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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001903-MR

PASTOR MERCADO — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 10-CI-01301

PADUCAH RIVER PAINTING, INC.;
AND JAMES MARINE, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether Appellant Pastor Mercado qualifies as a "seaman" under 46 U.S.C. § 30104, *et seq.* (the "Jones Act"). The McCracken Circuit Court found Mercado did not so qualify. We agree and affirm.

I. Facts and Procedure

Mercado was employed as a blaster and painter by Appellee Paducah River Painting, Inc., a subsidiary of Appellee James Marine, Inc. Mercado's employment began on January 26, 2009, and lasted approximately seven months. Mercado's job duties included blasting (removing) old paint from barges and tug boats, mixing new paint, and applying the paint. As part of his painting duties, Mercado painted safety markings and lines, such as the tug line, safety line, draft marks, and hash lids.

Mercado performed the majority of his job duties at Paducah River Painting's facility in Paducah, Kentucky. The facility consists of six land-based buildings. A barge scheduled to be blasted and/or painted would be hauled out of the Tennessee River with winches, loaded onto rails, and then moved on the rails into the various buildings for blasting and painting. The process of removing or transferring a barge from the water required Mercado to work, at times, from a tug boat or barge on the Tennessee River. According to Mercado's deposition, he transferred barges two or three times a week for approximately an hour at a time. Typically, it took Mercado (and others) one to two days to blast and/or paint a barge. Sometimes barges would remain at Paducah River Painting's facility for a couple of weeks; rarely would a barge stay for more than a month.

Mercado was also required, at times, to paint barges on the water at James Marine. When requested to do so, Mercado would travel by vehicle over land to

and from James Marine, which is located approximately ten miles from Paducah River Painting's facility.

Furthermore, according to Mercado, he would occasionally ride on a tugboat when transporting barges from one James Marine location to another. This process took approximately one to two hours.

In all, Mercado claims to have spent approximately thirty to forty percent of his time working on barges in the water. Brent Robinson, a Paducah River Painting foreman, disagrees with Mercado's estimate. Robinson stated in an affidavit that Mercado spent only ten percent of his time working on barges in the water, and the remaining ninety percent of his time working on land inside Paducah River Painting's facility.

On August 27, 2009, Mercado was blasting paint from a barge located inside Paducah River Painting's building number four. Mercado fell from the deck of the barge onto the ground, injuring his back and pelvis.

Mercado sued Paducah River Painting and James Marine, claiming negligence under the Jones Act, vessel unseaworthiness, and maintenance and cure under general maritime laws of the United States. "The Jones Act provides a cause of action in negligence for 'any seaman' injured 'in the course of his employment.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S.Ct. 2172, 2183, 132 L. Ed. 2d 314 (1995). Appellees moved for summary judgment, arguing Mercado did not qualify as a seaman and therefore could not prevail under any of his claims. The circuit court agreed and granted Appellees' summary-judgment

motion. From this order, Mercado appealed. Additional facts will be discussed as they become relevant.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

III. Analysis

Mercado contends genuine issues of material fact remain regarding whether he qualifies as a Jones Act seaman, thereby precluding summary judgment. We disagree.

The Jones Act provides that "[a] seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C. § 30104 (formerly 46 U.S.C. § 688(a)). Only sea-based maritime workers – otherwise known as seamen – are entitled to the protections afforded by the Jones Act. *See Stewart v. Dutra Const. Co.*, 543 U.S. 481, 481, 125 S.Ct. 1118, 1119, 160 L. Ed. 2d 932 (2005). By enacting the Jones Act, Congress "recognized seamen as a group meriting solicitude" and "heightened legal protection" stemming from "'their exposure to the perils of the sea.'"

Harrington v. Atlantic Sounding Co., Inc., 602 F.3d 113, 132-33 (2d Cir. 2010) (citation omitted).

The Jones Act does not define the term "seaman." In *Chandris*, *supra*, the United States Supreme Court established the criteria by which an employee qualifies as a "seaman" under the Jones Act. 515 U.S. at 354, 115 S. Ct. at 2183. To procure seaman status, an employee must satisfy a two-part test:

> First, . . . an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission. . . .
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Id. at 368, 115 S.Ct. at 2190. Because the "seaman inquiry" encompasses a "mixed question of law and fact," summary judgment is only proper "where the facts and the law will reasonably support only one conclusion." *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554, 117 S.Ct. 1535, 1540, 137 L. Ed. 2d 800 (1997) (internal quotation marks and citations omitted).

The parties present no meaningful argument pertaining to the first *Chandris* criterion. We interpret this to mean that the parties agree that, at the very least, a genuine issue of material fact exists regarding whether Mercado's duties contributed to "the function of the vessel or to the accomplishment of its mission." *Chandris*, 515 U.S. at 368, 115 S.Ct. at 2190. Taking our cue from the parties, we will confine our review and remarks to the second part of the *Chandris* test.

This prong – commonly referred to as the "substantial connection" standard – is designed to separate "land-based from sea-based employees." *Harbor Tug*, 520 U.S. at 555, 117 S.Ct. at 1540. The Supreme Court emphasized in *Harbor Tug* that "[f]or the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Id.* That is, "the employee's connection to the vessel [must] regularly expose[ ] him 'to the perils of the sea.'" *In re Endeavor Marine Inc.*, 234 F.3d 287, 291 (5th Cir. 2000) (quoting *Harbor Tug*, 520 U.S. at 555, 117 S.Ct. at 1540).

The second prong of the seaman test is conjunctive. To qualify as a Jones Act seaman, the worker must (A) be substantially connected in both (i) duration and (ii) nature to (B) a vessel or fleet of vessels in navigation. *Chandris*, 515 U.S. at 370, 115 S.Ct. at 2191. Should a worker fail to meet any sub-part, the second prong as a whole fails, as does the worker's ability to claim seaman status.

Mercado contends the circuit court erred when it determined that he did not work for an identifiable fleet of vessels. Mercado claims he presented unchallenged evidence that all the barges he worked on were under the control and ownership of the Appellees. We are not persuaded.

When, as here, the case "turns on whether the employee has a substantial connection to an identifiable[, finite] group of vessels, common ownership or control is essential for this purpose." *Harbor Tug*, 520 U.S. at 558, 117 S. Ct. at 1542. The Third Appellate Circuit has defined a fleet as "an identifiable group of

vessels acting together or under one control." *Reeves v. Mobile Dredging & Pumping Co., Inc*., 26 F.3d 1247, 1258 (3d Cir. 1994). "The case law uniformly rejects the claim that 'fleet' means any group of vessels an employee happens to work aboard." *Id.* At the very least, "the ships must take their direction from one identifiable central authority to constitute a fleet." *Id.*

In this case, Mercado testified in his deposition that, during the seven months prior to his accident, he painted (whether entirely or partially) over 100 different barges and blasted on approximately 40 barges. Mercado was not certain who owned the barges, but believed them to be *customer owned*. In his affidavit, Robinson confirmed that Paducah River Painting is in the business of blasting and painting *customer-owned* barges. As such, the make-up of the Appellees' alleged "fleet of vessels" was ever-changing, sometimes as often as every one to two days. Indeed, Mercado testified most barges remained at Paducah River Painting's facility for only a few days. We are sure that neither Congress nor the Supreme Court intended a fluctuating lineup of vessels, such as the barges here, to constitute a "fleet of vessels" for purposes of the Jones Act.

Furthermore, there is no evidence Paducah River Painting exercised anything more than limited control over the barges in its custody; its control was confined to that necessary to fulfill its blasting and painting obligations. There is no evidence Paducah River Painting was free to use the barges for any other purpose or to direct "any aspect of their business or operation." *Harbor Tug*, 520 U.S. at 557, 117 S. Ct. at 1541. Likewise, there is no evidence that the barges

"took their direction from one identifiable central authority." *Reeves*, 26 F.3d at 1258. Accordingly, because the barges that Mercado worked upon at Paducah River Painting's facility were owned by numerous customers and were not subject to common control, we find they do not constitute a "fleet of vessels" sufficient to satisfy the second prong of the *Chandris* test.

Mercado also points out that James Marine, the parent company of Paducah River Painting, owns a fleet of eight tugboats which operates on the Tennessee River. Accepting this fact as true, the mere ownership of a fleet of vessels by James Marine isn't enough to render Mercado a Jones Act seaman. To so qualify, Mercado must have a substantial connection to that particular fleet of tugboats. And there is nothing in the record to indicate Mercado performed any work on, much less had a substantial connection to, those particular vessels.

In conducting our analysis, we cannot lose sight of the fact that the "Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *Chandris,* 515 U.S. at 370, 115 S.Ct. at 2190. The test adopted by the Supreme Court must not be applied in such a manner that the policy underlying the Jones Act is ignored or forgotten. Again, the "substantial connection" criterion is designed "to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation[.]" *Id.* at 370, 115 S. Ct. at 2190.

In the case before us, we find Mercado was a land-based maritime worker whose job duties occasionally required him to enter navigable waters. In his deposition, Mercado admitted that, before any blasting took place, the barge would be pulled out of the water and placed on land. Mercado also admitted that all painting, except for detail painting, was "almost always" done on land.[1] Only occasionally would Mercado enter navigable waters, whether to paint detailing on a barge, ride on a tugboat when transporting barges, or during the process of transferring a barge from the river to Paducah River Painting's facility. Mercado's duties placed him sporadically on the waters of the Tennessee River. These isolated adventures onto navigable waters are the sort of "'transitory or sporadic' connection to a vessel or group of vessels that, as [the Supreme Court] explained in *Chandris*, does not qualify one for seaman status." *Harbor Tug*, 520 U.S. at 560, 117 S. Ct. at 1542.

In sum, we find Mercado simply did not perform work of a "seagoing nature[,]" *see id*., and was not subjected to the perils and hazards of the sea. The

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[1] We pause to note that, on this point, Mercado's deposition testimony conflicts with his August 31, 2012 affidavit, which was submitted in response to the Appellees' summary-judgment motion and in which Mercado claimed that it was "very rare" to paint barges on land. However, the Kentucky Supreme Court recently noted that

> "'[a]s a general proposition, a deposition is more reliable than an affidavit.'" While a post-deposition affidavit may be admitted to explain deposition testimony, "an affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact" to avoid summary judgment.

Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc., 215 S.W.3d 56, 62-63 (Ky. App. 2006) (footnotes omitted).

circuit court properly concluded, as a matter of law, that Mercado failed to qualify as a Jones Act seaman.

IV. Conclusion

We affirm the October 3, 2012 order of the McCracken Circuit Court granting summary judgment in favor of James Marine and Paducah River Painting.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher H. Morris
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BRIEF FOR APPELLEES:

Robert Nienhuis
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