

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5368
Summary Calendar

SIDNEY DAVIS, JR.,

Plaintiff-Appellant,

versus

WOODSON CONSTRUCTION CO., ET AL.,

Defendants,

KORI CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana
(91-CV-568)

(March 4, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The plaintiff appeals from the district court's grant of summary judgment to the defendants on the grounds that the plaintiff was not a Jones Act seaman because the spud barge upon which he worked was not a "vessel." Because any transportation

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

function the spud barge may have served was incidental to its primary purpose as a work platform, we affirm.

I

Sidney Davis, Jr. worked on the spud barge, Lay Barge I ("L/B I"), as a roustabout for Laine Construction Company ("Laine"). The L/B I is a configuration of three barges lashed end-to-end by cables. Laine used the L/B I as a floating assembly line on which its employees welded joints of pipe that eventually constituted a pipeline on the floor of Mobile Bay. The L/B I had several welding shacks, two movable cranes, X-ray equipment, and a shack for developing X-rays taken of the welding seams on the pipeline. On a previous job, the movable cranes on the L/B I were offloaded onto the shore for land-based pipeline operation and then loaded back on the L/B I for water-based operation. Tugboats moved the L/B I to job sites because the L/B I has no propulsion system or navigation lights of its own. Further, the L/B I has no crew quarters. Once the L/B I reached the job site, the workers anchored it to the seabed using its spud system--metal poles that were inserted through metal rings on the barge and implanted in the seabed to anchor the barge. The spuds remained in place until the workers laid a section of pipeline. The spuds were then retracted, and the workers laid the section of pipeline into the seabed with the assistance of a tugboat and pulling unit. After the workers laid a section of pipeline into the seabed, they moved the L/B I, via the on-board pulling unit that shoved out the pipe, approximately

fifty feet ahead in order to lay the next section of pipe. The workers moved the L/B I several times during the day after they laid each section of pipe. A tugboat stood by to keep the L/B I in proper position.

Davis was injured on the L/B I when a forklift struck him in the foot. The L/BI was anchored down by its spuds at the time of the accident.

II

On March 15, 1991, Davis filed this Jones Act suit against Laine, the Kori Corporation, Woodson Construction Company ("Woodson"), and their insurers. See 46 U.S.C. App. § 688 (1988). On August 19, the district court determined that Davis was not an employee of Woodson and dismissed Woodson from the suit. On November 27, the remaining defendants moved for summary judgment claiming that Davis was not a seaman under the Jones Act because he was not injured on a "vessel." On February 3, 1992, the district court granted the defendants' motion for summary judgment on the grounds that, as a matter of law, the L/B I was not a "vessel" under the Jones Act.

III

A

A plaintiff can bring an action under the Jones Act only if he is a "seaman." Bernard v. Binnings Constr. Co., Inc., 741 F.2d 824, 827 (5th Cir. 1984). Although seaman status is ordinarily a question for the jury, summary judgment may be appropriate "where

`the facts establish [the lack of seaman status] beyond question as a matter of law' and no reasonable evidentiary basis exists to support a jury finding that the injured person is a seaman." Ellender v. Kiva Constr. & Engineering, Inc., 909 F.2d 803, 805 (5th Cir. 1990) (citations omitted).

To qualify as a seaman under the Jones Act, a plaintiff has the burden of demonstrating:

- (1) that he was assigned permanently to a "vessel", which may include special purpose structures not usually employed as a means of transport but designed to float on the water; and
- (2) that the capacity in which he was employed or the duties which he performed contributed to the function of the vessel.

Ellender, 909 F.2d at 805 (citations omitted) (emphases added).

The Fifth Circuit has routinely held that, as a matter of law, one or more construction barges forming a work platform do not constitute a "vessel" under the Jones Act. See Waquespack v. Aetna Life & Casualty Co., 795 F.2d 523, 526 (5th Cir. 1986), cert. denied, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 163 (1987). In Bernard, 741 F.2d at 831, we summarized the cases allowing summary judgment for the plaintiff as follows:

A review of these cases indicates three factors common to them: (1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function was merely incidental to their primary purpose of serving as work platforms.

(Emphases added).

On appeal, Davis focuses on the third Bernard factor and argues that the L/B I had more than an incidental transportation function. Davis does not argue that we should characterize the L/B I as a vessel under the first or second factors. Indeed, the record shows that the L/B I was constructed and used primarily as a work platform because it had no self-propulsion system, no navigation lights, and the record does not indicate that the L/B I had a raked bow. See Bernard, 741 F.2d at 832. Further, the parties stipulate that the L/B I was spudded down at the time of Davis's accident. Accordingly, we must determine whether any transportation function served by the L/B I was, as a matter of law, incidental to the primary purpose of the structure to serve as a work platform.

Davis cites Sharp v. Wausau Ins. Co., 917 F.2d 885, (5th Cir. 1990), cert. denied, ___ U.S. ___, 113 S.Ct. 2333, 124 L.Ed.2d 245 (1993), and Ducote v. Keeler & Co., Inc., 953 F.2d 1000, (5th Cir. 1992), for the proposition that significant movement of a structure indicates its transportation function was not, as a matter of law, incidental to the primary purpose of the platform to serve as a work platform. In Sharp, 915 F.2d at 886-87, 888, workers used several barges, which were originally designed as regular transportation barge, in a pile-driving operation. Mr. Sharp operated a crane on a nonpile-driving barge that the workers used for transporting equipment, materials, and supplies and as a

stationary work platform during the actual pile driving. Id. at 887. We held that the above facts could support a jury finding that the transportation function of all of the barges was more than incidental. Id. at 888-89 (citing Brunet v. Boh Bros. Constr. Co., 715 F.2d 196, 198 (5th Cir. 1983) (holding that although a barge was used more often to support the pile-driving crane than to transport it, the transportation function was not so incidental as to warrant summary judgment)).

Similarly, in Ducote, 953 F.2d at 1001-02, 1003, a spud barge with a raked bow was used to transport and support a pile driving crane. We held that the scope of the project, which involved moving the spud barge to drive piles over an approximate area of five miles, would support a jury finding that the transportation function of the pile driving barge was more than incidental. Id. at 1004.

In contrast, we held in Bernard, 741 F.2d at 832, that a structure not designed for navigation that was used by a worker to assist in a pile-driving operation had only an incidental transportation function. Bernard worked on a small raft-like structure--a "work punt"--that he stood on as he guided the pilings into place. Id. at 826. Other workers lowered the pilings into place by a crane located on the shore. Id. In Bernard, id. at 833, we distinguished Brunet, by stating that the barge in that case carried a 150-ton crane and was designed to transport that

crane "across navigable waters to job sites that cannot be reached by land-based pile drivers." (Citations omitted).

Similarly, in Ellender, 909 F.2d at 807-08, we held that a spud barge used to support a large mobile crane that drove piles for an oil platform was not a vessel because it "was not solely designed to transport a crane from jobsite to jobsite" The barge also supported other equipment used to build the oil platform. Id. at 807. We stated that because the plaintiff did not argue that the defendant used the barge "to transport [the] crane around Louisiana waters," and the workers mainly used the barge to support the crane at the job site, any transportation function was merely incidental to the barge's primary function as a work platform. Id. at 808.

In the light of these precedents, we hold that although the L/B I moved across Mobile Bay between pipe welding operations, any transportation function served by the L/B I was merely incidental to its primary function as a work platform for laying the pipeline. First, unlike Sharp, 917 F.2d at 888, Ducote, 953 F.2d at 1003, and Brunet, 715 F.2d at 198, the L/B I was not designed for transportation. As stated above, Davis does not even contend that the L/B I, which has no self-propulsion system or navigation lights, has a raked bow, or any other indication that it was designed to navigate waters, instead of serving as a work platform.

Second, the above-cited precedents make clear the important difference between transportation and movement. In Sharp, 917 F.2d

at 888-89, Ducote, 953 F.2d at 1004, and Brunet, 715 F.2d at 199, the barges regularly transported, or would regularly transport, a pile-driving crane, or materials and supplies to various fixed job sites on the water where the piles were located. In Bernard, 741 F.2d at 832, although the work punt moved around the job site, it served mainly to support a man who guided the piles into place by working with minor tools around the job site. In Ellender, 909 F.2d at 808, even though the barge may have transported the large mobile pile-driving crane to the job site, its main function was to support the men and equipment in their work at the job site. In all of the cases, tugs or other transporting vehicles moved the structures to the job site.¹ In those cases finding vessel status, however, the structure's regular function was transporting a large, dominant, piece of machinery to a job site where men would use it to perform work, as opposed to merely providing a flat, though

¹In Leonard v. Exxon Corp., 581 F.2d 522, 524 (5th Cir. 1978), cert. denied, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 397 (1979), the barge assembly used to lay pipeline was not a vessel even though one of the barge units transported pipe from the shore to the other barges and the other barges moved somewhat, because the barge assembly was connected more or less permanently to the bank of the river by steel cables. In Watkins v. Pentzien, Inc., 660 F.2d 604, 606 (5th Cir. 1981), cert. denied, 456 U.S. 944, 102 S.Ct. 2010, 72 L.Ed.2d 467 (1982), a spud barge was affixed to the bed of the river by the spuds as the workers laid a pipeline. In the instant case, the L/B I was connected to the shore and bottom of the bay through the pipeline itself. Additional stability was provided by the spuds. Although the L/B I moved from section to section, the purpose of the movement was not to transport a large piece of machinery that could only be supported by a large barge but, instead, to provide a flat stable surface for the men to work on the next section of the pipeline.

movable, surface at the job site upon which men could work with and store smaller tools. See Hurst v. Pilings & Structures, Inc., 896 F.2d 504, 506-07 (11th Cir. 1990) (holding that a spud barge that was not designed for navigation and did not transport cargo, although it supported a diving air pump and a mobile crane, was not a Jones Act vessel even though workers moved that barge along the seawall that they repaired).

In the instant case, the L/B I was not designed as a transportation barge. It primarily served as a flat stable surface upon which the men, including Davis, worked on the pipeline. Instead of transporting a large, dominant, piece of machinery--like a 150-ton pile-driving crane--the L/B I merely served as a work platform where men used and stored minor tools such as welding machines and X-ray machines. Tugboats transported the L/B I and the men to the job site. The men used the welding machines and the mobile cranes on the L/B I. See Hurst, 896 F.2d at 506.²

Thus, we hold that as matter of law, any transportation function served by the L/B I was merely incidental to its primary purpose of serving as a work platform because the L/B I was not

²That the mobile cranes were taken off the L/B I on a prior job and used on land, and then moved back to the L/B I and used there, does not indicate that the L/B I served more than an incidental transportation function. Instead, the removal of the cranes relates to the mobility of the cranes themselves and shows that the L/B I was not required for the transportation of those small cranes. See Ellender, 909 F.2d at 808 (holding spud barge that supported large mobile crane and served primarily as a work platform had only an incidental transportation function).

designed as a transportation barge and, although movable across navigable waters, any transportation function served was incidental to its primary work platform function. Because the L/B I was constructed and used as a work platform, was anchored at the time of the accident, and only had incidental transportation functions, we hold that the L/B I was not a Jones Act vessel.

IV

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.