

| | | |
|---|---|---------------------------|
| WILLIE WOMACK | * | NO. 2004-CA-1338 |
| VERSUS | * | COURT OF APPEAL |
| CANAL BARGE COMPANY, INC., FREEPORT-MCMORAN SULPHUR, L.L.C., EFG INSURANCE COMPANY AND XYZ INSURANCE COMPANY | * | FOURTH CIRCUIT |
| | * | STATE OF LOUISIANA |
| | * | |

*
* * * * *

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-9483, DIVISION "D-16"
HONORABLE LLOYD J. MEDLEY, JUDGE**

**JAMES F. MCKAY III
JUDGE**
* * * * *

(Court composed of Judge James F. McKay III, Judge Max N. Tobias Jr.,
Judge David S. Gorbaty)

LAWRENCE BLAKE JONES
DAVID C. WHITMORE
SCHEUERMANN & JONES
New Orleans, Louisiana 70112
Counsel for Plaintiff/Appellant

DONALD R. ABAUNZA
CAROL WELBORN REISMAN
LISKOW & LEWIS
New Orleans, Louisiana 70139-5009
Counsel for Defendant/Appellee, Freeport McMoran Energy L.L.C.

WILTON E. BLAND III
C. WILLIAM EMORY
MOULEDOUX, BLAND, LEGRAND & BRACKETT, L.L.C.
New Orleans, LA 70139

Counsel for Defendants/Appellants, Canal Barge Company, Inc., and
The St. Paul Fire & Marine Insurance Company

**AFFIRMED IN PART, REVERSED AND REMANDED IN
PART**

On August 8, 1998, Willie Womack was a member of the crew of the M/V E.W. LUTZ. On that day, Mr. Womack was in the process of wrapping a mooring line, which was being lowered to him by a platform crane, around a bit on the vessel in order to secure the vessel to the platform when he was allegedly injured. On the day of the accident, Mr. Womack was employed by Canal Barge Company, Inc. (Canal) and the M/V E.W. LUTZ was owned by Freeport-McMoRan Sulphur, L.L.C. (Freeport) but bareboat chartered to Canal and then time chartered back to Freeport. The platform and crane were owned by Freeport, but the crane was operated by an employee of Baker/MO.

On June 16, 2000, Mr. Womack filed a petition for damages alleging that Canal and Freeport were liable to him under the Jones Act, the general maritime law, and the laws of Louisiana; Baker/MO was also made a defendant in this lawsuit. Both Canal and Freeport answered Mr. Womack's

lawsuit. Freeport also filed a cross-claim against Canal and a third-party claim against Canal's insurer, St. Paul Fire and Marine Insurance Company (St. Paul). Canal and St. Paul also filed cross-claims against Freeport. On November 25, 2003, Freeport filed two motions for summary judgment; the first sought summary judgment on Freeport's cross-claim against Canal and Freeport's third-party claim against St. Paul, while the second sought the dismissal of Canal's and St. Paul's cross-claims against Freeport. On May 4, 2004, the trial court granted both of Freeport's motions for summary judgment and ordered St. Paul to reimburse Freeport for all costs and attorney's fees incurred in asserting its third-party claim. On December 2, 2003, Canal filed a motion for summary judgment seeking dismissal of Mr. Womack's claims against Freeport arising out of Freeport's alleged capacities as Mr. Womack's employer and owner or operator of the M/V E.W. LUTZ. On February 17, 2004, Freeport filed a motion for summary judgment seeking dismissal of all of Mr. Womack's claims against it. On May 27, 2004, the trial court granted Freeport's motion for summary judgment. Mr. Womack, Canal and St. Paul now appeal those summary judgments rendered against them. Mr. Womack settled his claims against

Baker/MO.

On appeal, Mr. Womack raises the following assignments of error: 1) the trial court erred in granting appellee Freeport's motion for summary judgment dismissing all claims asserted by the appellant against Freeport. While Freeport's motion asked for dismissal of all claims, Freeport's motion was filed prior to appellant's second amended petition clarifying claims against Freeport as owner of the platform and ropes at issue in this case. The parties' briefs to the trial court only addressed appellant's claims under the Jones Act and general maritime law, and did not address appellant's claims against Freeport as owner of the platform and ropes at issue. As such, it was error for the trial court to grant Freeport's motion for appellant's claims against Freeport as owner of the platform and ropes, since that issue was not properly before the court; 2) the trial court erred in dismissing claims against Freeport as owner of the platform and ropes at issue. The evidence in this matter demonstrated that the ropes in use at the time of appellant's accident were too large and created a hazardous condition. A trier of fact could conclude that Freeport was negligent for allowing such large lines to be used on its platform; 3) the trial court erred in dismissing appellant's claims for

general maritime negligence against Freeport in its capacity as charterer of the vessel. A charterer of a vessel can be liable for injuries that resulted in part from decisions within the time charterer's spheres of control. A trier of fact could conclude that the owner of the platform at issue, i.e., Freeport, exercises control or should exercise control over the size of lines in use on its property, and that appellant's injuries resulted, in part, from Freeport allowing dangerously large lines to be used in its operations; and 4) the trial court erred in dismissing appellant's claims against Freeport under the Jones Act and for unseaworthiness under the general maritime law. Sufficient evidence in the record establishes that there are questions of fact as to whether appellant could be a "borrowed servant" of Freeport and the appellees put forth no evidence to contradict the evidence put forward by the appellant on the borrowed servant issue.

Canal and St. Paul raise the following assignments of error: 1) the trial court erred in granting Freeport's motion for summary judgment on its cross-claim and third party claim against Canal and St. Paul, respectively, requiring them to indemnify, defend and hold harmless Freeport from the claims brought against it by Womack; 2) the trial court erred in ordering

Canal and St. Paul to reimburse Freeport for all costs and attorney's fees incurred by it in defending Womack's claims; 3) the trial court erred in ordering Canal to indemnify Freeport for any judgments rendered against Freeport in this matter; 4) the trial court erred in ordering St. Paul to reimburse Freeport all costs and attorney's fees incurred in asserting its third party claim; 5) the trial court erred in dismissing the original first supplemental and amended cross-claim of Canal and St. Paul against Freeport in their entirety; 6) the trial court erred in dismissing the second supplemental and amended cross-claim of Canal and St. Paul against Freeport, which cross-claim was based upon Freeport's obligations found in Part 7a of the Master Time Charter wherein Freeport was obligated to pay all costs of defense of Womack's claims and is obligated to reimburse Canal and St. Paul those amounts. This is a completely separate claim from the relief sought by Freeport in its motion for summary judgment and should not have been dismissed with the original and first supplemental and amended cross-claims; 7) the trial court erred in awarding Freeport all costs and attorney's fees incurred in defense of Womack's claims and in prosecution of its third party claims. Freeport is only entitled to reasonable attorney's

fees and costs. Freeport has made no showing of the amount of attorney's fees and costs it claims to have incurred and has not demonstrated to any extent that the costs and fees sought were reasonable and necessary to a competent defense of the claim brought against it. Freeport's fees should be limited to those up to the time it should have moved for its dismissal in June of 2000; 8) the trial court erred in not holding an evidentiary hearing to determine whether the costs and fees sought by Freeport were reasonable and necessary to a competent defense, that the costs and fees were incurred solely for Freeport's defense of Womack's claim against it, that they do not include the cost of defending the cross-claims against it. Freeport has the burden of proof on these issues and has submitted nothing in its support; 9) the trial court erred in concluding that the insurance and indemnity provisions found in the Master Bareboat Charter have any bearing on the relief sought by Freeport. Canal was operating the LUTZ pursuant to the terms of the Master Time Charter, not the Bareboat Charter. It is the insurance and indemnity provisions found in the Master Time Charter that control; 10) the court erred in concluding that Womack's claim arises out of and is connected with the Master Time Charter; 11) the court erred in

determining that Freeport was entitled to blanket insurance coverage. Freeport was insured only to the extent it may have been found to be liable as owner and operator of the LUTZ; 12) the court erred when it concluded that Freeport is entitled to be indemnified and defended for the consequences of its own negligence; 13) the court's rulings on Freeport's motions for summary judgment were premature as there had been no findings or conclusions on key factual issues concerning the role each party played or did not play in this scenario, how Womack was injured, and what party or parties (if any) were responsible for causing those injuries and in what capacity those parties were acting, i.e., platform owner, vessel owner/operator or crane operator; and 14) the court's rulings were premature. There were no findings made and there still exist to be resolved at trial significant issues of fact concerning the liabilities of the parties, the capacities in which those parties acted, the role each played, what and who caused Womack's injury and how he was injured. These issues need to be resolved before the indemnity, insurance and defense clauses of the Time Charter can be interpreted and applied.

Summary judgment is favored in Louisiana. La. C.C.P. art. 966.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgments are appropriate. If the pleadings, depositions, affidavits, answers to interrogatories, and admissions on file show that there is no genuine issue as to a material fact, then the movers are entitled to judgment as a matter of law. A fact is material if its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. The burden of proof on a motion for summary judgment is on the mover.

Chaisson v. Domingue, 372 So.2d 1225 (La. 1979). When a motion for summary judgment is made and supported, the opposing party may not rest on mere allegations or denials but must respond by affidavits or with other affirming evidence. Henderson v. Administrators of Tulane University of Louisiana, 426 So.2d 291 (La.App. 4 Cir. 1983). However, if the mover will not bear the burden at trial on the matter that is before the court on the motion for summary judgment, the mover's burden does not require it to negate all essential elements of the adverse party's claim. Bell v. Touro Infirmary, Inc., 2000-0824 (La.App. 4 Cir. 3/21/01), 785 So.2d 926.

In the instant case, Freeport and Canal entered into a series of charter

agreements pursuant to which Freeport, as owner of the M/V E.W. LUTZ, bareboat chartered the vessel to Canal, who in turn manned the vessel and time chartered it back to Freeport. Paragraph 10 of the Master Bareboat Charter provides as follows:

Charterer assumes all risks of liability for the Vessels and for the use and operation thereof, and for loss or damage to property, other than Owner's cargo, arising from or incident to such use or operation. Charterer will protect, defend indemnify and hold harmless Owner (and any firm or corporation subsidiary to, affiliated with or under the same management as Owner, together with any and all Vessels owned, chartered or operated by any of the foregoing) against and from all loss, damage, liability, and expense including attorneys' fees, arising from or in connection with such loss or damage, howsoever caused and whether resulting in whole or in part from the sole negligence or other fault of either party.

In addition, Paragraph 10A of the Master Time Charter contains the following provision:

Manager agrees to indemnify, defend and save harmless Freeport, its servants, employees, agents, subcontractors, officers, directors, parent, subsidiary, and affiliated companies, from and against any and all claims, demands or causes of action asserted by Manager, its servants, employees, agents, officers, directors, parent, subsidiary and affiliated companies, and their successors and assigns, for their own personal injury or death arising out of or in connection with this Time Charter, however caused. The foregoing provisions of this sub-paragraph A shall not apply to any claim caused by the willful misconduct or sole fault of Freeport, its agents, servants or employees.

The language of these contractual provisions is clear; Canal has

agreed to indemnify Freeport against any claim made against it in connection with operation of the M/V E.W. LUTZ. When a contract is not ambiguous or does not lead to absurd consequences, it will be enforced as written and its interpretation is a question of law for a court to decide.

Gertler v. City of New Orleans, 2003-2131 (La.App. 4 Cir. 9/1/04), 881 So.2d 792.

The time charter also required that Canal obtain an insurance policy and name Freeport as an additional assured. Under the time charter agreement, it was also understood that the insurance policies would contain waivers of subrogation in favor of Freeport. The bareboat charter also requires Canal to name Freeport as an additional assured with waivers of subrogation by the underwriters in its favor. Canal obtained a policy of insurance from St. Paul Fire and Marine Insurance Company in which it named Freeport as an additional assured with waivers of subrogation in Freeport's favor.

Under the terms of the bareboat charter, the time charter, and the insurance policy issued by St. Paul to Canal, it is clear that Canal and St. Paul owed certain duties to Freeport. There is nothing unclear or ambiguous about the language in these documents. As such, Freeport was entitled to summary judgment on most of its claims against Canal and St. Paul as well

as their cross claims against Freeport. However, there is a question whether Freeport is entitled to all of its fees and costs as awarded by the trial court for defending its status as a platform owner. The trial court also failed to address the issue of whether St. Paul breached its duty of good faith and fair dealing with Freeport. As such, we must reverse the trial court's award of attorney's fees and remand this issue to the trial court for an evidentiary hearing to determine what fees and costs are directly related to the "cost of defense" and the reasonableness of the fees and costs claimed by Freeport in connection with that defense.

Canal also argues that the trial court erred by dismissing its second supplemental cross-claim for contractual indemnity from Freeport because the issue of contractual indemnity was not before the court pursuant to Freeport's motion for summary judgment. It argues that the indemnity provisions contained in the Time Charter are confusing, vague, and ambiguous, requiring that they be construed against Freeport as the drafter of the contract. This assignment of error is without merit. The judgment of the trial court granting Freeport's summary judgment is dated May 4, 2004. The second supplemental and amending cross-claim was filed on May 28, 2004, albeit without leave of court. Because the second supplemental and amending cross-claim was filed after all prior cross-claims and Freeport

were dismissed, the pleading has nothing to supplement and amend and was not before the trial court at the time it rendered its decision.

In his petition for damages, Mr. Womack alleged that Freeport was liable to him under the Jones Act, the general maritime law, and “the laws and statutes of the State of Louisiana, including but not limited to C.C. Arts 2315 et seq.” The trial court granted Freeport’s motion for summary judgment and dismissed all of Mr. Womack’s claims against Freeport.

As stated previously, when a motion for summary judgment is made and supported, the opposing party may not rest on mere allegations or denials but must respond by affidavits or other affirming evidence. Furthermore, if the mover will not bear the burden at trial, the mover’s burden does not require it to negate all essential elements of the adverse party’s claim. In the instant case, Mr. Womack failed to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. There is nothing to indicate that Freeport was in any way negligent. Mr. Womack failed to demonstrate to the trial court that the lines used on the platform created a defective condition that caused his alleged injury or that Freeport knew or should have known that such alleged defect existed and failed to exercise reasonable care to prevent the damage.

See La. C.C. art. 2317.1.

In any event, Mr. Womack's state law claims have prescribed. Mr. Womack's accident occurred on August 8, 1998. However, he did not file his lawsuit until June 20, 2000. Any claims he had under Louisiana law are subject to the one year prescriptive period provided for in Civil Code article 3492 and not the three year prescriptive period provided for under the Jones Act and the general maritime law. Mr. Womack's state law claims would be covered under the Outer Continental Shelf Lands Act (OCSLA), which adopts the substantive law of the adjacent state for platform-based claims.

See Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971).

The issues of whether Freeport was Mr. Womack's employer and/or owed a warranty of seaworthiness to him are *res judicata* and not before this Court. The trial court granted Canal's summary judgment that dismissed all of Womack's claims against Freeport with prejudice. Thus pursuant to La. C.C.P. art. 1915, it was a final judgment that should have been immediately appealed by Mr. Womack. Even if these issues were preserved for appeal, they are without merit.

Mr. Womack contends that he was the "borrowed servant" of Freeport, thus providing him a claim against Freeport as his Jones Act employer. While he alleged in his petition that Freeport was his employer, he first raised the specific issue of borrowed servant status in his opposition

to Freeport’s motion for summary judgment, without providing any evidence in support of the argument. The evidence in the record does not support this allegation; Mr. Womack admits that he received all his instructions from the captain of the vessel, who was also employed by Canal. A party opposing a motion for summary judgment must “make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial.” La. C.C.P. art. 966 C. Because Mr. Womack provided no proof, summary judgment was properly granted on this issue.

Mr. Womack also argues that Freeport is liable under general maritime law in its capacity as time charterer of the vessel on which he was injured. Specifically, he contends that the lines provided were unsafe for mooring and that this was within Freeport’s “sphere of control.” The language of the Time Charter negates this argument; Part 8 of the Time Charter provides that: “Manager, at its expense, will furnish provisions and all supplies necessary for the operation of the Vessels except as hereinafter set forth.” In addition, Mr. Womack provides no evidence that the mooring lines that caused his injury were owned by Freeport or under Freeport’s control at the time of the accident. As to any unseaworthiness claims, pursuant to the Bareboat Charter between Freeport and Canal, Freeport

relinquished total control of the vessel to Canal, which became its owner *pro hac vice*. Thus, Freeport is not liable if the vessel is found to be unseaworthy when Mr. Womack was injured.

For the foregoing reasons, we affirm the trial court's granting of the summary judgments in favor of Freeport in part, reverse the summary judgment against Canal and St. Paul in part as to the issue of attorney's fees, and remand to the trial for reconsideration of this issue.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART