IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FRANK CARASKA, Appellant, v. THE STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION, DIVISION OF WASHINGTON STATE FERRIES, Respondents,	)	No. 57814-6-I (Consolidated w/ No. 62636-1-I) UNPUBLISHED OPINION FILED: February 8, 2010

Schindler, C.J. — In Caraska v. Dep't of Transp., 140 Wn. App. 1022, 2007 WL 2473456 (Sept. 4, 2007), we reversed the trial court's dismissal of Frank Caraska's personal injury negligence claims under the Jones Act, former 46. U.S.C. § 688(a), and federal maritime unseaworthiness law against the Washington Department of Transportation, Division of Washington State Ferries (the WSF). On remand, the trial court issued a lengthy decision dismissing Caraska's lawsuit against the WSF. Caraska filed a motion to recall the mandate,

asserting the decision on remand does not comply with this court's opinion in Caraska. Caraska also filed a notice of appeal, arguing that substantial evidence does not support the trial court's findings. Because the trial court on remand complied with our decision and the court's findings are supported by substantial evidence, we deny the motion to recall the mandate and affirm.

The underlying facts and legal analysis is set forth in our previous decision and will only be repeated as necessary.

Frank Caraska sued the WSF for injuries he sustained when an intoxicated ferry passenger, Gary Collins, assaulted him.[1] Caraska asserted a negligence claim under the Jones Act, former 46 U.S.C. § 688(a), and a federal maritime unseaworthiness claim against the WSF.[2] Following a three-day bench trial, the court dismissed Caraska's lawsuit against the WSF. The court ruled that the WSF employees were not negligent in allowing Collins to board the ferry.

> The totality of the evidence leads me to conclude that Collins was drunk and obnoxious but he was not acting in a threatening or aggressive manner that would have alerted WSF employees, particularly Anderson and Lane, that he posed a threat to passengers or WSF employees. The testimony of Anderson and Lane, supported by the testimony of Morse and Walters, was that Collins was drunk, rude, obnoxious and unpleasant. While these characteristics are socially unacceptable they are insufficient, standing alone[,] to find that the WSF was negligent in permitting

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[1] Caraska also sued Collins. The court entered a default judgment in the amount of $467,447.84 against Collins. Collins is not a party to this appeal, nor was he involved in the first appeal.

[2] Former 46 U.S.C. § 688(a), as amended and recodified in 2006 at 46 U.S.C.A. § 30104, provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

> Collins to board the KLAHOWYA. Likewise, they are insufficient to establish that Anderson and Lane were negligent in not prohibiting Collins from boarding the ferry because, again, these characteristics standing alone, are insufficient to establish that Anderson and Lane could have foreseen that Collins, while posing no threatening or aggressive behavior in the terminal, would suddenly and unpredictably turn violent once he boarded the ferry.

The trial court also concluded the evidence did not support Caraska's claim that the WSF employees were "negligently trained and thus created an unseaworthy condition."

On appeal, we reversed the order of dismissal. We held that the trial court "erred in narrowly construing the WSF's duty to protect its crew members from an intoxicated passenger" by only focusing on whether Collins was acting in a threatening or aggressive manner and ignoring the language in the Safety Management System (SMS) policy that requires the WSF employees to inform a police officer or the master of the ferry of "any persons seeking passage who display symptoms of intoxication or illegal drug use ***and*** who are violent, disorderly, disruptive, or confrontational."[3] We directed the trial court on remand to consider the evidence based on the language of the SMS policy and to address whether the WSF was negligent in failing to implement and train its employees with regard to the SMS policy. Caraska, 140 Wn. App. 1022, slip op. at 4.

Decision on Remand

The parties did not present any new evidence on remand. Instead, Caraska and the WSF submitted proposed supplemental findings of fact and

[3] We also concluded that it was unclear whether the trial court correctly applied the Jones Act slight evidence causation standard.

conclusions of law. The trial court issued a 42-page "Memorandum Decision, Order, and Supplemental Findings of Fact and Conclusions of Law on Remand." After reexamining the evidence to determine whether Collins was disorderly, disruptive, or confrontational, the trial court concluded that Caraska did not establish a breach of duty by the WSF employees under the SMS policy by allowing Collins to board the ferry.[4] Because there was no breach of duty under the SMS policy, the court also concluded it was unnecessary to reach the unseaworthiness claim based on inadequate training.

> This court has found that there was no violation of SMS policy by WSF employees because plaintiff has failed to carry his burden of proof to establish that Collins was violent, disorderly, disruptive, or confrontational. Therefore, it would appear unnecessary to consider whether WSF employees, specifically Anderson and Lane, were improperly trained. Because Anderson and Lane in fact acted correctly under SMS policy, the adequacy of their training or whether they remember it or even whether it occurred would appear to be irrelevant.

Nonetheless, the court considered Caraska's unseaworthiness claim, and ruled that he failed to prove the WSF breached its duty to train its employees.

The trial court entered the order of dismissal on October 21, 2008. On November 6, Caraska filed a motion to recall the mandate. We granted Caraska's motion under RAP 12.9(a) to determine whether the trial court complied with our decision. On November 16, Caraska filed a notice of appeal of the order of dismissal.

Compliance with Appellate Decision on Remand

[4] Because the court found no breach, it did not reach the issue of causation.

Caraska contends that on remand, the trial court did not comply with this court's decision in the first appeal. Caraska argues the trial court ignored this court's opinion by misconstruing and failing to address the duty as defined in the SMS policy, and refusing to address causation with respect to the Jones Act claim. Caraska also contends that the court "glossed over" the unseaworthiness claims of inadequate training. Caraska asks us to strike the findings of fact and conclusions of law, and enter judgment against the WSF.

RAP 12.2 requires the trial court to comply with an appellate court decision. RAP 12.2 provides in pertinent part:

> Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9 . . . .

RAP 12.9 (a) allows the appellate court to recall the mandate "to determine if the trial court has complied with an earlier decision of the appellate court given in the same case."

The trial court's memorandum decision and the findings of fact and conclusions of law show the court complied with this court's decision in Caraska. The memorandum decision accurately describes our decision, stating that "[t]he Court of Appeals directed this court on remand to address the evidence 'in the context of the duty as defined by the adopted SMS policy.'" The trial court states that "[o]n remand, this court has read the entire record and considered it as a

whole. Especially pertinent evidence as to *whether* Collins was 'disorderly, disruptive, or confrontational . . . .'"

In reexamining the evidence, the trial court considered the demeanor and credibility of the witnesses in determining whether the WSF employees violated the SMS policy. The court also notes that while none of the witnesses used the terms "'disorderly, disruptive or confrontational'" in describing Collins's behavior, "what matters is what something is, not what it is called."

Based on the testimony, the court concluded that Caraska failed to establish by a preponderance of the evidence that the WSF employees breached the duty as defined in the SMS policy by selling Collins a ticket and allowing him to board the ferry. As to the slight evidence standard of causation under the Jones Act, the court clarified that it understood the correct standard, but because the court concluded there was no negligence on the part of the WSF, it did not reach the issue of causation.

With regard to our direction in Caraska to consider evidence of inadequate training as related to his Jones Act and unseaworthiness claims, while the court states that it was unnecessary to address those claims because the WSF employees did not violate the SMS policy, nonetheless, "mindful of the clear direction of the Court of Appeals," the court did so.

> Nevertheless, mindful of the clear direction of the Court of Appeals, this court has combed the record for evidence of improper training. The court has considered the all [sic] of the evidence. Plaintiff has failed to carry his burden of proof to establish that WSF breached its duty to implement the SMS policy by not properly training its employees. Plaintiff also has failed to carry his burden of proof to

> establish unseaworthiness because of the presence of an understaffed or ill-trained crew, whether WSF terminal employees or others.

In addition, the court pointed to the lack of evidence about training deficiencies regarding the SMS policy, the lack of evidence about the SMS policy in the context of the specific facts, and the fact that no witness was shown or asked about the policy which was admitted as an exhibit at trial.

Because on remand the trial court complied with our decision, we deny Caraska's motion to recall the mandate.

Appeal

Even if the trial court complied with the mandate, Caraska argues that the trial court's findings and conclusions are not supported by substantial evidence. Where a court has evaluated evidence in a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and whether the findings support the conclusions of law. Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).

The substantial evidence standard is defined as the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Our review is deferential and we view the evidence and all reasonable inferences in the light most favorable to the prevailing party. Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). We do not review credibility determinations on appeal. Miles v. Miles, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). And where

there is substantial evidence, "we will not substitute our judgment for that of the trial court even though the court might have resolved a factual dispute differently." Korst, 136 Wn. App. at 206.

The elements of a Jones Act negligence claim are duty, breach, notice, and causation. Ribitzki v. Canmar Reading & Bates, Ltd., 111 F.3d 658, 662 (9th Cir. 1997).[5] Breach is generally a question for the trier of fact. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Caraska argues that the trial court erred by continuing to only focus on whether Collins was threatening or aggressive, instead of whether his actions were "violent, disorderly, disruptive, or confrontational" under the SMS policy. Caraska points to evidence in the record that Collins was pacing, cursing, and arguing with Anderson when he purchased his ticket, and Lane's testimony that Collins was talking to himself and uttering obscenities, to argue that substantial evidence does not support the trial court's conclusion that Collins was not disorderly, disruptive, or confrontational. Because the court reexamined the evidence under the SMS policy and substantial evidence supports the trial court's findings, we disagree.

In its memorandum decision, the court states that it carefully reexamined the testimony in the context of the WSF's duty as stated by the SMS policy. It is

[5] The only difference between a common law negligence claim and a negligence claim under the Jones Act is the standard for causation. Under the Jones Act, negligence is a cause of an injury if it played any part, "however slight" in causing the injury. Ribitzki, 111 F.3d 658, 662, 664.

undisputed that Collins displayed obvious symptoms of being intoxicated. In examining the evidence in light of the SMS policy, the trial court addressed the testimony of WSF employees Anderson and Lane, and ferry passengers Bobby Morse and Lenny Walters, "who together offered the only evidence before the court as to Collins's behavior before he was allowed to board the ferry."

The court notes that it "evaluated the demeanor and credibility of the witnesses" in finding that "Collins was not engaged in 'violent, disorderly, disruptive, or confrontational' behavior during his encounter with Anderson, or during the contact Collins had with anyone else prior to boarding the ferry." The court states that it gave much more weight to the testimony of the WSF employees, Anderson and Lane, and the behavior they observed, and gave limited weight to the observations and opinions of ferry passengers Walters and Morse. The trial court describes the testimony of each of the four eyewitnesses that Collins was not acting in a "threatening" or "aggressive" manner and notes the discrepancy between the language of the policy and the testimony of the witnesses. The court also notes the fact that none of the witnesses were questioned about the language in the policy.

In concluding that the behavior described by Anderson and Lane did not implicate the SMS policy, the court gave great weight to the testimony of WSF employee Anderson. The court discussed and quoted significant portions of Anderson's testimony. Anderson testified that when she sold Collins the ticket, he was "kind of moving back and forth a little bit, confused, and couldn't find his

money, and was kind of cursing a little bit, . . ." When asked about Collins' cursing, Anderson said she thought he was cursing because he couldn't find his money as he went through his pockets. Anderson thought Collins might be intoxicated or might have diabetes.

After Collins found his money, bought a ticket, and walked away, Collins returned to her ticket window and "stated that [she] did not give him a ticket . . ." Anderson replied that she had, and the two "kind of went back and forth on that" until she said to him, "'[w]ell, check your pockets where your change is. You probably have your ticket with your change.'" Anderson said that the problem of people losing their tickets "is very common" and "happens a lot." After Collins checked his pockets and found the ticket, Anderson said he walked off "a little bit staggery."

Anderson testified that Collins was cursing during her second encounter with him, but she did not know if the cursing was directed at her or whether it was because he couldn't find his ticket. Anderson said she did not feel threatened and that she did not contact her supervisor because Collins "was not causing any problems from [her] viewpoint."

The court found that Anderson "credibly testified, based upon her 23 years as a WSF employee, including seven years as a ticket seller, and her training and experience, that she did not consider Collins to be a risky passenger."[6] The trial

[6] The other WSF employee, Lane, had worked for the WSF for less than five years at the time of the attack.

court acknowledged that the “back and forth” testimony suggested “a bit of an argument,” but concluded that “considering Anderson’s encounters with Collins as a whole, that Collins was not engaged in ‘violent, disorderly, disruptive, or confrontational’ behavior . . . .”

As to Lane, the trial court notes that Lane describes Collins as “upset” and “vulgar.”[7] Lane testified that Collins was “venting” about the ferry system to “nobody in particular.” Lane also said that because of his behavior, the people around Collins stopped talking and were “paying attention to him.” But Lane testified that he would contact a police officer if he thought a person seeking to board a ferry was “threatening.” The court found that Lane would have contacted authorities if Collins had been “violent, disorderly, disruptive or confrontational.”

Construing the evidence and all reasonable inferences in the light most favorable to the WSF and giving deference to the trial court’s assessment of credibility, we conclude that the trial court’s determination that the WSF employees did not breach the duty as defined in the SMS policy is supported by substantial evidence.[8]

We deny Caraska’s motion to recall the mandate and affirm the trial court’s decision to dismiss Caraska’s claims against the WSF.

[7] While Lane testified by way of deposition, the court stated that it considered his testimony, insofar as possible, in the same manner that it considered the testimony of the witnesses who testified in person.

[8] Therefore, we need not reach the question of causation or adequacy of training. Nonetheless, substantial evidence supports the trial court’s determination that because Anderson and Lane acted in accordance with the SMS policy, Caraska cannot establish unseaworthiness or a violation of the Jones Act.

WE CONCUR:

Becker, J.

Grosse, J