SUPREME COURT OF LOUISIANA

No. 96-C-0803

MELVIN and LOU M. FOSTER

VERSUS

DESTIN TRADING CORPORATION and BLESSEY MARINE SERVICES, INC.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH CIRCUIT, PARISH OF JEFFERSON

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BERNETTE J. JOHNSON

JUSTICE

KIMBALL, J., not on panel. Rule IV, Part 2, § 3.

JOHNSON, Justice[*]

Plaintiffs, Melvin and Lou M. Foster filed this action for damages under 46 U.S.C. § 688, commonly referred to as the Jones Act, and general maritime law pursuant to the saving to suitor clause. Foster suffered an injury on September 5, 1991, while employed as a relief captain on the M/V Laura Ann Blessey. Named as defendants were Destin Trading Corporation (hereinafter referred to as "Destin"), owner of the two barges and Foster's employer, Blessey Marine Services, Inc. (hereinafter referred to as "Blessey"). The trial court found the law and evidence to favor the defendants and dismissed the action.[1] Foster then appealed to the Fifth Circuit. Foster v. Destin Trading Corp., 670 So. 2d 1342 (La. App. 5 Cir. 1996). In a 2-1 decision, the appellate court found that Foster knew that his use of the board was against company policy and that Blessey had advised its employees not to use boards as a walkway. They opined "We cannot say the trial court erred in finding Blessey exercised reasonable care to maintain a reasonable safe work environment and is therefore not negligent."[2] In his dissenting opinion, Judge Cannella found that the vessel was unseaworthy and that Blessey was negligent. He assessed 20% liability to the owner, 40% liability for the employer's negligence with the remaining 40% placed on Foster for his failure to take action in disposing of the cracked board.[3]

Plaintiff's writ application was granted so that we could determine whether the court of appeal applied the appropriate standard of review. Because we find that both

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[*] **J. Kimball was not on panel. Rule IV, Part 2, § 3.**

[1] Prior to trial, Foster's wife, Mrs. Lou Foster voluntarily dismissed her claim for loss of consortium. Miles v. Apex Marine, 498 U.S. 19, 111 S.Ct. 317, 122 L.Ed.2d 275 (1990) and its progeny say clearly there is no recovery by parents, spouses or children for loss of society in a general maritime action for wrongful death or injury to a Jones Act seaman.

[2] See Foster at 1347.

[3] Id. at 1348-49.

lower courts erred in denying recovery to plaintiff, we reverse the assessment of liability and remand this matter to the court of appeal for a ruling consistent with the conclusions reached herein.

FACTS

Plaintiff, Melvin Foster was employed as a relief captain aboard the M/V Laura Ann Blessey on the date of his injury, September 5, 1991. The M/V Laura Ann Blessey had two barges in tow, WEB 205 and WEB 206 both of which were owned by Destin. The vessels were moored at the dock of the Houston Fuel Oil Terminal in Houston, Texas.

Oil was being discharged from each of the barges to the terminal. The two barges had cargo compartments thirty inches above the walkway of the vessel. Each barge had a hatch cover located at the mid point and at both ends. Three boards extended across from the tank of WEB 205 to WEB 206 at points approximately even with the hatch covers. These boards provided a direct route from cargo compartment to cargo compartment and were requested by the tankermen to conveniently cross from barge to barge. The tankermen would put the boards out when the barges were breasted (side by side) at the dock and take them down when the barges were moved. The boards that were used as a walkway were three 2" x 12" x 16' pressure treated pine boards.

During pumping operations, the tankermen checked the cargo compartment hatches for the level of product. The boards were laid even with the three hatches, so that the tankermen moved from cargo compartment to cargo compartment rather than down to the walkway across to the connecting barge then up to the cargo compartment.

Just before the accident, two U.S. Coast Guard officers boarded one of the

barges for a routine inspection, and one of Blessey's seamen was asked to produce his tankerman's certificate. Because he did not have the document on his person, the tankerman went to the Laura Ann Blessey and asked Foster to retrieve it. When he returned with the certificate, plaintiff was informed by the tankerman that he believed the Coast Guard was going to issue a citation because the hatches were open. Plaintiff was injured as he was crossing from the top of barge WEB 205 to barge WEB 206 which was the shortest route, when the wooden board connecting the barges broke, causing him to fall approximately 30 inches to the walkway below.

Foster was taken to Hermann Hospital and diagnosed with an open medial dislocation of the right subtalar joint and the right talonavicular joint. The treating physician also noted torn ligaments. Surgery was performed, with screws placed in plaintiff's right ankle to assist in the healing process. He was released after a seven day hospital stay.

DISCUSSION

Plaintiff has asserted two theories for his recovery, namely negligence and unseaworthiness. Based on these theories, the appropriate standard of review is the manifest error, clearly wrong standard. Cormier v. Cliff's Drilling Co., 640 So. 2d 552 (La. App. 3 Cir. 1994).

Plaintiff was employed by Blessey and the barges were owned by Destin. Both corporations are owned by the same individuals, Walter Blessey, Jr., President of the corporations and his children. The facts of this case place it in a rather unique posture based on the apparent inseparability of employer and owner. This fact is noted in plaintiff's petition wherein it states that plaintiff was an employee of Destin and/or Blessy, and that the vessel was owned and operated by Destin and/or Blessey. However, plaintiff's asserted theories of recovery are separate and distinct, therefore

he must meet two burdens of proof. Cormier, supra at 555; Hae Woo Youn v. Maritime Overseas Corp., 605 So. 2d 187 (La. App. 5 Cir. 1992), modified on other grounds 623 So. 2d 1257 (La. 1993); Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

An injured seaman is allowed to join a claim for unseaworthiness, for maintenance, cure and wages, with a Jones Act suit.[4] Seamen are allowed to bring their Jones Act claims in state court pursuant to the "saving to suitor" clause of the Judiciary Act of 1789. In matters involving admiralty and maritime jurisdiction, the saving to suitor clause permits state courts to have concurrent jurisdiction with the federal district courts. Green v. Industrial Helicopters, Inc., 593 So. 2d 634 (La. 1992), rehearing denied, certiorari denied, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992); Parker v. Rowan Companies, Inc., 599 So. 2d 296, certiorari denied, 506 U.S. 871, 113 S.Ct. 203, 121 L.Ed.2d 145 (1992); La. C.C.P. art. 1732(6). Accordingly, jurisdiction of this matter was proper in state court.[5]

Unseaworthiness

The doctrine of unseaworthiness was introduced to general maritime law in 1903 in The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760.[6] The case holds that an owner is responsible to the captain or any seaman thereof for injuries received because of the unseaworthiness of the vessel. This liability was imposed on the owner by the Merchants' Shipping Act of 1876, and there is an implied obligation that all

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[4] Haskins v. Point Towing Co., 395 F.2d 737 (3rd Cir. 1968), appeal after remand 421 F.2d 532 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed. 2d 368 (1959), rehearing denied 359 U.S. 962, 79 S.Ct. 795, 3 L.Ed.2d 769 (1959).

[5] Plaintiff's action was filed in the 24th Judicial District Court for the Parish of Jefferson.

[6] The case was argued in December, 1902 and decided on March 2, 1903.

reasonable means shall be employed to insure the seaworthiness of a vessel before and during voyage.

A vessel is unseaworthy unless all of its appurtenances and crew are reasonably fit and safe for their intended purposes. Griffin v. LeCompte 471 So. 2d 1382 (La. 1985); Youn, supra at 198: Cormier, supra at 555; Faul v. State, DOTD, 649 So. 2d 493 (La. App. 3 Cir. 1994); See also, Phillips v. Western Co. of North America, 953 F.2d 923 (5th Cir. 1992).

Our case law places a very high burden on a vessel owner to provide its crew with a seaworthy ship. This duty is absolute, non-delegable and completely independent of the Jones Act requirement to exercise reasonable care. To prevail on an unseaworthiness claim, a seaman must prove that the unseaworthy condition was the proximate cause of his injury. Youn, supra at 198. Cormier, supra at 555. A n owner's absolute duty to provide a seaworthy vessel may not be delegated to anyone. Liability for an unseaworthy condition does not depend on negligence, fault or blame. Thus, if an owner does not provide a seaworthy vessel, then no amount of prudence will excuse him, whether he knew of or should have known of the unseaworthy condition. *T. J. Schoenbaum, Admiralty and Maritime Law, Second Edition* § 6-26 (1994).

An owner's duty to provide a seaworthy vessel has been held to encompass the means by which individuals are provided ingress and egress to the vessel. In Reyes v. Maritime Enterprises, Inc., et al, 494 F.2d 866 (1974) a longshoreman[7] filed an action based on injuries received when he slipped and fell from an allegedly unstable, poorly lit gangway while boarding a barge. He sued the defendants under both theories of

[7] In FN1, it states that pursuant to the Longshoreman's and Harbor Workers Compensation Act Amendments of 1972, vessels no longer owed a duty of seaworthiness to longshoremen. The amendment had prospective application only and did not apply to this case. Id. at 866.

unseaworthiness and negligence. At the close of his evidence, a directed verdict was granted on both counts for the defense, and plaintiff appealed.

On appeal, the case was reversed and remanded for a new trial. The appellate court determined that seaworthiness entails a vessel owner's duty to provide his crew with a ship and equipment that are suitable, including suitable means to board and disembark the vessel. The court concluded that this duty extends to gangways by whomever supplied, controlled or owned. The court further concluded that where a crewman is injured by an "unfit", unseaworthy gangplank which is an appurtenance of the ship, he has the right to recover from the vessel's owner.

In THE PHOENIX, 3 F. Supp. 1017 (S. D. Tex. 1933), a seaman was awarded damages for injuries sustained while descending a ship by means of a Jacob's (rope) ladder. In that case, the plaintiff boarded the steamship Phoenix, in an attempt to find employment. He climbed aboard by means of the rope ladder that was hanging over the side. Upon being hired, plaintiff was granted permission to go ashore to obtain his clothes. He exited the vessel in the same manner he boarded it. While plaintiff was descending the Jacob's ladder, it broke, and plaintiff injured his right hand and arm.

At the time plaintiff boarded the vessel, there were no other means of doing so and it was customary for seamen to use the rope ladder under the circumstances. The court found that the ladder was unseaworthy because it was old, worn out and not sufficiently strong enough to withstand the weight of an ordinary man. It was determined that this unseaworthy condition was the proximate cause of plaintiff's injuries. The court found that the condition of the rope ladder was known to the ship's officers, or, if not known, it could have been discovered by ordinary and reasonable diligence.

In this case, trial testimony revealed that Foster ordered oak boards through the

Blessey/Destin office but treated pine boards were delivered by the supplier. Because these wooden boards were used by plaintiff and the other crewmen as a means of boarding and disembarking the vessel, they are synonymous with the gangway described in Reyes. Our inquiry is whether the three boards were being used for their intended purpose. The facts of this case show that seamen were using these boards to cross from one vessel to the other for at least five to six weeks prior to plaintiff's slip and fall. Tankerman John Riojas testified that he obtained his tankerman's certificate in 1982 and that it was common to use boards on barges in the manner in which Foster was using them at the time of his fall. On the other hand, Walter Blessey, Jr. testified that it was against company policy for anyone to use boards as a walkway on his vessels. The lower courts relied on this self-serving testimony and held that the defendants had no knowledge its seamen were using the boards as described. However, Riojas' testimony proves that this practice of using boards to cross from one barge to the other was a common practice in the maritime industry, but more importantly, was in use by Blessey's employees. The facts from THE PHOENIX, differ from the instant matter in that Foster could have taken another route to cross from one vessel to the next but the facts also make it clear that using the boards was the most direct route.

Tankerman Paul Yates even testified that the crew members performed maintenance on these boards by painting them and applying a skid resistant substance to them "so that when it got wet, that they would not - - you wouldn't skip on them."[8] The facts show that Destin failed to provide adequate equipment to its crew. Destin could have provided a sturdier board or provided portable aluminum walkways to the vessel. Riojas testified that they were used on other vessels. Because the boards failed

[8] See deposition of Yates at p. 27.

when used for their intended purpose, the vessel was unseaworthy.

Unseaworthiness results from a defective condition and is not the result of an isolated negligent act. Daughdrill v. Ocean Drilling and Exploration Co. (ODECO), 709 F. Supp. 710 (E.D.La. 1989); Meyers v. M/V EUGENIO C, 842 F.2d 815 (5th Cir. 1988). Also, wear and tear which result in the deterioration of equipment may render a previously seaworthy vessel unseaworthy. Caudill v. Victory Carrier, Inc., 149 F. Supp. 11 (E.D. Va. 1957); Cannella v. Lykes Bros., 174 F.2d 794 (N.Y.S.2d 1949). Just as the vessel involved in THE PHOENIX, which presumably contained a seaworthy ladder but over time became defective, the board used by Foster initially proved to be seaworthy, but deteriorated to the extent that it was not fit to be used for traversing from vessel to vessel. Thus, the vessel was not seaworthy. After reviewing all of the evidence herein, we conclude that the majority opinion rendered by the appellate court in finding the vessel seaworthy was legal error.

Plaintiff's Negligence

Comparative negligence applies to both unseaworthy claims as well as Jones Act negligence actions. Cormier, supra at 556. To prove comparative negligence on the part of the plaintiff, the defendant has to show that the plaintiff was contributorily negligent and that such negligence was a proximate cause of the resulting injury. Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989). The effect of finding negligence on the part of a seaman seeking recovery in a seaworthiness action or Jones Act claim is only to reduce damages proportionately, but not to bar recovery. A seaman's negligence will not defeat his claim under the Jones Act and general maritime law but may be considered as comparative negligence to mitigate damages in proportion to the degree of his negligence. Portier v. Texaco, Inc., 426 So. 2d 623 (La. App. 1982), writ denied 433 So. 2d 165 (La. 1983); Scott v. Fluor Ocean Services, Inc., 501 F. 2d 983 (1974);

Griffin, supra at 1389. Contributory negligence, however gross, does not bar recovery but only mitigates damages. Johnson v. Offshore Exp., Inc., 845 F.2d 1347, (5th Cir. 1988), rehearing denied, cert denied 488 U.S. 968, 109 S. Ct. 497, 102 L.Ed. 2d 533 (5th Cir. 1988).

Our review shows that Foster was negligent. First of all, he admitted he ordered oak boards and that they would safely hold the weight of the crew members. Yet when pine boards were delivered, the record shows that he failed to inform the captain or the office so that the proper boards could be delivered. Paul Yates weighed more than 400 pounds, and testified that he heard one of the boards make a "crack" sound when he attempted to walk across it. Riojas stated that he knew that one of the boards had a crack in it and some seamen refused to walk across this board. He further stated that it was an individual's choice whether to walk on this board, but because he weighed 160 pounds he did not fear any danger.

At the time of his injury, Foster weighed approximately 325 pounds. While he may have weighed less than Yates, he was twice the weight of Riojas. Although there was no evidence that the board from which he fell was the one with the crack, because of his weight, plaintiff should have taken extra precautions to avoid the possibility of walking on a cracked board. As relief captain, he should have removed the potential hazard of having his crew walk across a defective board. Accordingly, we hold him negligent for failing to remove the cracked board.

Jones Act

Next, we must decide whether the employer's conduct falls within the realm of Jones Act negligence, 46 U.S.C. App. § 688. An employer is vested with a fundamental duty to provide its seamen with a reasonably safe workplace. Ivy v. Security Barge Lines, Inc., 585 F.2d 732 (5th Cir. 1978). An employer's negligence

may arise from a dangerous condition on or about the vessel, failure to use reasonable care to provide a seaman with a safe place to work, failure to inspect the vessel for hazards and any other breach of the owner's duty of care. Davis v. Hill Engineering, Inc., 549 F.2d 314 (5th Cir. 1977).

Unlike the duty owed to seamen for a claim of unseaworthiness, the duty to provide a safe workplace is not absolute, but reasonable care under the circumstances sets the standard. Ober v. Penrod Drilling Co., 694 F.2d 68 (5th Cir. 1982), modified on other grounds 726 F.2d 1035 (1984). However, the burden of proof based on negligence is feather light and only the slightest degree of negligence is sufficient to impose liability on an employer. Cormier, supra at 555; Caravalho v. Dual Drilling Services, Inc., 631 So. 2d 725 (La. App. 3 Cir. 1994) writ denied 637 So. 2d 1074 (La. 1994); Mistich v. Pipelines, Inc., 609 So. 2d 921 (La. App. 4 Cir. 1994) writ denied 613 So. 2d 996 (La. 1993) certiorari denied, Brown & Root, Inc. v. Mistich, 113 S.Ct. 3020, 125 L.Ed.2d 709 (1993); Osorio v. Waterman S.S. Corp., 557 So. 2d 999 (La. App. 4 Cir. 1990) writ denied, 561 So. 2d 99 (La. 1990).

In affirming the trial court's dismissal of plaintiff's action, the appellate court relied on Blessey's trial testimony that the use of a board as a gangway between barges was against company policy, and that the vessel's crew was advised not to use the boards in this manner. The trial court found and the appellate court agreed, that the employer had exercised reasonable care to maintain a reasonably safe work environment. They determined that Foster's own negligence barred any recovery.

The trial court determined that Foster failed to prove any negligent conduct on the part of his employer and we agree. Our review for a negligence claim is the manifest error, clearly wrong standard. Based on the evidence in the record, we find that a reasonable basis exists for the trial court's denial of plaintiff's claim under the

Jones Act. Adhering to our rules of manifest error, we find that the trial court's conclusions are supported by the evidence and we will not disturb them.

Primary Duty Doctrine

The defense argues that plaintiff is prohibited from recovering based on "the primary duty doctrine" as discussed in Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2nd Cir. 1952); and, Peymann v. Perini Corp., 507 F.2d 1318 (2nd Cir. 1974). They further argue that the continued vitality of the doctrine was noted by our courts in the case of Ronquillo v. Belle Chasse Marine Transportation, Inc., 629 So. 2d 1359 (La. App. 4th Cir. 1993). Under this doctrine, the defense asserts that as captain, plaintiff had the duty of maintaining the vessel in a safe and seaworthy condition. Plaintiff cannot create or permit a dangerous situation to continue and then prevail with a claim for an injury which results from the danger he himself created.

In Walker, plaintiff, the ship's master, sought damages under the Jones Act for an injury that occurred when the drawer of a file cabinet opened during a voyage and struck him in the leg. The trial court rendered judgment for plaintiff, but on appeal the judgment was reversed and a new trial ordered. The appellate court determined that the condition of the drawers was known to plaintiff for nearly four months, and as master, he was charged with the duty of mending the catches. Plaintiff had knowledge of the defect and ample opportunity to correct it, but failed to do so. The court also noted that if the vessel became unsafe during voyage, it was the master's duty to see that the vessel was put in a seaworthy condition at the next port.

Peymann involved a vessel's chief engineer who sought recovery for injuries he sustained on board when he slipped and fell from an oil covered iron railing while attempting to fasten a chain and pulley device to the ceiling of the engine room. The trial court denied relief. The defendant was granted a directed verdict on the

negligence count and the jury found for the defendant on unseaworthiness. On appeal the decision was affirmed. The appellate court noted that it was plaintiff's responsibility as chief engineer to maintain proper working conditions and keep the engine rail free from substances such as oil. Plaintiff knew that the cylinder heads had oil on them. Plaintiff chose not to wipe the rail but instead stepped on it.

In Ronquillo, the plaintiff, a captain of a vessel was injured when he slipped on oil located on the vessel's deck plates. Before walking on the oil, plaintiff admitted that he saw the oil and considered walking on the deck plates unsafe, but walked on them anyway. In determining liability, the jury's assessment of 45% to plaintiff was affirmed because he failed to perform his duty to clean the vessel. Further, he walked over deck plates which he clearly saw had oil on them. While a master or captain's actions may prevent recovery in both Jones Act and unseaworthiness claims, these cases cited by defendants lend no support to their argument that Foster is not entitled to relief. Recovery under the primary duty doctrine is not barred unless the plaintiff is wholly responsible for his injury. Snow v. Boat Dianne Lynn, Inc., 664 F.Supp 30 (D.Me. 1987); 2 Thomas Schoenbaum, Admiralty and Maritime Law § 6-24 (2nd ed. 1994). The facts of this case do not indicate that Foster was entirely responsible for his injuries. We note that the board supported the weight of even the stoutest sailors when first laid for use as a walkway. The board's condition became hazardous only after its deterioration over time. Therefore, fault cannot be entirely attributable to plaintiff when the hazard that caused his injury was not his creation, but the result of the deteriorated condition of a once seaworthy plank. Accordingly, our duty is to weigh the liability of the seaman, employer and vessel owner, and determine the appropriate percentage of fault. The facts of this case show that Foster is not entitled to relief based on Jones Act negligence but that he is entitled to recovery due to the unseaworthiness of the

vessel.

Both the trial court and the court of appeal determined that the defendants were not liable for Foster's injuries. While Foster's negligence cannot be ignored, this total bar was error and requires reversal because the vessel owner had an absolute, non-delegable duty to provide a seaworthy vessel. As an appurtenance of the vessel, the board failed under ordinary circumstances. However, any recovery due Foster must be mitigated to the extent of his own negligence. Clements v. Chotin Transportation, Inc., 496 F. Supp. 163 (M.D. La. 1980); Villers Seafood Co., Inc. v. Vest, 813 F. 2d 339 (11th Cir. 1987). Accordingly, 50% liability is attributable to the plaintiff with the remaining 50% placed on Destin Trading Corporation as owner of the vessel.

Because this court has determined that the vessel was unseaworthy, the owner's liability for Foster's injuries must be addressed. It is more appropriate for the court of appeal to review the evidence and make a damage award. We therefore remand this case to the appellate court for that limited purpose.

DECREE

We reverse the finding of 100% liability on the part of plaintiff. This case is remanded to the court of appeal for further proceedings consistent with the views expressed herein.

REVERSED AND REMANDED.