IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4144
(Summary Calendar)

MARGIE A. PICKETT, ET AL.,

Plaintiffs-Appellants,

versus

RTS HELICOPTER LEASING CORP., ET AL.,

Defendants,

PETROLEUM HELICOPTERS, INC., and JOEY DIMAS,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana
(91-2635)

(July 30, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

In this wrongful death action, Plaintiffs-Appellants Margie Pickett and her children (collectively, the estate) appeal the district court's grant of summary judgment in favor of Defendants-Appellees Petroleum Helicopters, Inc. (PHI) and Joey Dimas, a PHI

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

mechanic. The estate insists that there are genuine issues of material fact regarding PHI and Dimas's knowledge that their actions were "certain or substantially certain" to result in the decedent's death. We agree, however, with the district court's opinion that the estate fails to produce any evidence that would render PHI or Dimas liable. We therefore affirm the summary judgment.

I

FACTS AND PROCEEDINGS

Joseph Pickett, an employee of PHI, was killed when the helicopter he was piloting crashed immediately upon takeoff. The day before the accident, the helicopter was assigned to Pickett. A PHI mechanic, Corey Rider, was instructed to remove the existing dual controls from the helicopter.[1] Removing the dual controls required the removal of the tail rotor interconnect tube, one of several control tubes in the aircraft. Unfortunately, Rider mistakenly removed the lateral cyclic interconnect tube, which controls the lateral movement of the helicopter. Consistent with PHI policy, Rider asked a more experienced mechanic, James Trahan, to inspect the work. Trahan failed to discover Rider's mistake, probably because Trahan became distracted and never finished his inspection. The next morning, Pickett attempted to take off without performing a preflight inspection of the helicopter. He aborted the takeoff, however, when he noted that the tail rotor

[1] Ron Rhame, one of the lead mechanics, assigned the job to Rider, a relatively inexperienced mechanic, because he mistakenly believed that Rider had installed the dual controls.

pedals did not move. Pickett reported this problem to Dimas, who suspected that the tail rotor interconnect tube had not been removed. Dimas removed the belly panel of the helicopter and confirmed his suspicions. He then removed the tube and checked the tail rotor pedals for freedom of movement. While working on that tube, Dimas noticed that there was an empty space in which another control tube could be inserted. In hindsight, of course, it is apparent that the lateral cyclic interconnect tube should have occupied that space.

After completing his work, Dimas certified the aircraft ready to fly, so Picket re-boarded the helicopter. Apparently, however, he again failed to go through his preflight check, for doing so would have revealed that the lateral cyclic interconnect tube was not functioning. Shortly after takeoff, the helicopter crashed, fatally injuring Pickett.

Pickett's estate sued for wrongful death. As PHI was Pickett's employer and Dimas his co-employee, the estate's remedies were limited under Louisiana law to workers' compensation. The only exception to this limitation is when an employer or co-employee commits an intentional tort against the plaintiff. Accordingly, the estate proceeded under an intentional tort theory, claiming that PHI and Dimas knew that Pickett's death was certain or substantially certain to follow their actions.

After PHI and Dimas moved for summary judgment, the district court allowed the estate more time for discovery. Upon completion of this additional discovery, the court granted the summary

judgment motion, adopting the findings and recommendations of the magistrate judge. In a detailed and through analysis, the magistrate judge explained how all summary judgment evidence produced by the estate would go to demonstrate negligence on the parts of PHI and Dimas, but that the evidence was devoid of proof that the defendants were certain or substantially certain that their acts would cause Pickett's death. The estate timely appealed.

II

DISCUSSION

A. Standard of Review

We review a grant of summary judgment by "reviewing the record under the same standards which guided the district court."[2] Summary judgment is appropriate when no issue of material fact exists and the movant is entitled to judgment as a matter of law.[3] In determining whether the grant was proper, we view all fact questions in the light most favorable to the nonmovant; questions of law are reviewed de novo.[4]

The judge's function on a motion for summary judgment "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is genuine issue for trial."[5] In so

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[2] Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

[3] Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986).

[4] Walker, 853 F.2d at 358.

[5] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

doing, the judge must inquire "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[6]

B. The Intentional Act Exception

The Louisiana law at issue is clear: an employee's remedies against his employer and co-employee are limited to those provided by his workers' compensation coverage except when the injury results from an intentional act.[7] In Bazley v. Tortorich,[8] the Louisiana Supreme Court held that the exception to the exclusive remedy provision in § 23:1032 is applicable to intentional torts and offenses. In that case, the court explained that a defendant acted intentionally if "defendant either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did."[9] Negligence or gross negligence is insufficient to constitute an intentional act.[10]

In the instant case, the estate does not allege that PHI and Dimas desired to bring about Pickett's death; rather, it insists that they believed that his death was substantially certain to result from their actions. The actions described by the estate, however, amount to nothing more than negligence. Rhame, who assigned the work, mistakenly believed that Rider had installed the

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[6] Id. at 252.

[7] La. Rev. Stat. Ann. § 23:1032.

[8] 397 So. 2d 475, 482 (La. 1981).

[9] Id.

[10] Gray v. McInnis Bros. Constr., Inc., 569 So. 2d 656, 658 (La. App. 2d Cir. 1990).

dual controls; there was no reason for Rhame to believe, however, that an accident would occur from assigning RiderSQa licensed, if somewhat unexperienced mechanicSQto the job. Likewise, Rider mistakenly removed the wrong control tube, but there is no evidence that he realized that he had made that error until after the crash.[11] And, in like manner, Trahan, who was asked to inspect the work, started the inspection but failed to complete it. Although this was negligence, there is no evidence that Trahan was even aware, much less substantially certain, that his failure to inspect completely a licensed mechanic's work would result in an accident. Finally, there is no evidence that Dimas, who was looking at the tail rotor interconnect tube, realized that the lateral cyclic interconnect tube was missing. Admittedly, because Dimas could have discovered that mistake by checking a manual, his failure in fact to check the manual or discover the mistake might constitute negligence but nothing more sinister than that.

In sum, the estate is reduced to arguing that PHI and Dimas should have been aware of the mistake, and therefore they were substantially certain that an accident would occur. This argument makes an impermissible leap in logic, ignoring the total absence of evidence that PHI or any of its employees were aware of the mistake. Moreover, there is no evidence that PHI or Dimas' practices were so dangerous that it was substantially certain that an accident would result.

PHI and Dimas demonstrate the fallacy of the estate's logic

[11] Apparently, Rider was never deposed.

with the following observation: Pickett, as a pilot, was negligent in not conducting a pre-flight check; had he done so, he would have discovered the absence of the lateral cyclic interconnect tube. His failure to conduct the check ensured his ignorance of that crucial fact and was, in fact, negligence on his part. Under the estate's reasoning, however, the fact that Pickett would have known of the mistake but for his negligence means that Pickett committed an intentional tort against himself. This is clearly nonsensical, yet no more nonsensical than the estate's use of the same flawed syllogism in regards to Dimas and PHI.

The estate relies heavily on the recent state appellate decision in Wainwright v. Moreno's Inc.,[12] which the estate claims applies an objective standard to the defendants, i.e., what a reasonable mechanic would have known. Even construing this decision in the manner most favorable to the estate, the factual distinctions underscore the fallacy of the estate's argument. In Wainwright, the employee was injured when a ditch in which he was working collapsed. In that case, however, the employer knew that a cave-in had occurred the day before, prompting a safety meeting. In addition, the supervisor of the ditch that caved in on the plaintiff knew that the soil was sloughing off in that ditch and that the soil was unstable.

In contrast, there is no evidence that PHI or Dimas knew of Rider's mistake, or even that Rider himself knew that what he had

[12] 602 So. 2d 734 (La.App. 3d Cir. 1992). According to the estate's brief, this is the first case in which a plaintiff succeeded in winning under the "substantially certain standard."

done was a mistake. The estate's evidence may well be sufficient to establish negligence, but Wainwright requires moresQit requires that the employer first know of some danger and then ignore it. The closest the estate comes to establishing a dispute on this issue is Dimas's testimony that he saw an empty space into which another tube "should" fit. Later, Dimas explained that he meant that a tube "could" fit in the spot, but that it was not unusual for there to be empty spaces. The estate insists that the word "should" indicates that Dimas knew that the control tube was missing. Without more, however, one such fine semantical distinction alone is insufficient to support an inference by a reasonable jury that Dimas recognized that the control tube was missing. There is no summary judgment evidence that a genuine issue of material fact exists as to the intentional act exception.

For the foregoing reasons, the district court's grant of summary judgment is

AFFIRMED.