IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3237
Summary Calendar

EUGENE D. NOLAN and VERGIE THOMAS NOLAN,

Plaintiffs-Appellants,

v.

M/V SANTE FE, ET AL.,

Defendants,

SOUTHERN SHIPBUILDING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(89-CV-5446-F c/w 90-CV-869-F)

(June 2, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

The district court granted summary judgment in favor of the appellant's employer under § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA). The district court also denied the employee's motion to amend his complaint a third time to assert a Jones Act claim. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Eugene Nolan was injured while performing services for his employer, Southern Shipbuilding Corporation (Southern). A local stevedoring contractor, Ceres Gulf, Inc., had contracted with Southern to use Southern's salvage barge, the D/B SOUTHERN NO. 6, to offload a large and heavy item of cargo from the M/V CONTI ALMANIA. Nolan was employed by Southern as a shipfitter/welder but worked occasionally aboard the SOUTHERN NO. 6 when it was put into use by its owners. On December 6, 1988, Nolan was serving as a deckhand aboard that barge helping to moor it to the M/V CONTI ALMANIA. Nolan was apparently standing on the M/V CONTI ALMANIA holding a mooring line when the line suddenly parted, causing him to lose his balance and fall into the hold of the M/V CONTI ALMANIA with resulting injuries.

Nolan has settled his claims against the owners and operators of the M/V CONTI ALMANIA. The district judge ordered summary judgment in favor of Southern based on 33 U.S.C. § 905(b) and against Ceres Gulf based on absence of any duty of care.[1] The district court also denied Nolan's motion to amend his complaint to add a Jones Act cause of action against Southern, finding that allowing the amendment would prejudice Southern and would be futile.

[1] This court earlier dismissed Ceres Gulf, Inc. from this appeal on its unopposed motion.

DISCUSSION

Summary Judgment under LHWCA

In reviewing summary judgment, we examine the record and pleadings independently, view fact questions in the light most favorable to the nonmovant, and consider legal questions de novo. Easley v. Southern Shipbuilding Corp., 936 F.2d 839, 841-42 (5th Cir. 1991) (Easley I).

The compensation scheme of the LHWCA is usually exclusive when a longshoreman suffers disability or death from an injury occurring upon the navigable waters of the United States. 33 U.S.C. §§ 903, 904, 905. Section 905(b), however, provides that a worker covered by the LHWCA may sometimes also sue a vessel if his injury was caused by the vessel's negligence. Prior to 1984 the Supreme Court, had held that a longshoreman could recover from the vessel when the vessel owner was the longshoreman's employer if the employer was negligent in his capacity as vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 550, 103 S. Ct. 2541, 2547 (1983). Following this decision, Congress significantly changed § 905(b) to limit such liability:

> If such person [a longshoreman suffering injury caused by the negligence of a vessel] was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

33 U.S.C. § 905(b) (effective Sept. 28, 1984).

Nolan attempts to wring out of Easley v. Southern Shipbuilding Corp., 965 F.2d 1, 3 (5th Cir. 1992) (Easley II) support for his contention that his claim against Southern under § 905(b) is not barred by the plain terms of that provision. He argues that language in Easley II allows him to recover against his employer because his injuries arose out of the negligence of the D/B SOUTHERN NO. 6 or its crew in navigating and mooring that vessel, as opposed to negligence arising from more traditional longshore-type activities. Nolan cites a paragraph from Easley II that discussed the effect of Southwest Marine, Inc. v. Gizoni, 112 S. Ct. 486 (1991) on the opinion in Easley I, 936 F.2d 839 (1991):

> Our second line of reasoning in Easley I -- concerning the ability of a ship repairer to bring a negligence action under § 905(b) of the LHWCA -- was unaffected by the Gizoni decision. This court has stated in the context of the LHWCA that "[i]f the employee's permanent duties, or his interim duties over an appreciable period of time, are such that he would be a covered ship repairer within the meaning of § 902(3) of the LHWCA, then he is barred from bringing [a negligence] suit against his employer under § 905(b)." When, in a situation involving an employer who is the shipowner, there has been a primary determination that the worker is not a seaman for purposes of the Jones Act but that he is covered by the LHWCA, and a secondary determination that the worker's trade is that of ship repairer or any of the other occupations listed in § 905(b), the worker is barred by the terms of that section from maintaining a negligence action against his employer, assuming that "the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services." [footnote citation to 33 U.S.C. § 905(b)]. This analysis remains correct; it was not affected by Gizoni.

Easley II, 965 F.2d at 3 (emphasis added).

The appellant claims that this amounts to a holding that employers who are vessel owners are protected by the liability exclusivity provision of § 905(b) only for the negligence of persons engaged in providing shipbuilding or repair services. This interpretation is incorrect because it would basically annul the broadly worded changes passed by Congress. In fact Easley II lends itself to misinterpretation because it appears to mistakenly cite a portion of § 905(b) that was repealed by the 98th Congress. But the decisive point about Easley II is that its holding on § 905(b) was unaffected by Gizoni. Easley I held, as section 905(b) states, that a person employed as a ship repairer may not sue his employer for vessel negligence if the employer owned the vessel. 936 F.2d at 843. We thus affirm the district court's summary judgment in favor of Southern on Nolan's § 905(b) negligence claim.

Denial of Complaint Amendment

We review for abuse of discretion the district court's decision to disallow Nolan's amendment of his complaint to assert a claim under the Jones Act. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981). In exercising its discretion, the trial court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. Id. In this case, the district judge did not abuse his discretion in determining that amendment to assert a

Jones Act claim, which requires seaman status, would be futile. A worker cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA. McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807, 813 (1991). Nolan testified at his deposition and then stipulated in two pretrial orders that he was primarily employed as a longshoreman. The district court was well within its discretion to conclude that the appellant's own testimony and his judicial admissions precluded Nolan's classification as a seaman for purposes of the Jones Act. See Easley II, 965 F.2d at 3, quoting Gay v. Barge 266, 915 F.2d 1007, 1010 (5th Cir. 1990) (discussing classification).

For the foregoing reasons, the district court's decision is in all respects **AFFIRMED**.