IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60581
(Summary Calendar)

ERNEST L. SMITH,

Plaintiff-Appellant,

versus

OLE MAN RIVER TOWING, INC., a corporation and SG Towing, Inc., a corporation

Defendant-Appellees.

Appeal from the United States District Court
For The Northern District Of Mississippi

(4:92cv148-B-O)

(July 10, 1995)

Before DUHÉ, WIENER, and STEWART:

PER CURIAM*:

Plaintiff-Appellant Ernest L. Smith brought this suit against Ole Man River Towing, Inc. (OMRT), seeking damages under the Jones

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Act[1] and general maritime law for personal injuries sustained while serving as an engineer aboard the M/V ANGIE GOLDING, a vessel owned by OMRT. Following a bench trial, the district court found OMRT responsible for the unseaworthy condition of the M/V ANGIE GOLDING and set Smith's total damages at $44,228.00. In addition, the court found that Smith's own negligence contributed to the accident, assessed his contributory negligence at fifty percent, and reduced his damages to $22,114.00. Finding no error, we affirm.

I.

FACTS AND PROCEEDINGS

In November 1990, OMRT hired Smith, a tow boat engineer with twenty years experience, to serve as trip engineer on the M/V ANGIE GOLDING. On November 7, 1990, Smith boarded the M/V ANGIE GOLDING to begin duty, and on November 9, 1990, the vessel sailed. A few days after embarking, Smith was called to the engine room when the starboard engine failed to start.

Working alone, Smith removed the starboard starter motor, using the chain hoist to lower the motor to the engine room floor. He then lifted the 75 pound motor and began carrying it toward the workbench. Halfway to his destination, Smith slipped on the oily engine room floor and fell across the starboard shaft. As he fell, the starter motor lunged to the side, wrenching Smith's left shoulder. After falling, Smith again lifted the starter motor and carried it the remaining distance to the workbench. Several hours

[1] 46 U.S.C.App. § 688 (West 1995).

later, Smith began to notice a pain in his left shoulder. Although he continued to work for the next few days, the pain in his left shoulder increased and eventually forced him to abandon employment on the M/V ANGIE GOLDING.

In June 1992, Smith filed this action, pursuant to the Jones Act and the general maritime law, alleging unseaworthiness. Smith sought damages for past wages, future wages, past pain and suffering, future pain and suffering, and future disability. Following a bench trial, the district court found that the oil on the engine room floor at the time of Smith's fall created an unseaworthy condition; thus, the vessel owner was liable for Smith's injuries. The district court awarded Smith $34,228.00 in lost wages and $10,000.00 for pain and suffering, but denied Smith damages for future wages, future pain and suffering, and future disability.

The district court also found that Smith was contributorily negligent. The court first noted that even though Smith had notice of the oil on the engine room floor, he attempted to carry the 75 pound motor over the oily surface anyway. Second, the court noted that Smith failed either to call a fellow crew member to assist him or to use the chain hoist in moving the heavy motor from the engine to the workbench. As a result, the district court assigned fifty percent contributory negligence to Smith, reduced Smith's award by fifty percent, and entered a judgment of $22,114.00 in Smith's favor.

Smith timely appealed, arguing that the court erred in (1) reducing his damage award by the percentage of his contributory negligence, and (2) denying his recovery for future pain and suffering.

II.

ANALYSIS

A. CONTRIBUTORY NEGLIGENCE

In Smith's first assignment of error, he essentially launches two separate attacks against the district court's conclusions regarding contributory negligence: (1) that, as a matter of law, contributory negligence is not available in a general maritime law claim for unseaworthiness and (2) that even if contributory negligence is available, as a factual matter, the evidence in this case does not support the trial judge's determination of fifty percent contributory negligence. We conclude that the first assertion is legally unsupported and that the second is factually incorrect.

1. The Legal Issue

Under both the Jones Act and the general maritime law, the doctrine of comparative negligence applies and bars an injured party from recovering for damages to the extent that they are sustained as a result of his own fault.[2] A determination of contributory negligence does not bar recovery, however, but only

[2] *See Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir.), *reh'g denied*, 888 F.2d 1388, *aff'd sub nom.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

mitigates damages.[3] These two rules of law provided the legal rubric under which the trial judge proceeded. OMRT was liable for an unseaworthy condition of the M/V ANGIE GOLDING. Smith's damages produced by the vessel's unseaworthy condition were calculated to be $44,228.00. But, as discussed below, Smith was found to have been fifty percent contributorily negligent, so he could recover only one-half of these damages or $22,114.00. As precedent required, Smith's contributory negligence did not bar his recovery; instead, it served to reduce his gross damage award by his own percentage of fault. We find no legal error.

2. The Factual Issue

In this Circuit, it is well established that "[i]n a bench trial case, a trial court's findings respecting negligence, cause, and proximate cause are findings of fact reviewed under a clearly erroneous standard."[4] Substantial evidence supports the district court's conclusion that Smith was negligent and that his negligence proximately caused his injury. In its oral opinion, the district court enumerated three separate instances of Smith's contributory negligence: (1) Smith had notice of the oily floor, but attempted

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[3] *See, e.g., Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1355 (5th Cir.)(upholding district court allocation of fault; twenty percent attributable to injured seaman and eighty percent attributable to vessel owner)(*citing Sacony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431, 59 S.Ct. 262, 266, 83 L.Ed. 265 (1939)), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988).

[4] *Gavagan v. United States*, 955 F.2d 1016, 1019 (5th Cir. 1992); *see also Johnson*, 845 F.2d at 1352 (Jones Act case; "Questions of negligence and causation in admiralty cases are treated as fact questions . . . . Findings of fact in admiralty cases are binding unless clearly erroneous.").

to carry the motor over this surface anyway; (2) Smith failed to obtain assistance from a fellow crew member in moving the motor; and (3) alternatively, Smith failed to use the chain hoist to move the motor to the workbench. Based on these three undisputed facts the district court concluded that if Smith "had used good judgment at all, . . . he could have avoided the whole accident." Reviewing the record as a whole, we are not "left with the definite and firm conviction that a mistake has been committed."[5] Accordingly, we hold that Smith has failed to establish that the district court's findings on contributory negligence are clearly erroneous.

B. FUTURE PAIN AND SUFFERING

In his second assertion of error, Smith claims that the district court erred in denying damages for future pain and suffering. He argues that his uncontroverted testimony and that of Dr. Savoie require us to reverse and remand this case with an instruction to the district court to calculate damages for Smith's future pain and suffering. We disagree.

We review a district court's assessment of damages under the "clearly erroneous" standard.[6] A plaintiff who seeks to recover for damages that he is likely to sustain in the future must prove them by a preponderance of the evidence, and can do so only by

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[5] *Noritake Co., Inc v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980).

[6] *See, e.g., Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 901 ("A trial judge's assessment of damages is a finding of fact is reviewed under a clearly erroneous standard."), *modified on denial of reh'g*, 22 F.3d 568 (5th Cir. 1994); *Breaux v. Schlumberger Offshore Services*, 817 F.2d 1226, 1232 (5th Cir. 1987)(same); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1035 (5th Cir. 1984)(same).

adducing expert opinion testimony.[7] For this reason, any testimony offered or opinions advanced by Smith -- an engineer, not a medical expert -- are irrelevant to an assessment of the likelihood of Smith's future pain and suffering.

The time-honored method of proving an individual's future physical condition is to present a qualified physician's opinion testimony based on reasonable medical probability.[8] Certainty is not required: The plaintiff need only demonstrate that the event is more likely to occur than not. On the other hand, possibility alone cannot serve as the basis for recovery, as mere possibility does not meet the preponderance-of-the-evidence standard.[9] Dr. Savoie's conclusions regarding Smith's future pain and suffering are tentative at best. The exchange between Dr. Savoie and counsel for Smith transpired as follows:

> Q: And as a practical matter, Doctor, can you tell the members of the jury here how that [the injury to Smith's shoulder] may affect his ability to carry on at work or his everyday activities?
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> A: In Mr. Smith's case, he really has no restrictions on his day-to-day activities, either working or leisure time, at home. It's basically a possibility of future arthritis, [sic] fact that there is going to be scarring in the rotator cuff and he may have some aching, especially when he does too much overhead activities or when the weather changes.

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[7] *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-37 (5th 1985).

[8] *Id.* at 1137 (*citing* Restatement (Second) of Torts, §910, comment b. at 469, and §912, comment e. at 485 (1979)).

[9] *Id.*

Q: And would those be possibly -- we're not saying they're going to occur -- but they could be some of the possible problems or complications he may have in the future?

A: Yes, sir, that's correct.

We agree with the district court: "There has been no persuasive evidence offered to the [district] Court that the plaintiff is undergoing or will undergo future pain and suffering that is significant enough to justify an award of damages." Smith failed to present evidence of anything greater than a "possibility" that he may sustain future pain and suffering as a result of his injuries. Again, "we are not left with the firm and definite conviction that an error has been committed."[10]

III.

CONCLUSION

The district court's conclusions on the damages issues are adequately supported, both by the precedent in this Circuit and by the evidence adduced in this case. Accordingly, the district court's judgment is, in all respects,

AFFIRMED.

[10] *Noritake*, 627 F.2d at 728.