

ALAN KESTER

NO. 2006-CA-0973

VERSUS

COURT OF APPEAL

**ZAPATA GULF PACIFIC,
L.L.C. AND L & M BOTRUC
RENTAL, INC.**

FOURTH CIRCUIT

STATE OF LOUISIANA

*** * * * ***

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-12368, DIVISION "J"
HONORABLE NADINE M. RAMSEY, JUDGE**

*** * * * ***

JUDGE MICHAEL E. KIRBY

*** * * * ***

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge
Max N. Tobias Jr.)

**WM. RYAN ACOMB
LAURIE L. DEARMOND
PORTEOUS, HAINKEL & JOHNSON, LLP
704 CARONDELET STREET
NEW ORLEANS, LA 701303774
COUNSEL FOR L & M BOTRUC RENTAL, INC.**

**JAMES K. CARROLL
STEPHANIE D. SKINNER
FOWLER RODRIGUEZ
400 POYDRAS STREET
30TH FLOOR
NEW ORLEANS, LA 70130
COUNSEL FOR ZAPATA GULF PACIFIC, L.L.C.**

Zapata Gulf Pacific, LLC (“Zapata”) appeals the trial court judgment in favor of L & M Bo-Truc Rental, Inc. (“Bo-Truc”), awarding reimbursement to Bo-Truc for maintenance and cure payments made by Bo-Truc to or on behalf of its employee, Alan Kester.

In this Jones Act case, plaintiff, Mr. Kester, was injured while aboard the M/V Midway Tide while in the course and scope of his employment with Bo-Truc. Zapata was the owner of the M/V Midway Tide. Plaintiff filed suit against Zapata and Bo-Truc. Bo-Truc filed a reconventional demand against Mr. Kester. Bo-Truc also filed a cross-claim against Zapata, seeking reimbursement for the maintenance and cure payments made to or on behalf of Mr. Kester. Mr. Kester settled his claims with Zapata and Bo-Truc prior to trial. Following trial, the trial court awarded Bo-Truc reimbursement from Zapata for maintenance and cure payments in the amount of \$51,359.12, plus judicial interest from date of demand. Zapata now appeals.

On appeal, Zapata first argues that the trial court failed to apply the correct standard of law in holding that Bo-Truc was entitled to

reimbursement for payments it made after Mr. Kester reached maximum medical improvement. Zapata further argues that in failing to apply the correct standard of law, the trial court improperly substituted its own opinion in lieu of the only expert medical evidence in the record regarding maximum medical improvement.

Zapata does not contest that it must reimburse Bo-Truc for the maintenance and cure expenses Bo-Truc paid before Mr. Kester reached maximum medical improvement, and which are directly related to the accident for which recovery is sought from Zapata. However, Zapata argues that an employer is not entitled to reimbursement from a third party for voluntary payments made beyond its legal obligation to pay maintenance and cure.

Maintenance and cure extends to the time an injured seaman reaches maximum medical recovery. *Butler v. Zapata Haynie Corporation*, 92-71 (La. App. 3 Cir. 2/23/94), 633 So.2d 1274, 1283, *writ granted in part, judgment amended on other grounds*, 94-1171 (La. 7/5/94), 639 So.2d 1186. Citing the case of *Pelotto v. L & N Towing Company*, 604 F.2d 396, 400 (5th Cir. 1979), the *Butler* court stated the definition of maximum medical

recovery as follows:

Maximum medical recovery...is achieved when it appears probable that further treatment will result in no *betterment* of the seaman's condition... . Thus, where it appears that the seaman's condition is incurable, or that future medical treatment will merely relieve pain and suffering, but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved. (Emphasis in original).

Butler v. Zapata Haynie Corporation, 633 So.2d at 1283.

The record reveals that Bo-Truc paid Mr. Kester's maintenance and cure expenses from the time of his accident until August 1, 2002. Dr. Kurt Krueger, a specialist in anesthesiology and pain management, treated Mr. Kester following his accident. Dr. Krueger stated in a medical report and in his deposition that Mr. Kester reached maximum medical improvement as of October 24, 2001. Mr. Kester also received treatment from Dr. M.L. Woodruff, a chiropractor. Dr. Woodruff was not deposed, but stated in a medical report that Mr. Kester reached maximum medical improvement as of December 3, 2001. Mr. Kester continued receiving treatment from both Dr. Krueger and Dr. Woodruff after the dates that he was found by each to have reached maximum medical improvement.

In reasons for judgment, the trial court noted that Mr. Kester continued to receive treatment from Dr. Woodruff until July 25, 2002. The court stated that plaintiff complained of neck pain and stiffness in his back on each visit, and improved after each treatment. The court found that even though Dr. Krueger determined that Mr. Kester had reached maximum medical improvement as of October 24, 2001, Bo-Truc was reasonable to continue paying maintenance and cure to Mr. Kester after that date based on the fact that Dr. Woodruff continued to treat him and report improvements.

In Dr. Woodruff's medical reports of treatment Mr. Kester received following December 3, 2001, he noted that Mr. Kester continued to complain of neck and back pain at each visit, and that his symptoms decreased following each treatment. However, Dr. Woodruff never retracted his earlier statement in his report, which was repeated in correspondence of December 12, 2001, that Mr. Kester reached maximum medical improvement as of December 3, 2001. Bo-Truc did not offer the testimony or records of any other medical expert to rebut the statements by Dr. Krueger and Dr. Woodruff that Mr. Kester had reached maximum medical improvement. Based on the evidence in the record, the latest

possible date that Bo-Truc was obligated to pay maintenance and cure expenses for Mr. Kester was December 3, 2001. In the absence of any medical evidence rebutting the statements of Dr. Krueger and Dr. Woodruff regarding the date of maximum medical improvement, we find that the trial court erred in holding Zapata liable to Bo-Truc for maintenance and cure payments made after December 3, 2001, and we will amend the trial court judgment accordingly.

In the second assignment of error, Zapata argues that the trial court erred in holding Zapata liable to Bo-Truc for payments made for Mr. Kester's eye care treatment. Zapata claims that Bo-Truc did not carry its burden of proving that the eye care expenses were causally related to the accident at issue.

In making its claim for reimbursement against Zapata, Bo-Truc introduced into evidence a printout that included payments made on behalf of Mr. Kester that were allegedly for maintenance and cure. Included in this printout were payments made to Dr. Ronald Landry at Eye Care Associates in the amount of \$3,680.00. Although the trial court did not make a specific reference to the eye care expenses in reasons for judgment, the court found

Zapata liable to Bo-Truc for the entire amount claimed by Bo-Truc for maintenance and cure. In response to Zapata's argument regarding the eye care expenses, Bo-Truc does not challenge Zapata's claim that no causal connection to the accident was proven, but rather argues that Zapata waived its right to object to the inclusion of the eye care expenses because no objection was offered at trial to the maintenance and cure payment records.

We find merit in Zapata's argument that the introduction of the maintenance and cure payment records without objection did not relieve Bo-Truc of its burden of proving that the expenses claimed were necessitated by the accident at issue. It is undisputed that Bo-Truc made the maintenance and cure payments on behalf of Mr. Kester as alleged in its printout.

However, in addition to introducing evidence of maintenance and cure payments made on behalf of Mr. Kester, Bo-Truc had to prove a causal connection between the accident and those payments in order to prevail in its claim for indemnification from Zapata.

An innocent employer is entitled to indemnification from a negligent third party for payments made to an employee injured *as a result of the third party's negligence*. *Savoie v. Lafourche Boat Rentals, Inc.*, 627 F.2d 722,

723-24 (5th Cir. 1980). (Emphasis ours). As the plaintiff in this indemnification claim, Bo-Truc had the burden of proving every essential element of its case, including causation, by a preponderance of the evidence. *Matthews v. Breaux*, 2004-0958, p. 6 (La. App. 5 Cir. 2/15/05), 896 So.2d 1146, 1150. Although Bo-Truc presented medical evidence establishing that maintenance and cure payments made on behalf of Mr. Kester for his neck and back injuries from the date of the accident through December 3, 2001 were causally connected to the accident at issue, no evidence was presented by Bo-Truc to establish a causal connection between the accident and Mr. Kester's eye care expenses. Therefore, we find that the trial court erred in holding Zapata liable for payments made by Bo-Truc for Mr. Kester's eye care expenses, and we will amend the judgment accordingly.

For the reasons stated above, the trial court judgment is amended to eliminate the amounts awarded to Bo-Truc for eye care expenses, and for maintenance and cure payments made beyond December 3, 2001, the date established in the record as the date that Mr. Kester reached maximum medical improvement for his neck and back injuries. The trial court judgment in favor of Bo-Truc and against Zapata is reduced from

\$51,359.12 to \$27,899.28 (See appendix.) In all other respects, the trial court judgment is affirmed.

AMENDED AND, AS AMENDED, AFFIRMED

APPENDIX

DATE	PAYEE	AMOUNT
5-11-01	Alan Kester	465.00
5-17-01	Alan Kester	195.00
6-1-01	Alan Kester	450.00
7-20-01	Lafourche Orthopedic	651.00
7-20-01	Dr. Michael Haydel	759.00
7-26-01	Dr. Michael Haydel	837.00
7-26-01	Houma Orthopedic	50.00
7-26-01	Physicians Surgical	632.90
8-6-01	Physicians Surgical	629.36
8-6-01	Dr. Michael Haydel	837.00
8-17-01	Alan Kester	930.00
8-17-01	Houma Orthopedic	50.00
8-17-01	Physicians Surgical	637.07
9-1-01	Alan Kester	450.00
9-11-01	Dr. Michael Haydel	78.00

9-11-01	Dr. M. L. Woodruff	509.00
9-17-01	Apollo Enterprises	248.77
9-17-01	Dr. M. L. Woodruff	780.00
9-26-01	W. Fla. Regional Med.	1,924.00
9-26-01	Dr. M. L. Woodruff	360.00
10-1-01	MASH, Inc.	39.00
10-1-01	Alan Kester	465.00
10-9-01	Apollo Enterprises	171.32
10-9-01	N. Fla. Surgery Ctr.	1,590.00
10-9-01	Comprehensive Pain Med.	175.00
10-9-01	Dr. M. L. Woodruff	225.00
10-11-01	Dr. M. L. Woodruff	84.00
10-18-01	N. Fla. Surgery Ctr.	1,590.00
10-30-01	MASH, Inc.	439.50
10-30-01	Apollo Enterprises	18.35
10-30-01	Dr. M. L. Woodruff	890.00
11-1-01	Alan Kester	750.00
11-13-01	Dr. M. L. Woodruff	405.00

11-13-01	Comprehensive Pain Med.	2,000.00
11-20-01	Apollo Enterprises	185.66
11-20-01	Comprehensive Pain Med.	75.00
11-20-01	Dr. M. L. Woodruff	405.00
12-1-01	Alan Kester	75.00

The following checks were issued after December 3, 2001, but represent payment for services rendered prior to that date:

12-10-01	Comprehensive Pain Med.	1,075.00
12-10-01	N. Fla. Surgery Ctr.	1,590.00
12-10-01	Dr. M. L. Woodruff	470.00
12-18-01	Dr. M. L. Woodruff	600.00
12-26-01	Dr. M. L. Woodruff	345.00
12-26-01	Apollo Enterprises	18.35
1-10-02	Dr. M. L. Woodruff	600.00
1-17-02	Dr. M. L. Woodruff	210.00
2-5-02	Dr. M. L. Woodruff	195.00
2-7-02	Sacred Heart Hosp.	615.00
2-7-02	Dr. M. L. Woodruff	1,125.00
	TOTAL	\$27,899.28