UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3118
Summary Calendar

MARQUETTE JOHNSON,

Plaintiff-Appellant,

versus

AVONDALE INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-3726 "M" (2))

(September 24, 1993)

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

POLITZ, Chief Judge:[*]

Marquette Johnson appeals an adverse summary judgment in his personal injury action against Avondale Industries, Inc. Finding no error, we affirm.

Background

In 1990, Petrochemical Services, Inc. (PSI) agreed to perform

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sandblasting work as a subcontractor for Avondale, in the course of refurbishment of the U.S.S. Merrimac. PSI's contract with Avondale expressly set forth that it would act as an independent contractor, performing all phases of the sandblasting operation without supervision. Johnson worked as a scaffolding rigger for PSI on the Merrimac site, reporting each morning to Jim Wieland, a PSI supervisor. Despite its knowledge that PSI had dismissed the safety superintendent assigned to the Merrimac job, Avondale did not supervise the sandblasting crew. On October 3, 1990, Johnson fell approximately 40 feet in the course of dismantling scaffolding, suffering injury to his left leg. The fall resulted from negligent construction of the scaffolding upon which Johnson was working and absence of proper safety equipment. Johnson presented evidence that, after the accident, Wieland met with an unidentified Avondale safety department employee who ordered PSI to stop work until it purchased and demonstrated use of appropriate safety equipment.

After receiving compensation from PSI under the Longshoremen's and Harbor Workers' Compensation Act Johnson filed the instant action against Avondale, asserting state, federal and general maritime law claims.[1] After extensive discovery, all parties filed motions for summary judgment. The district court granted summary judgment against Johnson, finding that he had presented no evidence of any negligent conduct by Avondale leading to the accident and

[1]Johnson named the Department of the Navy as an additional defendant, but did not oppose its motion for summary judgment.

that Avondale, as a matter of law, had no liability for PSI's negligence and owed Johnson no duty to ensure that PSI employed proper safety measures. Johnson timely appealed.

Analysis

We conduct de novo review of rulings on summary judgment motions, applying the same standards as the district court.[2] Summary judgment is appropriate where the evidence, viewed most favorably to the nonmovant,[3] "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] We may affirm a grant of summary judgment on grounds different from those relied upon by the district court.[5]

Under well-settled law, a principal such as Avondale generally has no duty "to discover and remedy hazards created by its independent contractor."[6] Likewise, principals generally cannot be held answerable on a respondeat superior theory for the negligent acts of an independent contractor committed in the course of its

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[2] E.g., **Perry v. Mercedes Benz of North America, Inc.**, 957 F.2d 1257 (5th Cir. 1992); see also Fed. R. Civ. P. 56(c).

[3] **Lavespere v. Niagara Mach. & Tool Works, Inc.**, 910 F.2d 167 (5th Cir. 1990).

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

[5] **Degan v. Ford Motor Co.**, 869 F.2d 889 (5th Cir. 1989).

[6] **Wallace v. Oceaneering Int'l**, 727 F.2d 427, 437 (5th Cir. 1984); **Cooper v. Offshore Express, Inc.**, 717 F. Supp. 1180 (W.D. La. 1989), aff'd, 915 F.2d 1569 (5th Cir. 1990); see also **Ellison v. Conoco, Inc.**, 950 F.2d 1196, 1207 (5th Cir. 1992), cert. denied, 113 S.Ct. 3003 (1993) (principal generally has no obligation to "ensure that an independent contractor performs its obligations in a safe manner.").

contractual duties.[7] These rubrics do not, however, apply where the principal exercised "operational control" over the contractor.[8]

Johnson first suggests that the Wieland affidavit created an issue of fact whether Avondale exercised "operational control" over PSI. We are not persuaded. PSI's contract with Avondale clearly identifies it as an independent contractor.[9] That Avondale might, as alleged in Wieland's affidavit, have ordered PSI to stop work until it demonstrated implementation of certain safety measures did not amount to an exercise of "operative control."[10] Johnson points to no other summary judgment evidence indicating any control over PSI's operation by Avondale. This contention lacks merit.

Johnson next points to deposition testimony of Josiah Bodie, Avondale's safety inspector on the Merrimac project, as indicating its knowledge that PSI employed unsafe methods. Given such knowledge, Johnson contends that Avondale had a duty to correct PSI's practices. Assuming arguendo that a principal's knowledge of

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[7]**Ainsworth v. Shell Offshore, Inc.**, 829 F.2d 548 (5th Cir. 1987), cert. denied, 485 U.s. 1034 (1988).

[8]**Ellison**, 950 F.2d at 1207; **Ainsworth**, 829 F.2d at 550; **Wallace**, 727 F.2d at 437. Courts also recognize an exception where the principal employs a contractor for ultrahazardous activity. **Ainsworth**, 829 F.2d at 549. No party asserts the applicability of this latter exception in the case at bar.

[9]**Duplantis v. Shell Offshore, Inc.**, 948 F.2d 187 (5th Cir. 1991) (relationship between principal and contractor generally defined by contract).

[10]**Ellison** (fact that principal could have ordered subcontractor to stop work if it observed obviously dangerous situation did not give principal "operative control" over subcontractor); **LeJeune v. Shell Oil Co.**, 950 F.2d 267 (5th Cir. 1992) (authority of principal to require compliance by subcontractor with its safety guidelines did not amount to "operative control.").

its subcontractor's unsafe practices would give rise to a duty to correct the situation, we find that Johnson failed to produce adequate summary judgment evidence in support of that theory. Although Bodie indicated unfamiliarity with PSI's method of rigging scaffolding, he did not indicate any belief that the method was unsafe or that Avondale failed to utilize adequate safety equipment. Likewise, we decline to infer knowledge of unsafe practices from Bodie's knowledge that PSI had discharged its site safety superintendent for being "too safety conscious."[11] This argument fails to persuade.

Johnson urges that Avondale's agreement with the Navy obligated it to ensure PSI's compliance with safety regulations. The contract provision upon which Johnson relies states that "[n]othing contained in this contract shall be construed as relieving [Avondale] from any obligations which it may have for compliance with [Department of Labor regulations promulgated under the Occupational Safety and Health Act of 1970]." This language clearly did not impose any duties upon Avondale beyond those which it already had. It is manifest that it did not impose upon Avondale an otherwise nonexistent obligation to ensure the safety of its independent contractor's procedures.[12]

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[11]We note in this connection that, although PSI terminated its site safety superintendent, it continued to employ Wieland, an expert in safety concerns, as its crew supervisor on the Merrimac job.

[12]We further note that, in any event, Johnson presented no evidence that he relied upon Avondale to do so. Cf. **LeJeune** (absent evidence that employee of independent contractor relied upon implementation of procedures outlined in principal's safety

Finally, Johnson suggests that the district court erroneously rejected his strict liability claim under article 2317 of the Louisiana Civil Code.[13] In order to recover under article 2317, a plaintiff must demonstrate the defendant's custody, or garde, of the injury-causing object or instrumentality.[14] Johnson presented no evidence that Avondale exercised control over or supervised PSI's activities. Thus, assuming arguendo the applicability of article 2317, the district court did not err in granting summary judgment against Johnson on this theory.[15]

The judgment of the district court is AFFIRMED.

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manual, production of manual would not support recovery).

[13]As Johnson has not adequately briefed his contention regarding Avondale's liability under La. Civ. Code Arts. 2315, 2316, we consider it abandoned. E.g., **Villanueva v. CNA Ins. Cos.**, 868 F.2d 684, 687 n.5 (5th Cir. 1989).

[14]**Friou v. Phillips Petroleum Co.**, 948 F.2d 972 (5th Cir. 1991) (citing **Kent v. Gulf States Utilities Co.**, 418 So.2d 493 (La. 1982)). The plaintiff further must establish a vice or defect in the object or instrumentality creating an unreasonable danger of injury and actually causing the damage, and the defendant's failure to take adequate remedial steps. **Id.** Because Johnson has failed to establish Avondale's custody of the instrumentalities causing his injuries, we need not discuss these elements of the cause of action under article 2317.

[15]**Friou** (citing **Boutwell v. Chevron U.S.A., Inc.**, 864 F.2d 406 (5th Cir. 1989)).