No. 11-420

In the
Supreme Court of the United States

PAULINE PARKER,

Petitioner,

v.

LUCKY STAR CASINO CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

COMPETITION PACKET FOR THE NINETEENTH ANNUAL JUDGE JOHN R. BROWN ADMIRALTY MOOT COURT COMPETITION, 2012

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PAULINE PARKER, Plaintiff-Appellant,

v.

LUCKY STAR CASINO CORP., Defendant-Appellee.

No. 09-12345

United States Court of Appeals,
Fifth Circuit

May 30, 2011

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Pauline Parker raises two arguments that this Court has already considered and rejected. The district court was bound to follow our previous decisions, and ultimately did so. As a three-judge panel, we are similarly bound. We accordingly affirm.

Ms. Parker claims personal injury damages under the Jones Act, 46 U.S.C. § 30104, against her employer, defendant-appellee Lucky Star Casino Corp. ("Casino Corp."). She argues that she is a "seaman" under the Jones Act because she was a member of the crew of the *M/V Lucky Star*, a casino boat that qualifies as a "vessel" under the Supreme Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005). But our subsequent decision in *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006), held — in light of *Stewart* — that the owner of a casino boat substantially indistinguishable from the *M/V Lucky Star* can defeat vessel status by showing that it has no present intention ever to sail the purported vessel again and by citing the Louisiana legislation that ensures that the purported vessel has no incentive ever to sail again. Casino Corp. has made the necessary showing. The district court correctly dismissed Ms. Parker's Jones Act claim.

Because Casino Corp. brought its counter-claim solely by way of set-off of any damages that it might owe Ms. Parker in her Jones Act action, it is unnecessary (now that Ms. Parker has

no Jones Act claim) for us to reach her second issue on appeal. We merely note that the district court correctly followed our binding decision in *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 2006 AMC 58 (5th Cir. 2005).

The judgment of the district court is

Affirmed.

JUSTINIAN, Circuit Judge, concurring:

I fully join in the panel's decision to affirm the district court's judgment. In view of this Court's prior decisions that are binding on us as a three-judge panel, no other solution is possible.

I write separately because I think we should review this case *en banc* if Ms. Parker petitions for rehearing. Although the Supreme Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005), is just over a half-dozen years old, it has already generated an entrenched conflict between our Court and the Eleventh Circuit. The watercraft that failed to qualify as a "vessel" in the present case, like the riverboat casino in *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006), would unquestionably have qualified as a "vessel" in our sister circuit. *See*, *e.g.*, *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). The Eleventh Circuit has recently reaffirmed its interpretation. *See Crimson Yachts v. Betty Lynn II Motor Yacht*, 603 F.3d 864, 2010 AMC 1414 (11th Cir. 2010).

I find this situation intolerable. If we do not correct the problem ourselves, we can only expect the Supreme Court to resolve the conflict.

HAMMURABI, Circuit Judge, concurring:

I agree with Judge Justinian's call for *en banc* review. Although as a three-judge panel our hands are tied, the full Court has the freedom to decide this case correctly.

If we reexamine the "vessel" status question, we should also reconsider *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 2006 AMC 58 (5th Cir. 2005). The conflict under FELA that we reviewed there has not only become more entrenched but has (not surprisingly) spread to the Jones Act context. Most recently, the Seventh Circuit reviewed the conflict and, in a Jones Act case, explicitly rejected our *Withhart* analysis. *See Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039, 2011 AMC 1 (7th Cir. 2010) (Posner, J.). Judge Posner's reasoning is highly persuasive and should be considered by our Court *en banc*.

United States District Court
for the Eastern District of Louisiana

PAULINE PARKER, Plaintiff,

v.

LUCKY STAR CASINO CORP., Defendant.

No. 08-Civ-6838

March 2, 2010

PORTIA, J.:

Plaintiff Pauline Parker claims personal injury damages under the Jones Act, 46 U.S.C. § 30104, against her employer, defendant Lucky Star Casino Corp. Defendant has moved for summary judgment on plaintiff's claim, arguing that plaintiff is not a "seaman" under the Jones Act because the casino boat on which she worked does not qualify as a "vessel" under the Supreme Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005).

Defendant has also filed a counter-claim against plaintiff for property damage to the casino boat by way of set-off of any damages that it might owe plaintiff in her action. Plaintiff has moved for summary judgment on that counter-claim, arguing that the Jones Act, which incorporates the Federal Employee Liability Act (FELA), 45 U.S.C. §§ 51-60, bars the counter-claim.

Both motions for summary judgment are now ripe for decision. For the reasons explained below, both motions are denied.

Factual Background[1]

Plaintiff was employed as an engineer on the *M/V Lucky Star*, which is owned and operated by defendant. As the name implies, the *M/V Lucky Star* was originally built as a vessel. The early history is not before the Court, but it is undisputed that defendant bought the vessel in 1995. At that time, it was a fully operational, steel-hulled paddlewheeler qualifying as a "riverboat" under La. R.S. § 27:44(23) and satisfying all of the necessary Coast Guard requirements for carrying passengers. Defendant has operated the *M/V Lucky Star* as a riverboat casino and gambling establishment under applicable Louisiana law ever since.

Prior to 2001, Louisiana law required riverboat casinos to cruise on navigable waters when conducting gaming operations. In 2001, however, the legislature reversed course, repealed the cruising requirement, and limited gaming operations to the time that a riverboat is dockside. *See* La. R.S. § 27:65(B)(1). The *M/V Lucky Star* ran gaming cruises on Lake Pontchartrain for six years, but since the 2001 enactment it has conducted all gaming dockside. Defendant notified the Coast Guard of the change. In response, the Coast Guard reduced the crew requirements, limited the *M/V Lucky Star* to "permanently moored operations," and notified defendant that if "the vessel return[ed] to underway passenger service, [defendant would] be required to show compliance with all applicable regulations" for the service to which the vessel returned.

Defendant did not physically disable the *M/V Lucky Star* from sailing in 2001. On the contrary, it retains a captain and crew on board (albeit a smaller crew than before), and it maintains the engines, generators, and equipment in working order. The only physical changes

[1] The facts stated here are either undisputed or must be assumed to be true in the present procedural posture of the case. For facts bearing on defendant's motion for summary judgment, all ambiguities have been resolved in plaintiff's favor. For facts bearing on plaintiff's motion for summary judgment, all ambiguities have been resolved in defendant's favor.

were adding steel cables to the mooring system and making the necessary attachments for the *M/V Lucky Star* to receive shore-based electrical, computer, telephone, water, and sewage service. Defendant concedes that if necessary the *M/V Lucky Star* could detach all of the shore-side connections and set sail in "about twenty minutes," which is not significantly longer than it took to set sail when it conducted its regular gaming cruises in the late 1990s.

In the early morning hours of Monday, September 17, 2007, plaintiff was the last crew member on board the *M/V Lucky Star* after a busy weekend's operations. It was her responsibility to ensure that all systems had been properly set for "overnight" operations before she went off duty. Defendant alleges (and in the present procedural posture those allegations must be accepted as true, *see supra* note 1) that she made two crucial mistakes. First, she mistakenly set the bilge pumps to "off." Second, she accidentally left open a valve that allowed water from Lake Pontchartrain to enter the *M/V Lucky Star*. As plaintiff was leaving the casino, however, she recognized that "something didn't sound right," and realized that she had failed to turn on the bilge pumps. She therefore hurried back to correct the mistake. As she descended the ladder to go below again, a defective step gave way. Plaintiff lost her balance, fell 12 feet to the steel deck at the base of the ladder, and suffered substantial injuries — including a severe head injury that caused her to lose consciousness for some time.

When plaintiff came to, her injuries prevented her from moving and she was unable to summon help. Thus she lay on the deck without medical attention until another engineer discovered her when he came on duty Monday afternoon. By that time, the lack of prompt medical attention had made plaintiff's injuries — which were already serious — even worse. Moreover, the water entering the *M/V Lucky Star* had caused extensive damage to sophisticated electronic equipment used in the gaming operations. Defendant was forced to shut down

operations for over six weeks while repairs were made and new equipment was purchased and installed.

Procedural Background

On September 2, 2008, plaintiff filed the present action in this Court asserting federal question jurisdiction under 28 U.S.C. § 1331 and the Jones Act, 46 U.S.C. § 30104, and seeking to recover for her personal injuries against her employer under the Jones Act. The Jones Act gives seamen a negligence remedy against their employers on the same terms as railroad employees' actions under FELA, 45 U.S.C. §§ 51-60. Plaintiff alleges that in maintaining a defective ladder and in other respects, Casino Corp. negligently failed to provide her with a reasonably safe workplace.

Defendant filed a counter-claim against plaintiff for the property damage to the *M/V Lucky Star* and its furnishings that was caused by plaintiff's negligence. Defendant has clarified, however, that it is bringing its counter-claim solely by way of set-off of any damages that it might owe to plaintiff in her action. If the property damages exceed the personal injury damages, defendant does not assert the right to collect the excess.

Defendant moved for summary judgment on the ground that plaintiff was not a "seaman" because she was not a member of the crew of a "vessel."[2] Defendant contended in support of the motion that the *M/V Lucky Star* was not a vessel under maritime law. That motion is now ripe for decision.

Plaintiff moved for summary judgment on defendant's counter-claim. Plaintiff argues that the counter-claim is barred by FELA § 5, which is incorporated into the Jones Act and provides as follows:

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[2] Defendant concedes that plaintiff satisfies the remaining requirements for seaman status. *See generally*, *e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995).

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55. Alternatively, plaintiff argues that the counter-claim is barred by FELA § 10, which is also incorporated into the Jones Act and provides in relevant part as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest of the facts incident to the injury or death of any employee, shall be void . . . .

45 U.S.C. § 60. Under plaintiff's theory, the counter-claim is simply a device intended to exempt defendant from its liability under the Jones Act and has the effect of intimidating her co-workers from furnishing information.

Seaman Status – Vessel Status

In this case, the most recent decision on point is also the most authoritative. In *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005), an injured worker sought damages from his employer under the Jones Act and was met with the argument that the watercraft on which he worked was not a "vessel." To resolve the case, the Supreme Court applied the definition of "vessel" that governs throughout the U.S. Code:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3. Under that definition, the Court unanimously held that a dredge with virtually no motive power of its own still qualified even though it was stationary at the time of the incident.

Applying the same definition here, I have no doubt that the *M/V Lucky Star* is "capable of being used as a means of transportation on water." Indeed, until 2001 it *was* used as a means of

transportation on water. Nothing has changed about the *M/V Lucky Star* to change its capability of being so used.[3] Only the state law that governs riverboat gambling (and thus the owner's intended use of the vessel) has changed. But the definition of such a key term in federal maritime law as "vessel" cannot change with every amendment of state law. Neither can it change with every self-serving change in the owner's state of mind. The meaning of "vessel" under maritime law turns on what Congress intended. The *M/V Lucky Star* clearly meets Congress's definition.

The Counter-Claim

The cases are in conflict over the issue of employer counter-claims under FELA and the Jones Act.[4] Relying on the "common law principle that a master or employer has a right of action against his employee for property damages suffered by him arising out of acts of negligence committed within the scope of his employment," one line of decisions holds that FELA

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[3] This case is thus in sharp contrast with cases in which a vessel has been so altered that it is no longer "capable of being used as a means of transportation on water." *See*, *e.g.*, *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 1994 AMC 2787 (9th Cir. 1992) ("a large opening" had been cut in the hull of a converted Liberty ship to allow for dock traffic, with the result that it would surely sink if it were ever put out to sea).

[4] The FELA and Jones Act cases are essentially interchangeable in this context. The Supreme Court has frequently declared that "the Jones Act adopts 'the entire judicially developed doctrine of liability' under [FELA]." *American Dredging Co. v. Miller*, 510 U.S. 443, 456, 1994 AMC 913 (1994) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 1958 AMC 251 (1958); *see also*, *e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 1991 AMC 1 (1990) (when Congress "incorporate[ed] FELA unaltered into the Jones Act" the judicial "gloss" on FELA was intended to be part of the package). Thus the Supreme Court has adopted FELA interpretations in Jones Act cases both when those interpretations have protected the rights of injured workers, *see*, *e.g.*, *Kernan*, 355 U.S. at 436 (applying "the principles developed in [a] line of FELA cases"), and when those interpretations have restricted those rights, *see*, *e.g.*, *Miles*, 498 U.S. at 32 (applying *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913)). In the history of the Jones Act, it appears that the Supreme Court has failed to follow FELA in only three situations. *See Cox v. Roth*, 348 U.S. 207, 208, 1955 AMC 942 (1955); *The Arizona v. Anelich*, 298 U.S. 110, 1936 AMC 627 (1936); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377-378, 1933 AMC 9 (1932); *see also Beadle v. Spencer*, 298 U.S. 124, 1936 AMC 635 (1936) (following *The Arizona*).

§§ 5 & 10, 45 U.S.C. §§ 55 & 60, do not bar such counter-claims. *See*, *e.g.*, *Cavanaugh v. Western Maryland Railway Co.,* 729 F.2d 289, 290-291 (4th Cir. 1984); *Sprague v. Boston & Maine Corp.,* 769 F.2d 26, 28-29 (1st Cir. 1985); *Gabourel v. Bouchard Transportation Co.,* 901 F. Supp. 142, 144-145, 1996 AMC 1108 (S.D.N.Y. 1995). Another line tracks Judge Hall's dissent in *Cavanaugh,* and holds that such counter-claims "pervert the letter and spirit of the FELA and . . . destroy the FELA as a viable remedy for injured railroad workers." 729 F.2d at 295-297 (Hall, J., dissenting). *See*, *e.g.*, *Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 94 Wash. 2d 155, 615 P.2d 457 (1980); *Yoch v. Burlington Northern Railroad Co.,* 608 F. Supp. 597 (D. Colo. 1985).

The Fifth Circuit has not only chosen sides in this conflict, it has done so in the context of a Jones Act case. In *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 2006 AMC 58 (5th Cir. 2005), the mate of a tugboat operated by Sea Mar Management allegedly left his post in the wheelhouse while the vessel was in congested waters to go below and make a sandwich. During Withhart's absence, the tugboat collided with an Otto Candies vessel, damaging both vessels and injuring Withhart. The ensuing litigation included (1) Withhart's Jones Act claim against Sea Mar; (2) Otto Candies' claim against Sea Mar for collision damage; and (3) Sea Mar's counter-claims against Withhart for property damage to Sea Mar's tug and indemnity of the sums Sea Mar had to pay Otto Candies for damage to Otto Candies' vessel. Rejecting Withhart's argument that FELA §§ 5 & 10 barred Sea Mar's counter-claims, the *Withhart* Court referred to FELA cases on both sides of the question and followed the Fourth Circuit's decision in *Cavanaugh*. Because *Withhart* is binding on this Court, plaintiff's motion for summary judgment must be denied.

Conclusion

Defendant's motion for summary judgment is denied; plaintiff's Jones Act case may proceed. Plaintiff's motion for summary judgment is denied; defendant's counter-claim may also proceed.

It is so ordered.

United States District Court
for the Eastern District of Louisiana

PAULINE PARKER, Plaintiff,

v.

LUCKY STAR CASINO CORP., Defendant.

No. 08-Civ-6838

April 21, 2010

PORTIA, J.:

On March 2, 2010, this Court denied both defendant's and plaintiff's pre-trial motions for summary judgment. Familiarity with that opinion is assumed. Defendant has moved for reconsideration under Fed R. Civ. P. 60(a). The motion to reconsider is granted and, on reconsideration, defendant's motion for summary judgment is granted.

Defendant argued that it was entitled to summary judgment on the ground that plaintiff was not a "seaman" because she was not the member of the crew of a "vessel." The Jones Act protects only seamen, and thus plaintiff's Jones Act claim must fail if she was not a member of the crew of a vessel at the time of her injury. Defendant contended that the *M/V Lucky Star*, where plaintiff worked, was not a vessel under maritime law. In ruling on defendant's motion for summary judgment, this Court followed *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005), and applied the legal standard advocated by both parties in their pre-trial briefs and at oral argument to conclude that the *M/V Lucky Star* was indeed a "vessel."

Unfortunately, both parties — and thus this Court — overlooked the Fifth Circuit's more recent decision in *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006), which held that the owner of a casino boat such as the *M/V Lucky Star* can defeat the assertion of vessel status under *Stewart* merely by establishing that it has no present intention ever to sail the purported vessel again (and, at least in Louisiana, by citing the legislation that effectively forbids such a watercraft from sailing). Here it is conceded that defendant, the owner

and operator of the *M/V Lucky Star*, has no present intention ever to sail the *M/V Lucky Star* again and that the relevant state legislation is still in force.

Since March 2, defendant has retained new counsel who has recognized the relevance of *De La Rosa* and moved for reconsideration. Rule 60(a) expressly permits this Court to "correct . . . a mistake arising from oversight or omission whenever one is found in [an] order." The denial of defendant's motion for summary judgment was "a mistake arising from oversight" — the failure to consider *De La Rosa*. Under *De La Rosa*, which is binding on this Court, defendant is entitled to summary judgment.

Defendant's motion for reconsideration is granted. On reconsideration, defendant's motion for summary judgment is granted. Plaintiff's action is dismissed.

It is so ordered.

Selected Chronology of the Case*

Sept. 17, 2007	Plaintiff injured
Sept. 2, 2008	Plaintiff files present action in the United States District Court for the Eastern District of Louisiana asserting federal question jurisdiction under 28 U.S.C. § 1331 and the Jones Act, 46 U.S.C. § 30104.
Mar. 2, 2010	Defendant's pre-trial motion for summary judgment and plaintiff's pre-trial motion for summary judgment both denied with a memorandum opinion (reported as *Parker v. Lucky Star Casino Corp.*, 2010 AMC 3335 (E.D. La. 2010))
Apr. 21, 2010	On reconsideration, defendant's pre-trial motion for summary judgment granted with a memorandum opinion (reported as *Parker v. Lucky Star Casino Corp.*, 2010 AMC 3333 (E.D. La. 2010))
May 1, 2010	Notice of appeal filed
May 30, 2011	Court of appeals opinion (reported at 642 F.3d 1387, 2011 AMC 3333) filed and judgment entered
July 5, 2011	Motion for rehearing denied
Oct. 3, 2011	Petition for certiorari filed raising (1) the vessel definition issue and (2) the counter-claim issue (docket number 11-420)
Dec. 5, 2011	Petition for certiorari granted

* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.