IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2739
(Summary Calendar)

JAMES G. HETZEL,

Plaintiff-Appellant,

versus

M/V FEDERAL LAKES, ET AL.,

Defendants,

MARINE TRANSPORT LINES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-3770)

(November 22, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff, James G. Hetzel, was injured while climbing stairs in the course and scope of his employment on the motor vessel Federal Lakes. Hetzel lost his balance when the toe of the boots he wore got caught underneath a step. Hetzel filed suit against his employer, Bethlehem Steel Corporation, for negligence, products liability, and deceptive trade practices because it sold him the boots. Hetzel also named as a defendant Marine Transport Lines

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(MTL), the owner and/or occupier of the M/V Federal Lakes. Upon motion of each defendant, the district court entered summary judgment against Hetzel. Hetzel appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

James Hetzel was employed as a welder for Bethlehem Steel Corporation during its repair operations on the M/V Federal Lakes which was docked at BSC's shipyard in Beaumont, Texas. At approximately 3:45 a.m. on September 18, 1987, Hetzel was climbing a flight of stairs while carrying 85 to 100 pounds of welding cable on his shoulder. The toe of Hetzel's boot caught underneath the "lip" of the tenth step. Hetzel lost his balance, fell backward, and twisted his knee as he awkwardly stepped down to the eighth step. Hetzel attributes his injury to several factors which include moisture (dew) on the stairs, a layer of sand from previous sandblasting activity on board the vessel, and the allegedly defective design of the boots. Hetzel drew compensation in the form of disability payments and medical expenses, pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, et seq.

On October 13, 1989, Hetzel filed suit in Texas state court against Bethlehem Steel Corporation, and Marine Transport Lines.[1] The petition alleged that MTL "manufactured, designed, or maintained a defective and extremely dangerous stairwell" which

[1] Hetzel also named the M/V Federal Lakes as a defendant, however, there was no attachment of the vessel and no judgment rendered against it.

caused his injuries" and "failed to keep the working area and the accompanying stairwells clean of debris and excessive moisture." The petition also alleged that Hetzel's injuries "were caused by the defectively designed safety boots sold to him by Defendant Bethlehem under the 'threats' of job termination'."

The case was removed to federal court and each defendant moved for summary judgment. On October 5, 1992, the district court granted summary judgment against Hetzel as to each defendant. Hetzel requested reconsideration of this judgment. The district court reinstated his DTPA claims against Bethlehem Steel and remanded them to state court, and maintained summary judgment in favor of MTL. Hetzel filed a second motion for reconsideration of the judgment in favor of MTL. The district court reaffirmed the summary judgment in MTL's favor.

Hetzel appeals the district court's October 5, 1992 judgment and its rulings on the two motions for reconsideration as to dismissal of his claims against MTL. We affirm.

HETZEL'S CLAIM AGAINST MTL

The district court determined that there was no proof that vessel personnel had actual knowledge of the debris from the sandblasting on the stairs and no proof that the vessel personnel had control of the vessel. Hetzel contends that the district court misapplied the "open and obvious" doctrine and failed to properly follow the precedent of this circuit.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). When a party fails to make a showing sufficient to establish the existence of an element which is essential to that party's case and on which that party will bear the burden of proof at trial, there can be no genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Thus, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Randolph v. Laeisz, 896 F.2d 964, 969 (5th Cir. 1990), citing Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the LHWCA"), establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with various benefits for work-related injuries and deaths. Howlett v. Birkdale Shipping Co., ___U.S.___, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994). The injured longshoreman's employer--in most instances, an independent stevedore--must pay the statutory benefits regardless of fault, but is shielded from any further liability to the longshoreman. Id. The LHWCA was amended in 1972. The design of the 1972 Amendments was to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer. Id. "Subjecting vessels to suit for injuries that could be anticipated

and prevented by a competent stevedore would threaten to upset the balance Congress was careful to strike in enacting the 1972 Amendments." Id. However, the vessel or shipowner is still subject to liability under certain circumstances.

As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 170, 101 S.Ct. 1614, 1623, 68 L.Ed.2d 1 (1981). The LHWCA provides that an employee covered by the LHWCA may recover damages for injuries caused by the negligence of a vessel. 33 U.S.C. § 905(b). Accordingly, Scindia Steam's broad statement of vessel immunity is tempered by three general duties that shipowners owe to longshoremen. Howlett, 114 S.Ct. at 2063; Masinter v. Tenneco Oil Co., 867 F.2d 892, 897 (5th Cir. 1989). First is the "turnover duty," which relates to the condition of the ship upon commencement of stevedoring operations. Howlett, 114 S.Ct. at 2063; Scindia Steam, 451 U.S. at 167, 101 S.Ct. at 1622. The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." Id. The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to operations in areas under the principal control of the independent stevedore. Howlett, 114 S.Ct. at 2063; Scindia Steam, 451 U.S. at 167-178, 101 S.Ct. at 1622-28. This duty to intervene provides that, if the shipowner becomes aware of a dangerous condition in the ship's gear

during the stevedoring operation, and is also aware that the stevedore is unreasonably failing to protect a longshoreman against this danger, then the shipowner has a duty to intervene and repair the gear constituting the danger.[2] Casaceli v. Martech International, Inc., 774 F.2d 1322, 1326, (5th Cir. 1985), cert. denied, 475 U.S. 1108, 106 S.Ct. 1516, 89 L.Ed.2d 914 (1986), citing Scindia Steam, 451 U.S. at 172-76, 101 S.Ct. at 1624-26. The rationale of Scindia Steam is not limited to stevedoring operations; it applies to any independent contractor and its employees covered by the LHWCA and working aboard ship. See Casaceli, 774 F.2d at 1326-27, quoting Hill v. Texaco, Inc., 674 F.2d 447, 451 (5th Cir. 1982); Teply v. Mobil Oil Corp., 859 F.2d 375, 377 (5th Cir. 1988).

The instant facts do not implicate the "turnover duty". To the extent that the second duty is implicated, the district court correctly determined that the record shows no indication that MTL had active control of the stairway on which Hetzel was injured. Thus, we are here concerned only with the duty to intervene.

Hetzel argues that members of the vessel's crew came aboard prior to his accident and were therefore aware that there was sand

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[2] See also, Randolph, 896 F.2d at 970 (citing Masinter, 867 F.2d at 897), where we stated that there is an exception to the general rule of vessel immunity

> if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to work on in the face of it and therefore cannot be relied on to remedy it.

on the vessel from the sandblasting operations of an independent contractor other than his employer, BSC. Hetzel presented evidence that he and another BSC employee notified BSC of the hazardous condition during a safety meeting. He argues that it was not BSC's responsibility to clean up after another contractor. According to Hetzel, any member of the vessel's crew who came on board would have seen this dangerous condition (the sand that was all over the place), and this knowledge imputes notice to MTL.

Even if we were to assume, *arguendo*, that (1) members of the vessel's crew did come aboard and see the sand, (2) the crew members held positions such that notice to MTL could be inferred from their knowledge, and therefore (3) MTL had actual knowledge of the sand on the vessel, mere knowledge is not enough to show a breach of the duty to intervene. MTL is not held to a duty to anticipate the danger of the sand. See Casaceli, 774 F.2d at 1327, quoting Helaire v. Mobil Oil Co., 709 F.2d 1031, 1038-39 (5th Cir. 1983). Something more is required when, as here, the alleged dangers were obvious to BSC employees and arose during and in the area of BSC's operations. See and compare, Futo v. Lykes Bros. S.S. Co., 742 F.2d 209, 215 (5th Cir. 1984); Casaceli, 774 F.2d at 1327-28. Even if there exists a dispute as to whether MTL had actual knowledge that the sand was on the M/V Federal Lakes, there is no indication that MTL had reason to know of the hazardous nature of the sand, or reason to know that BSC or the other contractor would not protect the longshoremen such as Hetzel from the danger. The party moving for summary judgment need not

disprove its opponent's claim, but need show only that the party who bears the burden of proof has adduced no evidence to support an element essential to its case. Tepley, 859 F.2d at 379. Hetzel had the burden of proving that MTL knew of the hazard and knew that the contractors were unreasonably failing to protect longshoremen from this danger. Even viewing the facts as asserted by Hetzel, there is no proof of this element. Thus, Hetzel has failed to show a genuine issue of material fact regarding the "something more" than actual knowledge that is a required element to show breach of MTL's duty to intervene. Accordingly, the district court judgment is affirmed.

SCOPE OF THE APPEAL

In his brief, Hetzel challenges the district court's summary judgment in favor of Bethlehem Steel Corp., however, he did not preserve this issue for appeal. Rule 3(c) of the Federal Rules of Appellate Procedure provides that a notice of appeal shall designate the judgment, order, or part thereof appealed from. Notices of appeal are liberally construed where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party. Securities and Exchange Commission v. Van Waeyenberghe, 990 F.2d 845, n.3 (5th Cir. 1993); C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir. 1981), cert. denied, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981). However, where the appellant notices the appeal of a specified judgment only or a part thereof, this court has no jurisdiction to review other judgments or issues which are

not expressly referred to and which are not impliedly intended for appeal. C.A. May, Id.; see also, Ingraham v. United States, 808 F.2d 1075, 1080 (5th Cir. 1987).

Hetzel's first motion to reconsider addressed both judgments, the district court granted partial relief as to his claims against BSC. His second motion to reconsider addressed only the ruling in favor of MTL. After the district court maintained or affirmed its grant of summary judgment against Hetzel and in favor of MTL, Hetzel filed a notice of appeal which reads as follows:

> NOTICE is hereby given that the Plaintiff, James G. Hetzel, hereby appeals the final summary judgment and order overruling Plaintiff's First and Second Motions for Rehearing as to dismissal of Plaintiffs' cause of action against Defendant, Marine Transport Lines a/k/a Marine Transport Lines Company a/k/a Marine Transport Lines, Inc., granted and/or reaffirmed by Order entered on the docket of the District Clerk for the United States District Court for the Southern District of Texas, Houston Division, to the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana.

This notice does not imply an intent to appeal as to BSC. For this reason, we do not address Hetzel's arguments regarding the summary judgment in favor of BSC.

CONCLUSION

Having found no error in the district court judgment which Hetzel appealed, we affirm the entry of summary judgment against Hetzel and in favor of defendant Marine Transport Lines.

AFFIRMED.