

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30228
Summary Calendar

LYNN A. FOLAND,

Plaintiff-Appellant,

VERSUS

SEACOR MARINE, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(94-CV-310-I(1))

(November 4, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

On January 27, 1994, Lynn A. Foland filed suit against Seacor Marine, Inc., seeking recovery under the Jones Act and general maritime law for an injury he sustained on October 26, 1990, aboard the M/V PAIGE. Foland alleged that he was attending his duties as a crew member when a large wave washed over the back deck of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

vessel, causing him to fall and break his wrist. He further alleged that he was treated by Seacor's company physician and was told that his wrist had healed, but that he recently had the wrist x-rayed and found that it had not healed.

Seacor filed a motion to dismiss Foland's suit pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the action was time-barred. Foland filed a memorandum in opposition, arguing that Seacor's physician had notified Seacor that "there was some question as to whether the fracture was in fact healed," but that he was not notified of this situation. He further argued that the injury, a non-union of the carpal navicular requiring either bone grafting or wrist fusion, was a latent injury; therefore, the statute of limitations did not begin to run until the injury was diagnosed. Foland also argued that he had a claim for maintenance and cure and "possibly for the negligence of Seacor's physician in failing to properly advise [him] of his medical situation." He attached to his opposition an affidavit wherein he stated that he was never informed that he might have a permanent disability, letters from Seacor's physician to Seacor detailing his progress, and letters from a second physician to Foland's attorney indicating that his injury might require surgery.

Seacor responded, arguing that Foland's injury was not latent and that there was no concealment of his condition by Seacor's physician. Seacor also argued that Foland had his wrist x-rayed in 1993 only because he re-injured his arm and wrist aboard his

current employer's vessel when he was struck by a mooring line.¹ Id. at 12. Finally, Seacor argued that Foland had failed to include a claim for maintenance and cure in his complaint, but that, even assuming Foland had made such a claim, it too was time-barred.

The district court granted Seacor's motion. The court concluded that, although Foland's broken wrist may have been more serious than he originally thought, Foland's lawsuit for his injury and the allegedly negligent care of the Seacor physician must have been filed within three years after the time of the occurrence which caused his injury. Thus, the district court reasoned, Foland's suit was time-barred. Regarding Foland's allegation that he was entitled to maintenance and cure, the district court concluded that Foland failed to include that claim or the factual allegations supporting the claim in his complaint; therefore, "the Court declines to address the issue at this time."² Foland timely appealed.

OPINION

Foland argues that the district court erred by granting summary judgment in favor of Seacor solely because he filed suit three years after the date of his accident. The district court indicated that it was granting Seacor's motion to dismiss; however,

¹ Seacor included in its response a letter from Foland's second physician recounting Foland's second injury.

² Foland does not assert his maintenance and cure claim on appeal. Thus, it is deemed abandoned. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988).

our review of the district court's order and reasons reveals that the court relied on matters outside the pleadings in dismissing the suit as time-barred. Thus, the district court's dismissal is treated as a grant of summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(b)(6)(if matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment).

This Court reviews the district court's grant of summary judgment de novo. Bunge Edible Oil Corp. v. M/V TORM RASK, 949 F.2d 786, 788 (5th Cir.), cert. denied, 112 S. Ct. 2998 (1992). Summary judgment is appropriate when, considering all of the facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Newel v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of material fact if, taking the record as a whole, a rational trier of fact could not find for the nonmoving party. Id. Rule 56 of the Federal Rules of Civil Procedure "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(e)).

It is undisputed that Foland's suit was filed more than three years after the date of his accident, and that an action under either the Jones Act or the general maritime law must be filed within three years from the date that the cause of action accrues. See Armstrong v. Trico Marine, Inc., 923 F.2d 55, 58 (5th Cir. 1991). Foland argues that because his is a "classic latent injury case," the limitations period did not begin to run until his condition was discovered in 1993.

This Court uses one of two rules to determine when the statute of limitations begins to run. Armstrong, 923 F.2d at 58. The "time of event rule" applies if some injury is discernable when the tort occurs. Id. Under the time of event rule, the cause of action accrues when the harmful event occurs. Id. The "discovery rule" applies to pure latent injury cases, cases in which the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred. Id. Under the discovery rule, the cause of action accrues on the date the plaintiff discovers, or should have discovered, both the injury and its cause. Id.

The district court determined that Foland's action was not a pure latent injury action, but that the action fell "quite clearly within the traumatic event/latent manifestation category to which the time of event rule applies to determine when plaintiff's cause of action accrued." A traumatic event/latent manifestation case occurs when the plaintiff realizes both that he is injured and what is responsible for causing the injury, but the full extent of the

harm has not become manifest. Armstrong, 923 F.2d at 58-59. In traumatic event/latent manifestation cases, the time of event rule applies and the cause of action accrues when the harmful event occurs. Id. at 58.

In Armstrong, the plaintiff alleged psychological injuries after serving on a vessel during a hurricane four years earlier. Id. at 57. This Court held that the case fit within the traumatic event/latent manifestation rule because Armstrong knew he was injured shortly after his frightening experience aboard the vessel. Id. at 59. The Court noted that Armstrong admitted experiencing psychological problems shortly after the event, and that Armstrong associated his problems with that event. Id.

Similarly, in Clay v. Union Carbide Corp., 828 F.2d 1103, 1104-05 (5th Cir. 1987), the plaintiff was diagnosed with "chronic respiratory complaints" aggravated by his exposure to irritant fumes seven years earlier. This Court held that the case fit within the traumatic event/latent manifestation rule because Clay suffered many ailments that were virtually identical to his subsequent diagnosis; therefore, "Clay possessed or had reasonable opportunity to discover the critical facts of the injury he claims to have suffered." Id. at 1107.

The authority cited by Foland in support of his argument, Taurel v. Central Gulf Lines, Inc., 947 F.2d 769 (5th Cir. 1991), is distinguishable because it involved a pure latent injury, asbestosis. Taurel admitted in his deposition that a fellow seaman and a doctor told him that his exposure to asbestos might have

caused his condition. Id. at 771. This Court held, however, that neither of the conversations demonstrated that Taurel knew or should have known that asbestos was more likely for his problems than other potential causes; therefore, the cause of action did not accrue until Taurel was diagnosed with asbestosis. Id. at 771-72.

Unlike the plaintiff in Taurel, Foland's injury occurred during a traumatic event. Foland knew that he injured his wrist when he fell aboard the vessel and that the injury he sustained was a broken wrist. The fact that Foland did not know the full extent of his injury does not remove the case from the traumatic event/latent manifestation category. See Armstrong, 923 F.2d at 58-59. The district court did not err by concluding that Foland's case fell within the traumatic event/latent manifestation category and that, consequently, the cause of action accrued when Foland was first injured.

Foland also argues that the district court ignored his allegations that he had been misled by Seacor's physician regarding the extent of his injury. He argues that the physician's misrepresentations estop Seacor from claiming the statute of limitations as a defense. Id. at 5-6. In support of his claim that he was misled, Foland included in his pleadings a letter from the Seacor physician to Seacor in which the physician stated that there was some question as to whether the fracture was in fact healed.

Summary judgment is properly rendered for the defendant on the basis of the expiration of the statute of limitations unless the

plaintiff presents facts which create a genuine factual issue as to the defendant's conduct that would equitably estop him from asserting the statutory bar. Sanchez v. Loffland Bros. Co., 626 F.2d 1228, 1231-32 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981). Conduct mandating the estoppel principles includes active misrepresentations to the plaintiff regarding his legal rights and promises to pay or to settle if a suit is not filed. Id. at 1231. However, the conduct must be so misleading as to cause the plaintiff's failure to file suit. Id.

Foland asserted that Seacor's physician reported to the company instead of him, and that he did not have an "in depth discussion relative to his situation" with the Seacor physician. In his affidavit, he alleged that he was never informed that he might have any permanent disability as a result of his injury. Other than those assertions, Foland provided no facts which suggested that Seacor's conduct was so misleading as to cause him to fail to file suit. The letter does not support Foland's assertion that he was misled because it does not reveal that the physician suspected that Foland might have problems with his wrist in the future. By determining that Foland's suit was time-barred, the court implicitly determined that Foland had failed to present facts which established that Seacor was equitably estopped from asserting the statutory bar. The court did not err by making such a determination. See Sanchez, 626 F.2d at 1231-32.

Finally, Foland argues that the district court failed to address his claim that Seacor was responsible for the negligence of

its physician in failing to advise him of his medical condition, thus prejudicing his legal rights. Seacor argues that the district court, by concluding that Foland was informed that his wrist was broken, implicitly rejected Foland's argument that the physician was negligent in failing to advise Foland regarding his injury.

The district court did not address Foland's contention that Seacor's physician was negligent in failing to advise him that his wrist had not healed. Under the Jones Act, the shipowner is responsible for the negligence of an independent practitioner employed by the shipowner. Central Gulf S.S. Corp. v. Sambula, 405 F.2d 291, 302 (5th Cir. 1968). However, it is unclear when such a cause of action accrues under the Jones Act. Language in Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 230 (5th Cir. 1984), suggests that a negligent-diagnosis claim should be treated as a pure latent injury and the cause of action accrues on the date the plaintiff discovers, or should have discovered, the malpractice. However, because the district court did not address this claim, we remand that issue to the district court for further consideration. See Armstrong, 923 F.2d at 57 (affirming damages claim as prescribed, but remanding maintenance and cure claim not expressly addressed by the district court).

Accordingly, that portion of the district court's judgment dismissing Foland's claim for damages related to the unseaworthiness of Seacor's vessel and Foland's resultant broken wrist is affirmed. Foland's claim for negligence of Seacor's physician is remanded.

AFFIRMED in part, REMANDED in part.