Fifth Circuit Redefines Standard of Care in Jones Act Cases

In a surprising about face, a Fifth Circuit *en banc* panel redefined the standard of care owed in Jones Act negligence cases. *Gautreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 781 (5th Cir. 1996); rehearing *en banc* granted July 17, 1996; opinion reinstated in part on rehearing by 107 F.3d 331 (5th Cir. 1997).

Charles Gautreaux was severely injured while operating the portside winch while performing his duties as a seaman for his employer, Scurlock Marine, Inc. His claim alleged the negligence of his employer as well as the unseaworthiness of the vessel BROOKE LYNN. After a trial on the merits, the jury returned a verdict in favor of Gautreaux, although it found the BROOKE LYNN to be seaworthy. The jury apportioned fault at 95% to Scurlock and 5% to Gautreaux.

Scurlock appealed alleging that the District Court's jury instruction regarding contributory negligence of the seaman was erroneous. The District Court's jury instruction was consistent with the standard Fifth Circuit's pattern jury instructions and stated in part that the Jones Act seaman does not have a duty to use ordinary care under the circumstances for his own safety. A Jones Act seaman is obliged to exercise only "slight care" under the circumstances for his own safety at the time of the accident.

The initial Fifth Circuit opinion affirmed the trial court, acknowledging that the "slight care" standard, though recently questioned, remained the "settled law" of the Fifth Circuit. *Gautreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 781 (5th Cir. 1996). The Fifth Circuit case law, as it previously had evolved, found that employer's liability could be determined based on the “slightest” negligence standard of care and the seaman only owed a “slight” duty to protect himself.

Despite the District Court having used an instruction which was consistent with the published Fifth Circuit's pattern jury instructions and the *Scurlock* Court's initial acknowledgment of the jury instruction being in accordance with "settled law," on rehearing the Fifth Circuit *en banc* held that the duty of care owed by a seaman is one of ordinary care under the circumstances. The Court additionally found that the Jones Act employer's duty is one of ordinary care. *Id.*, 107 F.3d 331.

In reaching these conclusions, the Fifth Circuit reviewed the historical development of the "slight care standard" applied in Jones Act negligence cases and in the Federal Employees Liability Act ("FELA"). The Court noted that under Section 51 of FELA the plaintiff is entitled to recover under the Jones Act if his employer's negligence is the cause in whole or part of his injury. The Fifth Circuit observed that the use of the term "slightest" first appeared in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 506, (1957) rehearing denied 77 S.Ct. 808 (1957), where the Supreme Court used it to describe a reduced standard of causation in the employer's negligence and the employee's resulting injury under Section 51 of FELA.

The *en banc* Fifth Circuit concluded that the Supreme Court precedent did not support the proposition that the duty of care owed is slight. It concluded that the use of the phrase "in whole or in part" related only to causation and not to the nature of the duty of care that is owed. The Court, therefore, concluded that Supreme Court had not sanctioned or utilized the concept of "slightest care" in connection with any duty of care owed by either employee or employer.

The Court next turned to the precedent of duty of care in Jones Act negligence cases. The Court noted that its first deviation from the ordinary care standard occurred in *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977) rehearing denied 554 F.2d 1065 (5th Cir. 1977) (overruled on other grounds), 688

F.2d 280 (5th Cir. 1982), where the Court held that Jones Act liability could be sustained on evidence of only the "slightest negligence."

Later the similar case of *Spinks v. Chevron Oil*, 507 F.2d 216 (5th Cir. 1975) (clarified on other grounds), 546 F.2d 675 (5th Cir. 1977), overruled by *Gautreaux v. Scurlock Marine* 107 F.3d 331 (5th Cir. 1997), the Fifth Circuit held that the Jones Act employer owed a higher standard of care to the employee and the employee owed only a slight duty to protect himself. *Spinks,* 507 F.2d at 223. Since *Spinks* was well established authority in the Fifth Circuit, the *Gautreaux* Court was required to overrule *Spinks* and its progeny to hold that a Jones Act seaman should follow a standard of ordinary care under the circumstances.

The *Gautreaux* Court also overruled any Fifth Circuit precedent which held that the Jones Act employer had a higher duty of care than that required under ordinary negligence. In reviewing the FELA, the *Gautreaux* Court said that there is no distinction between degrees of negligence or standard of care as to the employer and employee. The Court held that the person is negligent if she or he fails to act as an ordinary, prudent person would act under similar circumstances.

It would appear to this writer that the "slightest" care standard can still be utilized in terms of a reduced standard of causation between the employer's negligence and a resulting injury in FELA and Jones Act cases. The Court concluded that *Gautreaux* had met his "feather weight" burden of proof on causation. The *Gautreaux* Court did not in any way indicate that any other causation standard would be applicable to Jones Act cases.

CONCLUSION

The Fifth Circuit now applies the same standard of care to both the seaman and the seaman's employer. There is a duty to act with ordinary care and prudence under the circumstances. The circumstances of the seaman's employment include

not only his reliance on his employer to provide a safe working environment, but his own experience and training.

This writer suggests that jury charges be drafted carefully with *Gautreaux* in mind and in light of the reduced causation standard which continues to be available in Jones Act-FELA cases.