

IN THE COURT OF APPEALS 02/13/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00211 COA

GEORGE MILTON COTHERN

APPELLANT

v.

ZAPATA-HAYNIE CORPORATION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILL JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RON M. FEDER

DAVIS & EMIL

ATTORNEY FOR APPELLEE:

VINCENT J. CASTIGLIOLA, JR.

NATURE OF THE CASE: SEAMAN'S CLAIM FOR PERSONAL INJURY PURSUANT TO
JONES ACT AND GENERAL MARITIME LAW

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED FOR APPELLEE

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

George Milton Cothorn (Cothorn), chief engineer on a fishing vessel, M/V GULF COAST, filed a complaint pursuant to both the Jones Act, 46 U. S. C. § 688, and general maritime law in the Circuit Court of Jackson County against Zapata-Haynie Corporation (Zapata-Haynie), owner of the GULF COAST, to recover damages for a back injury which he suffered while he was serving on board that vessel as chief engineer. The trial court granted Zapata-Haynie's motion for summary judgment. Cothorn has appealed. We affirm.

I. Facts

On Friday, September 27, 1991, the GULF COAST returned to its dock at the Zapata-Haynie plant located in Moss Point, Mississippi after fishing that week. Shortly before 6:00 p. m. that same day, after the captain and other crew members had left the GULF COAST for the weekend, chief engineer Cothorn and second engineer Ricky Porter were removing part of a broken electric bilge pump from below deck in the engine room to the outside deck. This item of machinery consisted of a five-horsepower electric motor to which a seal from the pump remained attached. Cothorn and Porter carried the motor and seal from the engine room deck to the deck above where they placed it within a short distance of a hatch which opened onto the deck.

Porter left to get a forklift parked on or near the dock to carry the machinery from the boat deck to Zapata-Haynie's shop located near the dock. After he departed, Cothorn, who knew where and why Porter had gone, proceeded to lift the motor and attached seal and carry it toward the hatch to put it on the outside deck. While he was carrying the motor, Cothorn lifted his left leg to step across the eighteen-inch high wall beneath the hatch when he felt a pain in his back. He placed the motor on the lip of the hatch, immediately after which Porter returned from procuring the forklift. Porter helped Cothorn lift the motor and place it on a pallet which Porter had laid across the lift on the forklift to transport the motor pump assembly. Porter had driven the forklift to the very edge of the fishing boat so that the lift protruded through the deck rail and over the deck. Cothorn was diagnosed as having a herniated disc in his lumbar spine.

As an auxiliary policeman for the City of Moss Point, Porter was scheduled to assist with parking and crowd control at a football game to be played in Moss Point that very evening. He was expected to report to the football field by 6:30 that evening, although he testified in his deposition that the auxiliary police chief would understand if he were late reporting for duty.

Only one week remained in the fishing season when this accident occurred. Cothorn and Porter's removal of this machinery was a part of the process of preparing the boat for winter's inactivity. However, Cothorn did go out on the GULF COAST the following Sunday and remained on the boat during this last week of fishing. On Tuesday of that last week, he told the boat's captain, Frank Dixon, about the accident with the motor which had happened the previous Friday.

II. Issue and the Law

In his appeal, Cothorn assigns but one error, which is:

The trial court erred when it found no material facts in dispute and that summary

judgment in favor of the defendant was inappropriate as a matter of law.

A. The Trial Court's Findings

After hearing Zapata-Haynie's motion for summary judgment and Cothorn's response to that motion, the trial court granted summary judgment in favor of Zapata-Haynie and ruled as follows:

It is the Court's opinion and the Court does find that the Motion for Summary Judgment is well taken, and should be, and is hereby granted by the Court on all material issues of this case. This decision is based upon and consideration of the following cases: *Chisolm v. Sabine Towing & Transport Co., Inc.* 679 F.2d 60 ([5th Cir.] 1982); *Peymann v. Perini Corporation* 507 F.2d 1318 ([6th Cir.] 1974); *Skandalis v. M/V Salini* 1974 A.M.C. (E.D. Va. 1974); *Burden v. Evansville Materials, Inc.* 636 F. Supp 1022 (W.D. Ky. 1986).

B. Standard of Review for Summary Judgment

The Mississippi Supreme Court provided the following standard by which it reviews the issue of whether a trial court erred when it granted summary judgment in *Seymour v. Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995):

We employ a *de novo* standard of review in reviewing a lower court's grant of summary judgment. Thus, we use the same standard that was used in the trial court. We must review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. The burden of demonstrating that no genuine issue of material fact exists is on the moving party. However, this burden on the moving party is one of production and persuasion, not of proof. A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. This Court does not try issues on a [R]ule 56 motion, it only determines whether there are issues to be tried. In reaching this determination, this Court examines affidavits and other evidence to determine whether a triable issue exists, rather than for the purpose of resolving that issue.

Id. at 894-95 (citations omitted).

C. Issue and the Law

In his brief, Cothorn summarizes his argument by which he would persuade this Court to reverse the

trial judge's grant of summary judgment for Zapata-Haynie as follows:

Defendant, Zapata-Haynie, is required by Jones Act law and general maritime law to provide a safe workplace and/or a "seaworthy" vessel for an employee like [Cothorn]. Any negligence by the defendant which causes or contributes to [Cothorn's] injury is actionable, no matter how slight the negligence. Seamen enjoy special protection and are considered wards of the courts.

Defendant's negligence consists of directing that a heavy piece of equipment be moved without adequate equipment or manpower. The manpower deficiency resulted from the defendant's apparent approval of the second engineer's early departure from the vessel to accomplish personal business. The atmosphere of haste and urgency created by the defendant's negligence, as well as the failure to have on board a dolly or come-a-long, caused [Cothorn] to suffer injuries and incur compensable injuries. Issues of material fact surrounding the circumstances of plaintiff's injury remain to be decided by a jury; therefore, summary judgment is not appropriate.

Our analysis of Cothorn's argument reveals these issues:

1. Whether Zapata-Haynie was negligent when it directed Cothorn to move the pump "without adequate equipment or manpower."
2. Whether Zapata-Haynie's negligence created an atmosphere of haste and urgency which compelled Cothorn to lift the pump by himself.

In harmony with the previously quoted standard of review, our task is to determine whether there are issues of fact to be tried by a jury. The law which creates the issues on which a litigant expects to prevail determines whether or not an issue of fact is material. Cothorn fails to specify what the material issues of fact are in this appeal.

There can be no material issue about whether Zapata-Haynie was negligent when it directed Cothorn to move the pump "without adequate equipment or manpower." There is no evidence in the record from any source, *i. e.*, affidavits, depositions, or requests for admissions, that Zapata-Haynie ordered Cothorn to move the pump by himself. In his deposition, Cothorn was asked, "Was anybody supervising your work?" Cothorn answered, "No, sir." The most the evidence shows is that Cothorn had been instructed to remove all unnecessary parts and material preparatory to ending the fishing boat's fishing voyages for the summer. There is no evidence from which the jury might find that Zapata-Haynie ordered Cothorn to lift the pump over the bottom of the hatch by himself.

Neither can there be a material issue about whether there was adequate equipment or manpower to

remove the pump from the engine room's lower deck to the upper exterior deck because Cothern and Porter together had lifted this machinery from the engine room's lower deck to the engine room's upper deck uneventfully. True, Cothern presented to the trial court the affidavit of William C. Van Busick, Ph. D., P. E., an expert in biomechanical engineering, that "[f]or the task of lifting and carrying the motor pump assembly in this case, the maximum permissible lift is 68 pounds." It is equally true that Cothern estimated the machinery to weigh as much as 125 pounds and that Porter thought that it weighed between 85 to about 120 pounds. There were adequate means for Cothern to complete the removal of the motor pump assembly in the form of second engineer Porter. That Porter's assistance was adequate is demonstrated by Cothern's and Porter's uneventful lifting of the motor pump assembly for a height of several feet from the lower deck to the upper deck of the engine room. Porter testified that "[f]or two persons, . . . it wasn't really heavy." There is no material issue about whether Zapata-Haynie failed to furnish Cothern with an adequate means to aid him in this task. Porter was that adequate means.

Related to this first issue is Cothern's argument that Zapata-Haynie -- not Cothern -- allowed Porter to leave early despite "the perceived urgency to remove the equipment." There is no evidence in the record that Zapata-Haynie allowed Porter to leave early. The evidence shows that when Cothern was injured, Porter had left the fishing boat to get a forklift parked on or near the dock for the purpose of using it to haul the motor pump assembly from the fishing boat to Zapata-Haynie's shop which was located near that dock. Moreover, Cothern testified that Porter "indicated" to him that he was going to get the forklift so that the motor pump assembly could be moved from the boat to the dock. Thus, Cothern knew that Porter would soon return to the engine house of the fishing boat after he had gotten the forklift. Cothern elected to move the motor pump assembly from inside the engine room's upper deck to the exterior deck while he was waiting for Porter to return.

Cothern's argument on this issue fails to acknowledge that he was Porter's superior when he attempted to move the machinery from the engine room to the exterior deck. In his deposition Cothern was asked, "As the second engineer, [Porter] is supposed to follow your instructions?" Cothern replied, "Yes, sir." When asked if Porter had disobeyed his instructions in going to get the forklift, Cothern responded, "No, sir."

In *Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 209-10 (1st Cir. 1955), the court acknowledged the plaintiff's duty, which it found he had breached, to supervise someone else. However, because the court found that the ship was made unseaworthy because of a defective generator, the court held that the plaintiff-master's failure to supervise the engineer, whose duty it was to repair the generator, was but a contributory fault. *Id.* at 210 In the case *sub judice*, we have already concluded as a matter of law that the GULF COAST was not unseaworthy in terms of Cothern's claim for damages because it had on board an adequate means of assisting Cothern in removing the motor pump assembly. The adequate means was second engineer Porter, who had successfully assisted Cothern in carrying the machinery from the lower deck to the upper deck of the engine room.

Here Cothern had the duty to supervise Porter, and he breached that duty by failing to direct Porter to assist him in completing the transfer of the motor pump assembly to the fishing boat's outer deck. Cothern's breach of his duty to supervise Porter is also relevant to Cothern's second issue, which is whether Zapata-Haynie's negligence created such an atmosphere of haste and urgency that Cothern was compelled to lift the pump by himself. The record presents us with absolutely no evidence to

support this argument. Cothorn testified in his deposition that he knew that Porter was scheduled to serve as an auxiliary policeman at the Moss Point High School football game that Friday night and that he was expected to be at the football field by 6:30 p. m. Thus, he argues that the haste created by completing the transfer of the pump motor assembly in time for Porter to attend the football game was the consequence of Zapata-Haynie's negligence.

As with the first issue there is no evidence that Zapata-Haynie ordered or instructed Cothorn to permit Porter to leave the GULF COAST in time to get to the football field by 6:30 p. m. Neither is there any evidence that Zapata-Haynie authorized Porter to leave the GULF COAST in time to attend the football game that evening. At most the evidence supports the proposition that Cothorn, whose duty it was to supervise Porter, was responsible for any haste or sense of urgency under which he was working when he attempted to lift the pump motor assembly over the bottom of the hatch. Cothorn testified that he knew that Porter had gone to get the forklift for the purpose of moving this machinery from the boat's deck to Zapata-Haynie's shop. Finally, the evidence indicates that Cothorn had hardly concluded placing the pump motor assembly on the bottom of the hatch when Porter returned with the forklift.

Dickens v. United States, 815 F. Supp. 913 (E.D. Va. 1993) involved a claim by a seaman for injury to his back which he sustained while he and one other crewman were "flaking the lines." *Id.* at 915. The court determined that:

To prevail on his claim of temporary unseaworthiness, Dickens was required to show that he was ordered to perform the task without adequate assistance.

Id. at 918. The court then noted that Dickens was required to show that the inadequacy of the number of crewmen assigned to the task was the proximate cause of his alleged injury. *Id.* This was followed by the explanation that while "[i]t is the general rule in unseaworthiness cases that a seaman's own negligence will not defeat his right to recovery," there are "narrow exceptions to this rule" in situations where the unseaworthy condition is "entirely [the seaman's] own fault." *Id.* at 918-19. The court concluded that Dickens failed to establish the unseaworthy condition of the ship because there was no evidence that anyone had ordered him and the one other crewman to proceed with "flaking the lines." In the case *sub judice* there is no evidence that anyone for Zapata-Haynie ordered Cothorn to complete single-handedly the transfer of the motor pump assembly from inside the engine room to the fishing boat's outer deck. He freely decided to undertake the conclusion of this task on his own.

In *Burden v. Evansville Materials, Inc.*, 636 F. Supp. 1022 (W.D. Ky 1986) a seaman, Burden, was injured while he was single-handedly moving coiled cables. There was an unoccupied call-watch deckhand who was available to assist him in this task, but the court found that Burden had failed to establish that he had been ordered to refrain from disturbing this call watch deckhand in order to help him move the coils. The court further found that Burden knew that this call watch hand was available to help him move the coils and that the captain had testified that he had not ordered Burden to refrain from disturbing the call-watch deckhand. *Id.* at 1031. In the case *sub judice*, Cothorn knew that Porter was available to help him. On this issue the court in *Burden* held that the number of the crew aboard the vessel were not so few as to render the vessel unseaworthy or constitute negligence on the

owner's part.

III. Conclusion

The warranty of seaworthiness is independent from the duty of reasonable care imposed by the Jones Act. *See Burden*, 636 F. Supp. at 1029. Cothorn's argument that M/V GULF COAST was unseaworthy because it lacked adequate equipment and crew to undertake removing the motor pump assembly from the engine room's lower deck fails to recognize that the second engineer, Porter, was an adequate means to undertake and to complete this task as his participation in much of that task demonstrated. It was Cothorn's duty to supervise Porter throughout this task. If Porter was not available to assist Cothorn in the final step of removing this machinery through the hatch and from the engine room, Cothorn breached his duty to see that Porter was available.

In fact, Porter was away only long enough to drive the forklift to the side of the fishing boat preparatory to removing the motor pump assembly. Cothorn admitted that he knew that Porter had gone to get the forklift for this purpose and that Porter had not disobeyed him in doing so. If there were any "atmosphere of haste and urgency which compelled Cothorn to lift the pump by himself," Cothorn -- and not Zapata-Haynie -- created it. The reality is that Cothorn, like seamen Dickens and Burden, decided on his own to proceed with lifting and moving this machinery by himself. Pursuant to the cases which we have discussed, Zapata-Haynie as a matter of law cannot be held liable for the injury to Cothorn's back either on the theory of a breach of its warranty of its vessel's seaworthiness or its negligence under the Jones Act.

Because there are no issues of fact which are material to the legal principles on which Cothorn must depend to establish his claim for damages against Zapata-Haynie, the trial court correctly granted Zapata-Haynie's motion for summary judgment.

**THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY IS AFFIRMED.
APPELLANT IS TAXED WITH THE COSTS OF THIS APPEAL.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.J.J., BARBER, DIAZ, KING, McMILLIN,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**