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United States District Court, N.D. Illinois, Eastern Division.
Lauren KNIGHT, Plaintiff,
v.
GRAND VICTORIA CASINO, Defendant.

No. 98 C 8439.
Dec. 28, 2000.

MEMORANDUM OPINION AND ORDER
KENNELLY, District J.

***1** The purpose of this Memorandum Opinion and Order is to rule on the parties' motions *in limine*, and to deal with an issue regarding jury instructions that was left open at the final pretrial conference.

A. Plaintiff's motions *in limine*

1. *Failure to mitigate.* Plaintiff has moved to bar defendant from raising at trial the defense of failure to mitigate damages, alleging that defendant failed to assert this as an affirmative defense. Plaintiff is incorrect. Defendant's third affirmative defense, contained in her answer to plaintiff's amended complaint, clearly asserts this defense.

2. *"Open and obvious" hazards: "natural accumulation" of ice.* Plaintiff, a blackjack dealer at the Grand Victoria riverboat casino, claims that she slipped and fell on ice on a pedestrian walkway between a parking garage used by casino patrons and the casino's land-based pavilion, where plaintiff was to participate in an orientation seminar for new employees. She seeks to preclude defendant from relying on various defenses that exist under Illinois law, such as the "open and obvious" doctrine and the doctrine of "natural accumulation." An Illinois landowner is liable for injuries caused by "open and obvious" hazards on its property only in limited circumstances. *See, e.g.*, *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 390, 706 N.E.2d 441, 447 (1998). And under Illinois law, a landowner has no duty to keep its outdoor premises free from natural accumulations of ice and snow. *See, e.g.*, *Koziol v. Hayden*, 309 Ill.App.3d 472, 476, 723 N.E.2d 321, 324 (1999).

The Jones Act is a negligence statute, not a worker's compensation statute. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Defendant concedes, however, that under the Jones Act case, common law defenses are modified or abolished. *See* Dfdt. Resp. to Pltf. Motions *In Limine*, p. 3; *Gottshall*, 512 U.S. at 543-44. Though a plaintiff's comparative negligence can lessen a shipowner's liability under the Jones Act, assumption of risk is not a defense. *See, e.g.*, *Olsen v. American S.S. Co.*, 176 F.3d 891, 897 (6th Cir.1999) (citing *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Burden v. Evansville Materials, Inc.*, 840 F.2d 343, 346 (6th Cir .1988). *See also* 45 U.S.C. § 54 (provision of Federal Employer's Liability Act stating that assumption of risks of employment is not a defense); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (principles of liability under FELA apply in Jones Act cases). To allow defendant to assert as a defense to liability that the risk was "open and obvious" would amount to allowing a defense of assumption of risk. Defendant may argue this as a factor in determining whether and the extent to which plaintiff was contributorily negligent, but it is not entitled to argue that it is a defense to liability.

Defendant likewise is not entitled to avoid liability based on the "natural accumulation" rule. Under the Jones Act, an employer has a duty to provide its employees with a safe workplace, a duty which applies even when the employee's duties require that he

or she go onto property owned and controlled by a third party. *Cazad v. Chesapeake & Ohio R.*, 622 F.2d 72, 75 (4th Cir.1980), citing *Shenker v. Baltimore & Ohio R.*, 374 U.S. 1 (1963). Defendant's contention that it cannot be held liable for natural accumulations of snow and ice is directly contrary to this principle. Indeed, the only authority that defendant cites for this proposition is an unpublished decision from the Northern District of Ohio which on its face does not take into account the employer's duty to provide a safe workplace.

***2** Defendant argues that because plaintiff slipped outside her workplace, in a walkway from a parking lot ordinarily used by patrons, the Jones Act standard should not apply. For all practical purposes, this is nothing more a variation on an argument that the Court has previously rejected. In denying defendant's summary judgment motion, we considered and rejected defendant's argument that plaintiff was not subject to the Jones Act at the time of the accident. *See Knight v. Grand Victoria Casino*, No. 98 C 8439, 2000 WL 1434151, at *2 (N.D.Ill. Sept. 27, 2000). Plaintiff will of course have to establish that she was a "seaman" and suffered the injury while in the course of her employment. 46 U.S.C.App. § 688(a). But if plaintiff reaches this threshold, there is no basis to apply anything other than Jones Act standards in determining defendant's liability. Indeed, if (as noted above) the Jones Act's standards apply even when an employee is, as part of his duties, on a third party's premises outside the employer's control, there certainly is no basis to apply a standard more favorable to the employer when the employee is on premises within the employer's control (though perhaps outside of the employee's normal work area).

For these reasons, the Court grants plaintiff's motion *in limine;* defendant may not argue to the jury, and is not entitled to a jury instruction, that it is entitled to a verdict in its favor if plaintiff slipped on a natural accumulation of ice or if the risk was open and obvious.

3. *Benefits from collateral sources.* Plaintiff seeks to preclude defendant from introducing evidence or argument concerning plaintiff's receipt of benefits from collateral sources. This motion is denied as moot, as neither party can identify any such benefits that could conceivably become an issue at trial.

B. Defendant's motions *in limine*

1. Defendant's motion *in limine* No. 1 is granted in part and denied in part. Plaintiff may testify regarding what doctors or health care professionals told her only to the extent that such testimony is offered for some non-hearsay purpose, such as to show the effect that the statement had on plaintiff.

2. Defendant's motion *in limine* No. 2 is denied. Dr. Parrish, plaintiff's treating physician, may testify about what plaintiff told him she had been told by her supervisors at work regarding her use of a "step box." This is not, as defendant argues, "hearsay within hearsay." The supervisors' statements to plaintiff are not hearsay, *see* Fed.R.Evid. 801(d)(2)(D), and plaintiff's statement to Dr. Parrish is offered not for its truth, but to show the effect that the statement had on his treatment of plaintiff and his recommendations regarding her work.

3. Defendant's motion *in limine* No. 3 is granted in part and denied in part. Plaintiff does not object to being precluded from arguing that the accumulation of ice upon which she says she flipped was anything other than natural, and the Court so orders. Plaintiff may, however, argue (assuming a proper basis in the evidence) that defendant failed to do an adequate job of removing the snow and ice from the pedestrian walkway.

***3** 4. Defendant's motion *in limine* No. 4 is granted without objection. Plaintiff may not introduce evidence or make argument regarding whether defendant is insured or will be indemnified.

5. Defendant's motion *in limine* No. 5 is granted without objection. Witnesses will be excluded from the courtroom when not testifying. Defendant should make sure to bring this request to the Court at the outset of trial.

6. Defendant's motion *in limine* No. 6 is granted. Plaintiff may not testify or introduce evidence that she was wrongfully terminated. Her wrongful termination claim was voluntarily dismissed, and it does not appear that evidence regarding the reason for her termination is relevant to any of her remaining claims.

7. Defendant's motion *in limine* No. 7 is denied. The question whether plaintiff lost income as a result of her injury or is likely to do so in the future is properly one for the jury, and thus the Court will not bar evidence or argument from plaintiff on this point.

8. Defendant's motion *in limine* No. 8 is denied. Plaintiff may introduce weather records from the Elgin weather reporting station. Though the station is not in the precise location of the casino, this affects only the weight to be given to the evidence, not its admissibility.

9. Defendant's motion *in limine* No. 9 is granted in part and denied in part. Plaintiff is not competent to testify regarding medical causation issues and thus may not testify as to whether the fact that she did not use a "step box" caused or contributed to her injury. The Court will not, however, preclude argument on this point assuming that a proper evidentiary basis exists. Defendant may renew this motion during trial if the evidentiary basis for such an argument fails to develop.

10. Defendant's motion *in limine* No. 10 is denied. The fact that defendant's human resources manager, Sharon McGill, checked off on an incident report about plaintiff's accident that plaintiff was at work on company time is certainly relevant on the question of whether plaintiff had "seaman" status at the time of the accident, and the evidence is not unfairly prejudicial. McGill will be able to explain at trial why she did what she did.

11. Ruling on defendant's motion *in limine* No. 11 is deferred. This concerns whether Fed.R.Evid. 409 precludes plaintiff from introducing evidence that defendant paid her medical expenses. Plaintiff wishes to introduce this evidence not to show defendant's liability on plaintiff's Jones Act negligence claim, but rather to support her contention that defendant, by later refusing to pay plaintiff's medical expenses, unreasonably refused to pay "maintenance and cure" as required by maritime law. The parties are to submit additional authority on this point on or before 12/28/00 as discussed at the final pretrial conference.

12. Defendant's motion *in limine* No. 12 is granted. Plaintiff may not introduce evidence that Zurich American Insurance Company, defendant's worker's compensation insurer (not its Jones Act insurer), made a determination that plaintiff's injury was subject to the Jones Act. This is not a "statement by an agent" admissible under Fed.R.Evid. 801(d)(2)(D), as there is no evidence that representations regarding Jones Act coverage were within the scope of Zurich's agency, even assuming (which the Court doubts) that Zurich was defendant's agent to begin with.

***4** 13. Defendant's motion *in limine* No. 13 is denied as moot. Neither party was able to identify any "non-managerial employee of Grand Victoria" other than Sharon McGill (*see* discussion of defendant's motion *in limine* No. 10, *supra*) made any statements regarding whether plaintiff's injury was subject to Jones Act coverage.

14. Defendant's motion *in limine* No. 14 is denied. Dr. Parrish is a treating physician, not a retained expert, and thus he was not required to submit a report

pursuant to Fed.R.Evid. 26(a)(2). There is thus no basis under Rule 26 to confine his testimony at trial to the matters that defendant elected to depose him about.

15. Defendant's motion *in limine* No. 15 is granted without objection. Plaintiff may not introduce evidence or argument regarding any claimed need for future medical treatment, as no such claim has been made in this case.

16. Defendant's motion *in limine* No. 16 is granted. This is essentially a duplicate of defendant's motion *in limine* No. 12, seeking to preclude evidence regarding what Zurich American employees said or concluded about Jones Act coverage. The evidence is not admissible.

C. Jury instructions

At the final pretrial conference, the Court advised the parties that it would use the Fifth Circuit's pattern Jones Act jury instructions; reviewed with the parties the proposed jury instructions that they had tendered; and made rulings on disputed matters. One of the disputes that the Court did not resolve concerned a modification that defendant proposed to the Fifth Circuit pattern instruction regarding the plaintiff's "seaman" status. *See* Fifth Circuit Pattern Jury Instructions (Civil) 4.1. Specifically, defendant proposed to modify the instruction to (among other things) add a sentence requiring the jury to find that the plaintiff faced the "perils of the sea" in order to qualify as a "seaman." See Dfdt's Proposed Jury Instruct. No. 2. As support for this modification, defendant relied on the Supreme Court's decisions in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997) and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

The Court has considered the effect of *Papai* and *Chandris* and concludes that they do not support the modification that defendant proposed. Indeed, *Papai* (relying on *Chandris*) reaffirms the test for "seaman" status found in the Fifth Circuit pattern instruction:

[T]he essential requirements for seaman status are twofold. First, ... an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission.... Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Id. at 554 (quoting *Chandris*, 515 U.S. at 368) (citations and internal quotation marks omitted). Though the Court in *Papai* did say that Jones Act coverage is limited to those subjected to the "perils of the sea," *Papai*, 520 U.S. at 555, 560, it did so not to announce a separate requirement that must be met, but rather to explain the reason for the second part of the *Chandris* standard:

***5** "The fundamental purpose of th[e] substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."

Id. (quoting *Chandris*, 515 U.S. at 368).

In sum, there is no basis to include a "perils of the sea" requirement in the jury instruction regarding "seaman" status.

CONCLUSION

For the reasons stated above, plaintiff's motion *in limine* [Item 30-1] is granted as to part 2 and denied as to parts 1 and 3. Defendant's motions *in limine* Nos. 4, 5, 6, 12, 15 and 16 [34-1, 35-1, 36-1, 42-1, 45-1, 46-1] are granted; Nos. 1, 3, 9 [31-1, 33-1, 39-1] are granted

in part and denied in part; Nos. 2, 7, 8, 10, 13, and 14 [32-1, 37-1, 38-1, 40-1, 43-1, 44-1] are denied; and ruling on No. 11 [41-1] is deferred. The parties are to submit a set of jury instructions consistent with the Court's rulings, and additional authority concerning defendant's motion No. 11 on or before 12/28/00. The case is set for status on 1/4/01 at 10:30 a.m. to put the jury instruction conference on the record and deal with any remaining pretrial issues.

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