IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3356
Summary Calendar

ALLEN J. BENJAMIN,

Plaintiff-Appellant,

v.

ARCO OIL AND GAS COMPANY, ET AL.,

Defendants,

ARCO OIL AND GAS COMPANY and PETROLEUM PERSONNEL, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 91-1355 "E" (5))

(March 11, 1994)

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

EDITH H. JONES, Circuit Judge:

The district court granted appellees Arco Oil and Gas Company's ("Arco") and Petroleum Personnel, Inc.'s ("PPI") motions for summary judgement. Finding genuine, if weak, issues of material fact as to each element of negligence, we reverse the decision of the district court.

BACKGROUND

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BOCO of Louisiana, Inc. ("BOCO") was hired as an independent contractor by Arco to perform sandblasting and steam cleaning operations on Arco's fixed platform, Matagorda Island Block 703, located on the outer continental shelf in the Gulf of Mexico. Appellant Allen Benjamin was an employee of BOCO. Arco also contracted with PPI to perform various duties, including keeping the platform decks clean and clear.

According to Benjamin, while plugging a drain hole on the production deck of the platform, Benjamin stepped in some oil that surrounded the drain; plugged the drain; scraped the oil off his boots on a step leading to the top deck of the platform; rubbed his boots for another two to three minutes; climbed stairs to the top deck of the platform; walked through a puddle of water; climbed a ladder; performed still another task on the top of the platform; and began to climb down the ladder whereupon he slipped and landed on his feet, injuring his back. Benjamin claims that the oil in which he stepped caused him to slip and fall.

DISCUSSION

This court reviews the district court's ruling on a motion for summary judgment de novo. See Ladue v. Chevron, U.S.A., Inc., 920 F.2d 272, 273 (5th Cir. 1991). Summary judgment is appropriate only if, when viewing the evidence in the light most favorable to Benjamin, there is no genuine issue of material fact and the moving parties are entitled to judgment as a matter of law. See id.; Fed. R. Civ. P. 56(c). Benjamin's accident occurred on the outer continental shelf; therefore, the law of the adjacent

state, Texas, is adopted as surrogate federal law. See Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 357, 89 S.Ct. 1835, 1838 (1969). Under Texas law, Benjamin must prove duty, breach, and proximate cause to establish an action based on negligence. See F.D.I.C. v. Ernst & Young, 967 F.2d 166, 170 (5th Cir. 1992).

A. Duty and Breach

Both Arco and PPI claim that they had no duty to Benjamin that was breached as a result of oil being present on the platform. We disagree. Texas law provides that one who contractually retains control over the work of an independent contractor may be liable if he fails to exercise his control with reasonable care. See Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985). Benjamin testified at his deposition[1] that a paint inspector, whom he did not know, gave him instructions regarding the plugging of the drain. This is sufficient to raise a fact question as to the identity of the paint inspector and whether Arco had a duty to Benjamin. Additionally, Arco claims that PPI was responsible for keeping the decks of the platform clean. This is sufficient to raise a fact question as to whether PPI had a duty to Benjamin. No one challenges Benjamin's claim that there was oil on the deck. The presence of oil on the deck indicates that either Arco or PPI or both may have breached their duty to Benjamin.

[1]This court relies on the testimony of Benjamin as provided in his deposition. Therefore, it is not necessary for this court to rule on whether Benjamin's affidavit manufactures additional disputed facts where none previously existed in violation of Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 228 (5th Cir. 1984).

B. Proximate Causation

Both Arco and PPI argue that Benjamin has not raised a material issue regarding the proximate cause element of negligence. We again disagree. Texas law provides:

> [T]he two elements of proximate cause are cause-in-fact and foreseeability. Cause in fact means that the omission or act involved was a substantial factor in bringing about the injury and without which no harm would have occurred. Foreseeability requires that the actor, as a person of ordinary intelligence, would have anticipated the danger that his negligent act created for others. Foreseeability does not require that a person anticipate the precise manner in which injury will occur once a negligent situation that he has created exists.

City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) (emphasis added and citations omitted). Benjamin claims that the oil was the substantial factor that caused him to slip off the ladder. It is reasonably foreseeable to Arco and to PPI that a person may slip and fall as a result of stepping in oil. Although it is true that the precise sequence of events leading to Benjamin's fall may not have been anticipated by the defendants, Texas law requires only that Arco and PPI be able to foresee that a person may slip and fall as a result of stepping in the oil. Contrary to representations by Arco and PPI, the events that occurred between Benjamin's stepping in the oil and the actual slip and fall may be more appropriately taken into consideration when determining Benjamin's comparative responsibility. See Tex. Civ. Prac. & Rem. Code § 33.001 (West Supp. 1994) (providing that in an action to recover damages for negligence resulting in personal injury, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent).

CONCLUSION

By concluding that material fact issues are present on the record before us, we do not mean, however, to foreclose the possibility that judgment as a matter of law may be appropriate at the close of trial. But for the foregoing reasons, we vacate the order granting the defendants' motions for summary judgment and remand to the district court for further proceedings.

REVERSED and **REMANDED**.