UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60519
Summary Calendar

ROBERT WEAVER, ET AL.,

Plaintiffs-Appellants,

versus

UNITED STATES COAST GUARD and
THE UNITED STATES OF AMERICA,

Defendants,

THE UNITED STATES OF AMERICA,

Defendant-Appellee-Third
Party Plaintiff-Appellant,

versus

MINI INC. d/b/a "PORKY'S CABARET",

Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-G-93-128)

(April 28, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellants challenge the summary judgment granted in favor of the government in a case arising under the Federal Tort Claims Act for the death of their family members. The Weavers' survivors sought to hold the government and the Coast Guard liable for the actions of Coast Guardsman Mark Brown, who, driving while intoxicated, crashed his pickup truck into the victims' car in Galveston, Texas. Brown was on a four-hour liberty from the Coast Guard cutter BUTTONWOOD at the time of the accident and was attempting to return to the ship before liberty expired at 6:00 p.m. He had been drinking heavily with other crewmen during the liberty. He pled nolo contendere to three counts of involuntary manslaughter and is now imprisoned. The district court held that the government is not liable for Brown's drunken driving because he was not acting in the course and scope of his employment nor was he on a "special mission" for the Coast Guard at the time of the accident. The court further held that the government was not liable for alleged negligence of fellow Coast Guardsman Bray because Bray's actions did not proximately cause the tragedy as a matter of law. We find no error and affirm.

After a careful review of the district court's analysis of applicable law in light of the record, we have little to add to his discussion of the claim regarding Brown's negligence. Texas law of respondeat superior governs the liability of the United States under the Federal Tort Claims Act. Fairly read, the deposition testimony of the crewmen and officers of the BUTTONWOOD establishes that the crewmen were free to do as they pleased during

the four-hour liberty on June 21, 1990. While the officer who announced the liberty might have suggested that the crewmen tend to their personal affairs, purchase supplies, or visit family members, he did not order the crewmen to do so. Brown was neither acting in the course and scope of his employment nor was he on a "special mission" when he became drunk and ran into the Weavers' car.[1]

The Weavers next contend that the Government is liable for Bray's negligence in not reporting that Brown was drunk on board the BUTTONWOOD on the morning of June 21. They argue that Bray was obliged to report that Brown had told him about drinking a lot of tequila the night before and missed muster. They also argue that a material factual issue exists regarding whether it was foreseeable to Bray that Brown would drink and drive during the afternoon liberty.

The court held that, even if Bray should have reported Brown, "it was not at all foreseeable that Bray's failure would result in Brown being allowed liberty, becoming intoxicated, driving his car, and killing the Plaintiffs' decedents."

Bray testified in depositions that he smelled alcohol on Brown's breath around 8:00 or 9:00 a.m. on the morning of June 21 and that Brown was late and missed muster. Brown appeared "beat" when he arrived in the engine room. Later that day, Brown told Bray that he and three or four other sailors had been drinking

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[1] The Weavers incorrectly rely on Garcia v. United States, 799 F.Supp. 674 (W.D. Tex. 1992), affirmed, 22 F.3d 609 (5th Cir.), rehearing granted en banc, 22 F.3d 612 (1994). The granting of rehearing en banc vacated the panel opinion, which had tentatively affirmed the district court on other grounds. The district court decision in Garcia is currently of no force or effect.

tequila the previous evening at one sailor's apartment. Bray could not recall whether Brown had claimed to have consumed almost an entire bottle by himself or had averred that the group together had consumed that amount. Bray could not remember whether Brown had told him that he had passed out. According to Bray, he did not believe that Brown was intoxicated on June 21. Bray also testified that he and Brown conversed about whether the crew would be granted an afternoon liberty and about their plans to go drinking if one was granted.

The court characterized Brown's statements to Bray as hearsay, insofar as they are offered to prove that Brown may have consumed a bottle of tequila during the first liberty. FED. R. EVID. 801(d)(2)(D); see Cormier v. Pennzoil, 969 F.2d 1559, 1561 (5th Cir. 1992)(hearsay evidence may not be considered in determining whether summary judgment is appropriate). The Weavers contend that they do not offer Brown's statements to prove the truth of those statements, but to show that Brown made those statements to Bray. In the light of Bray's testimony that he did not believe that Brown appeared intoxicated on June 21, however, the relevance of Brown's statements is questionable. Lt. Comdr. Gray's testimony indicates that crewmen are obliged to report intoxicated guardsmen; not that they are obliged to report guardsmen who claim to have imbibed excessively while off-duty. This court need not determine whether Brown's statements were hearsay. Even if those statements were admissible, the Weavers' negligence contention must fail.

"The law of [Texas] is that proximate cause includes two essential elements: (1) foreseeability and (2) cause in fact or causal relation." Wolf v. Friedman Steel Sales, Inc., 717 S.W.2d 669, 671 (Tex. Ct. App. 1986). "[I]n Texas both components of proximate cause present questions of fact unless reasonable minds are compelled to a single conclusion, in which event the matter becomes a question of law." Garza v. United States, 809 F.2d 1170, 1173 (5th Cir. 1987)(internal and concluding citations omitted).

> Foreseeability, the second element of proximate cause, means the actor as a person of ordinary intelligence should have anticipated the dangers his negligent act creates for others. Foreseeability does not require the actor anticipate the particular accident, but only that he reasonably anticipate the general character of the injury. . . . Generally, a person's criminal conduct is a superseding cause extinguishing liability of a negligent actor. Operation of a motor vehicle while intoxicated is unlawful. The tortfeasor's negligence, however, is not superseded when the criminal conduct is a foreseeable result of the negligence.

El Chico Corp. v. Poole, 732 S.W.2d 306, 313-14 (Tex. 1987)(internal citations omitted).

The district court found that Bray could not have foreseen that Brown would drink heavily and drive his truck into the decedents' car. The Weavers allege that the Government failed to raise foreseeability as an issue in its summary judgment motion. Indeed, the Government's summary judgment motion indicates that the Government believed that the Weavers sought recovery based on Bray's alleged negligence during the four-hour afternoon liberty. The Government did not discuss the foreseeability issue.

In their response to the summary judgment motion, the Weavers articulated their theory that Bray had been negligent by

failing to report a drunken Brown earlier in the day. Significantly, the Weavers alleged that "Bray failed to intervene in a situation when he clearly knew or should have known the condition of MK1 Brown and the danger that condition posed to the community," and that "[h]ad Bray made this mandatory report, these procedures would have been enacted and Brown would not have had an opportunity to leave the base, consume more alcohol, get behind the wheel of an automobile, and drive through the fateful intersection[.]"

The Weavers thus provided the district court with the theoretical basis of their contention that Brown's drunken driving in the afternoon was foreseeable to Bray, albeit without the legal citations and arguments that they offer to this court. Additionally, as will be explained below, the Weavers' foreseeability contention is unconvincing as a matter of law. Any error by the district court in holding that the Government had carried its summary judgment burden regarding the foreseeability to Bray of Brown's actions therefore is harmless. See FED. R. CIV. P. 61.

Assuming, arguendo, that Bray violated his duty to report what Brown had told him, and that Bray's duty to protect the safety of the crew somehow extended to the motoring public at large, no reasonable mind could conclude that Brown's drunken driving was foreseeable to Bray. Assuming that Brown was intoxicated when he appeared in the engine room around 8:00 or 9:00 a.m. (as Bray avers he was not), Bray could not have foreseen that Brown would leave

the ship at 2:00 p.m., drink more alcohol, and drive his pickup. Brown's later driving was not a foreseeable result of Bray's failure to report Brown as intoxicated. Moreover, any negligence by Bray after liberty was granted was outside the scope of Bray's employment.

The Weavers contend that the court should take into account that Bray had anticipated the afternoon liberty and discussed transportation and a purchase of beer with Brown before leaving the BUTTONWOOD on liberty. Bray's conversation with Brown and Cole regarding afternoon plans does not change the result of the foreseeability analysis. Bray averred that Brown did not appear to be intoxicated on June 21. He could not have foreseen that his failure to report the tequila incident could have contributed to Brown's drunken driving.

Two additional minor matters need to be addressed. The Weavers contend without citation of authority that the government should be held liable because the collective actions of the BUTTONWOOD crew constitute negligence. A litigant must brief issues on appeal. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Having failed to brief their contention, the Weavers have abandoned it. United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, 113 S.Ct. 984 (1993). Further, we need not address the government's cross-appeal of the dismissal of its third-party complaint against Mini, Inc.

For these reasons, the judgment of the district court is AFFIRMED.