In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00187-CV

PERRY ASHWORTH AND BAMBI ASHWORTH, Appellants

V.

RAILSERVE, INC., Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-179,635

MEMORANDUM OPINION

Perry and Bambi Ashworth appeal a take-nothing summary judgment in favor of Railserve, Inc. While working as an employee for Railserve, Perry Ashworth fell underneath a railcar at the Huntsman facility in Port Neches, Texas. He sustained a leg injury, and his leg ultimately required amputation. Appellants sued Railserve under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60 (West 2007). Specifically, the appellants argue Railserve failed to provide Perry a reasonably safe place to work, furnish him with safe tools and equipment, and comply with applicable government regulations.

Railserve filed traditional and no-evidence motions for summary judgment. A traditional summary judgment movant has the burden of showing it is entitled to judgment as a matter of law, and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A no-evidence motion requires the non-movant to present evidence raising a genuine issue of material fact supporting each element contested in the motion. TEX. R. CIV. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

Because Railserve established as a matter of law that it was not operating as a "common carrier by railroad" at the Huntsman facility, we affirm the trial court's judgment. *See* 45 U.S.C.A. § 51.

THE SUMMARY JUDGMENT EVIDENCE

Railserve contracted with Huntsman Petrochemical Corporation to provide in-plant railcar switching. Railserve employees weighed inbound and outbound cars at the plant and blocked and switched railcars at the Huntsman facility pursuant to a daily switch list provided by Huntsman.

In support of its motion, Railserve provided affidavits stating it did not "hold itself out to the public as engaged in the business of transportation of persons or property from place to place for compensation" or provide such services "to the public generally." The affidavits established that no railroad has any ownership interest in Railserve, nor is Railserve a party to any contract with any railroad related to switching services at

Huntsman. Railserve was not paid by a railroad to transport goods; Huntsman paid Railserve a flat fee under the "Railcar Switching Agreement."

Perry Ashworth testified by deposition that prior to a railroad picking up railcars from Huntsman, Railserve employees line up the train on a rail line that runs from the facility. Railserve would pull railcars from inside the gate and push the railcars out for the railroad to pick them up. Appellants provided an affidavit of Perry Ashworth stating that, while employed by Railserve at the Huntsman facility, he rode on tracks outside Huntsman's premises. Appellants presented answers to interrogatories showing that General Electric, not Huntsman, owned the railcar involved in the accident. Appellants also attached to their summary judgment response an affidavit of Huntsman's Land Management Coordinator stating that, based on her research, she could not confirm that the railroad track in question was leased or owned by Huntsman. Appellants argue Railserve has previously admitted that it is a "railroad" in the same trial court, and therefore Railserve is estopped from denying that it is an employer for FELA purposes. Appellants also assert that another court has determined Railserve is a common carrier for FELA purposes.

THE MEANING OF "COMMON CARRIER"

FELA applies to common carriers by railroad who are engaging in interstate commerce. 45 U.S.C.A. §§ 51, 57; *see also Edwards v. Pac. Fruit Express Co.*, 390 U.S.

538, 540, 88 S.Ct. 1239, 20 L.Ed.2d 112 (1968). A common carrier for purposes of FELA liability has been described as

> one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant.

Kieronski v. Wyandotte Terminal R.R. Co., 806 F.2d 107, 108 (6th Cir. 1986) (quoting *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd*, 204 F.2d 692 (3d Cir.), *cert. denied*, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953)). The plaintiff bears the burden of proving that the defendant is a common carrier, and the plaintiff "therefore must present affirmative evidence indicating such." *Mickler v. Nimishillen and Tuscarawas Ry. Co.*, 13 F.3d 184, 189 n.3 (6th Cir.), *cert. denied*, 511 U.S. 1084, 114 S.Ct. 1835, 128 L.Ed.2d 463 (1994).

In *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967), the Fifth Circuit Court of Appeals identified the relevant factors in determining whether a railroad is a common carrier. *Id.* at 647. The factors considered are whether (1) the entity is actually performing rail service; (2) the service being performed is part of the total rail service contracted for by a member of the public; (3) the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public; and

(4) remuneration for the services performed is received in some manner -- such as a fixed charge or by a percentage of the profits -- from a railroad. *Id.*

By contrast, the Sixth Circuit Court of Appeals has held that the *Lone Star* factors should not be applied as a "four-part test," but only treated as "*considerations* for a court to keep in mind when determining whether a carrier is a 'common carrier.'" *Kieronski*, 806 F.2d at 108. In *Kieronski*, the Sixth Circuit followed a categorical approach in determining when a railroad is a common carrier, explaining that approach as follows:

> Our review of the numerous cases determining when a carrier is a "common carrier" reveals that carriers can be divided into several categories. We believe that it is more helpful here to focus on the several categories than it is to apply the considerations of *Lone Star* as a "four-part test."
>
> The first category we see is that of in-plant facilities. Courts have long recognized that in-plant rail facilities are not common carriers, even where those facilities are quite extensive, and an in-plant system does not become a common carrier merely by being connected to a common-carrier, because such a connection is a common feature of in-plant systems.
>
> Another category of carriers that are not considered to be "common carriers," is that of private carriers. Private carriers haul for others, but only pursuant to individual contracts, entered into separately with each customer.
>
> A type of carrier that is invariably labelled a "common carrier" is a linking carrier. Where a rail entity links two or more common carriers, the linking entity has become a vital part of the common carrier system and, therefore, becomes a common carrier. This is true where there is common ownership between the linking carrier and a linked common carrier, or where the relationship is purely contractual.
>
> Finally, there is the category in which we find *Lone Star*. Lone Star looks initially like a typical in-plant operation, which would not be characterized as a "common carrier," except that Lone Star's operation did not end there. Lone Star also performed some of the functions of the common carrier, functions that the common carrier's customer had contracted to have the common carrier perform. Lone Star became, in

> effect, part of the common carrier by virtue of Lone Star's ownership of the common carrier, combined with Lone Star's performance of the common carrier's duties. Several of the "linking" cases . . . may also fit into this category.

806 F.2d at 108-09 (citations and footnote omitted).

Railserve maintains that, regardless of the approach, courts uniformly hold that a company providing in-plant switching services is not a common carrier under FELA, particularly when the company does not have a contract with a railroad. Appellants respond that a number of the cases relied on by Railserve involve a defendant in a non-railroad business hauling its own materials for its own benefit. Appellants argue further that *Kieronski* does not apply because in that case the facility switched its own cars, and in this case Huntsman was not switching its own railcars. Appellants argue *Lone Star* rejected the argument that a company providing "in-plant switching" services may never be a common carrier under FELA.

ANALYSIS

Railserve performs rail service. *See Nichols v. Pabtex, Inc*., 151 F. Supp.2d 772, 778 (E.D. Tex. 2001) ("[Activities of the defendant] included 'switching cars' . . . , a practice that even [the defendant] admitted would constitute rail service."); *see also Iverson v. S. Minn. Beet Sugar Coop.*, 62 F.3d 259, 262-63 (8th Cir. 1995) (holding that switching cars and putting them into position for unloading at various loading docks is rail service and meets the first *Lone Star* factor). However, application of each of the remaining three *Lone Star* factors indicates Railserve is not a common carrier for FELA

purposes. The "Railcar Switching Agreement" and Railserve affidavits demonstrate Railserve provided in-plant switching services for Huntsman pursuant to an individual contract. The affidavit of Railserve's co-president states that Railserve has no common ownership or contractual relationship with a railroad. Huntsman pays Railserve directly pursuant to the "Railcar Switching Agreement" and Railserve directly invoices Huntsman. Railserve does not collect payment from any common carrier railroad. *See Iverson*, 62 F.3d at 264.

Appellants cite *Benavidez v. Burlington N. Sante Fe Corp.*, 2008 U.S. Dist. LEXIS 35357 (S.D. Tex. Apr. 29, 2008), for the proposition that Railserve can be a common carrier by railroad despite its contentions that it performs only in-plant switching. Appellants also assert that Railserve relied on its "railroad" status in support of its summary judgment motion in an unrelated pending lawsuit styled *Boudreaux v. Huntsman Corp.*, Cause No. E-163575, in the 172nd Judicial District Court of Jefferson County, Texas.

As the parties point out, the *Benavidez* opinion was vacated. Benavidez had sustained an injury while working as a railroad brakeman/switchman for Railserve. *Benavidez*, 2008 U.S. Dist. LEXIS 35357 at *3. The court held that, under the facts presented, Railserve was a common carrier by railroad by virtue of its contractual relationship with a common carrier. *Id.* at **29-31. The common carrier owned the terminal where Benavidez sustained his injury, and each of the *Lone Star* factors was

imputed to Railserve. *Id.* at *4, *29. In this case, Railserve contracted with Huntsman. Huntsman is not a common carrier. In determining whether Railserve is a common carrier for purposes of FELA, we consider the specific operation, and apply the *Lone Star* factors to that operation. *See id*. We do not consider the circumstances in *Boudreaux* or *Benavidez* determinative of the issue here. We conclude Railserve was not operating as a common carrier by railroad at the Huntsman facility within the meaning of that term under FELA. Appellants' sole issue is overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on April 8, 2010
Opinion Delivered May 27, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.