control over the independent contractors, the owner has no duty to remedy the hazards created by its independent contractor."); **Boutwell v. Chevron**, 864 F.2d 406 (5th Cir. 1989) (Absent operational control, platform owner not liable for negligent acts of independent contractor).

[6] 709 F.2d 1031 (5th Cir. 1983).

[7] **Id.** at 1043.

[8] "The fact that the decision to dispatch the crew boat was made on fixed ground hardly detracts from the maritime vessel-centered character of the negligence." **Id.** at 1042 n.16 (quoting **Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.**, 462 F.Supp. 485, 490 (E.D.La. 1978)).

[9] See **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986).

forward with evidence establishing each of the challenged elements of its case for which [they would] bear the burden of proof at trial."[10] They would now seek to create genuine issues of material fact by relying on evidence which was not before the district court. In an attempt to distinguish **Helaire**, they point to deposition testimony of Johnson Chouest, the vessel captain, that Boothe insisted, over his objection, that the unloading continue in bad weather. That deposition testimony, however, was not made a part of the summary judgment record and may not be considered on appeal.[11] The district court did not err in granting the unopposed motion for partial summary judgment.

Denial on Reconsideration

The Matthewses also contend that the district court erred in denying their motion for reconsideration of the summary judgment in light of the new evidence SQ the supplemental accident report. They would rely on that report to establish that the offloading took place during "marginal weather." In light of **Helaire**, however, this created no genuine issue of material fact. That the weather may have been marginal was not in dispute; as the district

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[10] **Topalian**, 954 F.2d at 1131 (citing **Celotex Corp. v. Catrett**, 477 U.S. 317, 322 (1986)).

[11] Matthews also contends that there was evidence that the Hydril was improperly loaded onto the vessel. This theory of liability (and the evidence allegedly supporting it) was never presented in the district court, either in response to the motion for summary judgment or in support of the motion to reconsider. We perforce cannot consider it for the first time on appeal. See **Munoz v. International Alliance of Theatrical Stage Employees**, 563 F.2d 205 (5th Cir. 1977) (parties may not advance new theories on appeal to secure reversal of summary judgment).

court correctly noted, "the contents of the report do not place in dispute the historical fact that actions or omissions in the unloading of cargo during marginal weather are vessel-related."

We AFFIRM the district court in all respects.