JAMES CHIZMAR, JR., Plaintiff and Appellant,

v.

MALPASO PRODUCTIONS CORPORATION et al., Defendants and Respondents.

No. B228598.

Court of Appeals of California, Second District, Division Eight.

Filed October 19, 2011.

Stolpman, Krissman, Elber & Silver, Dennis M. Elber and Donna Silver for Plaintiff and Appellant.

Cox, Wootton, Griffin, Hansen & Poulos, Terence S. Cox and Max L. Kelley for Defendants and Respondents.

Appellant James Chizmar, Jr., was injured working on the movie Flags of Our Fathers (Malpaso Productions Corporation, 2006) as he attempted to transfer, in open water, from one boat into another. On appeal, he challenges a jury verdict rejecting his theories that Warner Brothers Entertainment, Inc. (Warner) was negligent under the Jones Act and provided an unseaworthy vessel. The Jones Act grants seamen[1] who suffer personal injury in their employment the right to seek damages in a jury trial (46 U.S.C. § 30104), and federal law also requires ship owners provide their employees with seaworthy vessels. We affirm.

FACTS

Listed in order of seniority, James O'Connell, Mark Vollmer, Richard Kuhn, and James Chizmar, Jr. (Chizmar) worked for Warner on the production of the feature film Flags of Our Fathers (Flags). As marine coordinator, O'Connell was responsible for the safety of his crew and for ensuring a safe workplace. Vollmer was responsible for the day-to-day assignments of the water safety personnel including Chizmar. Kuhn was a marine safety worker with more experience than Chizmar at boat operations. Chizmar was originally hired as a dive master (which reflects a high level of certification under the curriculum for recreational divers), but transferred to marine safety duties when he learned that Flags did not require any underwater diving.

Flags was filmed in the waters off the coast of Iceland. Warner purchased boats for the movie, including Zodiacs — inflatable rubber boats — and DUKW's — amphibious trucks, which travel both on land and in water. During filming, cast and crew members regularly transferred out of and into boats in the open water. Chizmar understood, and O'Connell

confirmed, that Chizmar's duties included making boat-to-boat transfers. Chizmar had learned to make boat-to-boat transfers while working on other films.

It was undisputed that Warner prioritized safety and that Warner provided safety training prior to commencing filming. Safety Bulletin No. 15 described guidelines for boat-to-boat transfers. It was undisputed that a captain (or other superior officer) bore responsibility for considering the consequences of each order issued to a crew member. It was also undisputed that a crew member given an unsafe order was expected and entitled to refuse the order.

On August 25, 2005, Chizmar was injured as he attempted to follow Kuhn's order and complete a boat-to-boat transfer from a Zodiac into a DUKW. Shortly before the injury, Chizmar had been ordered to relinquish command of the Zodiac to Kuhn. Chizmar piloted the Zodiac to the DUKW, where Kuhn had been stationed. Kuhn transferred from the DUKW into the Zodiac and took control of the Zodiac. Chizmar then stepped on to the ledge of the DUKW in order to keep the deck of the Zodiac clear and allow other persons to transfer from the DUKW into the Zodiac. Chizmar held the Zodiac alongside the DUKW from his position perched on the DUKW's ledge for about five minutes. Chizmar testified that he did not immediately fully transfer into the DUKW because he believed that he would return to the Zodiac. But, in his deposition, Chizmar acknowledged that there were too many people in the Zodiac for him to return to it.

After Kuhn and others transferred from the DUKW into the Zodiac, Kuhn ordered Chizmar to transfer from the Zodiac into the DUKW. As a superior ordering a crew member to perform a task, Kuhn bore responsibility for Chizmar's safety. Chizmar concluded that he could safely transfer into the DUKW and that he did not require assistance. Following Kuhn's order, Chizmar started to move into the DUKW by lifting his right leg over the 28-inch railing of the DUKW, but the DUKW lurched, and Chizmar fell into the DUKW, twisting his left knee.

Chizmar testified that the following accurately summarized what happened: "[Chizmar] was transferring from one boat to another and a large wave knocked the boats together causing him to lose his balance and fall forward. He landed on his left knee which was bruised and swollen." Chizmar's left knee was severely injured and prevented him from working as a commercial diver, his chosen profession.

Michael Waters, a marine coordinator and Chizmar's expert, opined that Warner should have loaded the Zodiac on the beach, eliminating the need for a boat-to-boat transfer. Waters further opined that Warner should have built steps into the DUKW to assist with boat-to-boat transfers. Waters criticized Kuhn for ordering Chizmar into the DUKW because he "ordered his only other qualified marine crew member out of his boat [the Zodiac] . . . ." On cross-examination, Waters acknowledged that he was "very beholden" to Chizmar's father and at least some part of his testimony was speculative. Waters also acknowledged that he had never worked in a DUKW and did not know how easy it was to transfer into a DUKW from another boat.

Defense expert Gary Moran, a forensic biomechanist, testified that an able-bodied person could safely transfer from a Zodiac to a DUKW. He further testified that Chizmar's position on the ledge of the DUKW was an unsafe position. Andrew Ulak, a naval architect and defense expert, testified that loading the Zodiac on the beach was more hazardous than requiring a boat-to-boat transfer because of the risk of the Zodiac rolling over.

PROCEDURE

On January 23, 2008, Chizmar sued, among others, Warner and Malpaso Productions Corporation (Malpaso). In his first amended complaint, Chizmar asserted causes of action under the Jones Act, maritime law, and general negligence.[2] He alleged that he was injured while working "in the waters off of Hefnir, Iceland as part of a movie production, [when] directed to . . . transfer . . . passengers and equipment from one fleet vessel to another in high seas inside the ocean `break line.'" He alleged that the vessels were unseaworthy. He further alleged that he "was involved in a transfer from one vessel to another when an unsafe work method caused him to lose balance and fall." According to Chizmar, "[t]his unsafe work method was caused by defendant Warner Bros. Entertainment Inc.'s refusal to implement safety planning and procedures . . . ."

Prior to trial, the trial court found Warner could not be held liable for punitive damages. The court relied on evidence of Warner's safety guidelines, safety bulletins and safety meetings, as well as Chizmar's experience and acknowledgement that he could have asked for assistance. The court found that no reasonable juror could conclude respondents acted with oppression, fraud, malice, or even gross negligence.

On June 4, 2010, pursuant to Code of Civil Procedure section 998, Malpaso offered Chizmar $250,000 to settle his lawsuit against Malpaso (998 offer). The trial court concluded that Chizmar did not validly accept the 998 offer. The trial court subsequently granted Malpaso's unopposed motion for nonsuit.

During closing argument, Chizmar's attorney focused heavily on the amount of damages. With respect to liability, he argued that Warner could have loaded the Zodiac on the beach eliminating the need for a boat-to-boat transfer and the need for Chizmar to perch on the ledge of the DUKW. Counsel argued that Kuhn was obligated to refrain from exposing Chizmar to risks and to correct unsafe acts. Counsel argued there was no reason to order Chizmar into the DUKW because there was room in the Zodiac for him. Finally, counsel argued the DUKW was not seaworthy because it did not have steps.

The jury concluded that Warner was not negligent. It also found neither the Zodiac nor the DUKW was unseaworthy. Because it found Warner was not negligent, the jury was not required to consider causation or contributory negligence. The trial court entered judgment in accordance with the jury verdict, and Chizmar appealed from the judgment, the posttrial order denying his motions for reconsideration and reversal of the nonsuit, and the posttrial order awarding costs and fees. The order denying reconsideration was not appealable (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166

Cal.App.4th 1625, 1633), but we consider the propriety of the court's ruling with respect to the 998 offer because Chizmar timely appealed from the judgment.

DISCUSSION

Chizmar challenges (1) the sufficiency of the evidence supporting the finding that Warner was not negligent, (2) the court's rejection of several proposed instructions, and (3) the court's finding that Chizmar never validly accepted Malpaso's 998 offer. Chizmar also argues that because reversal is warranted on the merits, the order awarding costs to Warner and Malpaso must be reversed. As we explain, no argument has merit.[3]

1. Sufficiency of the Evidence

Summarizing the evidence most favorable to him, Chizmar argues that the evidence was insufficient to support the findings that Warner was not negligent and that the Zodiac and DUKW were not unseaworthy.

"When findings of fact are challenged on appeal, we are bound by the familiar and highly deferential substantial evidence standard of review. This standard calls for review of the entire record to determine whether there is any substantial evidence, contradicted or not contradicted, to support the findings below. We view the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences and resolving all conflicts in its favor." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) When considering the sufficiency of the evidence, the burden of proof is relevant. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655.) Under the proper standard of review, Chizmar fails to show error.

A. Negligence

The Jones Act grants seamen who suffer personal injury recourse against their employer when the injury is caused in whole or in part by the employer.[4] (*Kernan v. American Dredging Co.* (1958) 355 U.S. 426, 432.) An employer is required not only to comply with statutory duties, but also generally to act with a duty of care. (*Id.* at pp. 438-439.) "The term `negligence' as used in the Jones Act is given a liberal interpretation, and includes any conscious or careless breach of the employer's obligation to provide for the safety of the crew." (*Rouchleau v. Silva* (1950) 35 Cal.2d 355, 361.)

Sufficient evidence supported the jury's finding that Warner was not negligent. A reasonable jury could have concluded that Kuhn's order requiring Chizmar to transfer from the Zodiac to the DUKW was not negligent. Chizmar himself believed the order was safe. Additionally, Warner's expert testified that an able-bodied person could safely transfer from a Zodiac to a DUKW. Although there was conflicting evidence regarding whether the transfer should have been avoided by loading the Zodiac on the beach, a reasonable jury could have credited

Ulak's testimony that a boat-to-boat transfer was preferable. This inference is further supported by Chizmar's acknowledgment that boat-to-boat transfers occurred routinely and fell within his responsibilities. Additionally, Warner provided safety guidelines describing boat-to-boat transfers and provided safety training prior to commencing production.[5]

Considering the requisite burden of proof further supports this conclusion. Chizmar was required to prove that Warner was negligent; Warner was not required to prove that it was not negligent. (Cf. *Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 655.) The jury could have rejected Chizmar's theories of negligence by finding that his expert witness Waters — the sole witness who supported his theories — lacked credibility. Waters testified that (1) the Zodiac should have been loaded on the beach, (2) steps should have been built into the DUKW, and (3) Kuhn should not have ordered Chizmar into the DUKW. But, a reasonable jury could have rejected that testimony after learning (1) that Waters was "very beholden" to Chizmar's father, (2) that at least some portion of his testimony was based on speculation, and (3) that he had no experience with DUKW's.

B. Seaworthiness

Chizmar argues that steps should have been provided in the DUKW for safe ingress and egress in an open-water transfer. He also argues the Zodiac was unseaworthy because Kuhn did not tell him to move from the ledge of the DUKW.

i. Legal Background

The doctrine of unseaworthiness is based on the "principle that it has long been a shipowner's duty to provide his seamen with safe surroundings during his employment . . . . This duty is not based on statute but has developed over centuries through decisional admiralty law. In recent times it has been expanded to the point where it is now considered a form of absolute liability." (*Baptiste v. Superior Court* (1980) 106 Cal.App.3d 87, 99.) The test for an unseaworthy vessel is whether the vessel and its appurtenances were "reasonably fit for [its] intended use." (*Mitchell v. Trawler Racer, Inc.* (1960) 362 U.S. 539, 550.) An unsafe method of work may create liability for unseaworthiness. (*Adams v. United States* (9th Cir. 1968) 393 F.2d 903, 905.)

ii. DUKW

As previously noted, Waters testified that Warner should have built steps on the DUKW to facilitate transfers. On cross-examination, Waters acknowledged that he never worked in a DUKW and did not know how easy it was to transfer into it. In contrast, Ulak, testified that steps were not required and were potentially hazardous because: "It is . . . a hazard to have anything in the way that would prevent you from jumping over the side in the event that the

boat was sinking or on fire." In reaching this conclusion, Ulak relied on information from the United States Coast Guard and standards of the American Boat and Yacht Council.

Given the conflicting evidence in the record regarding the appropriateness of steps in the DUKW, a reasonable jury could have credited Ulak and discredited Waters. Chizmar's emphasis of his own witness's testimony ignores the appropriate standard of review. (*Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1312 [under substantial evidence test appellate court defers to trier of fact when conflicting inferences available].) Although Chizmar correctly points out that the lack of safe ingress and egress may, in proper circumstances, support an unseaworthiness claim, here the jury rejected that claim.[6]

iii. Zodiac

Citing *Bozanich v. Jo Ann Fisheries, Inc.* (1969) 270 Cal.App.2d 178 (*Bozanich*), Chizmar argues that the Zodiac was unseaworthy because Kuhn failed to order him to move off the ledge of the DUKW during the five minutes Chizmar perched there. Assuming Chizmar has preserved this argument, which he raises for the first time on appeal, his reliance on *Bozanich* is misplaced.

In *Bozanich,* a seaman fell when his captain gave an order to move a boat at full speed, allegedly without warning the plaintiff/seaman. (*Bozanich, supra,* 270 Cal.App.2d at p. 182.) The appellate court held that the trial court should have instructed the jury on the doctrine of unseaworthiness. The court explained: "[T]he jury might reasonably have concluded that the order of the captain and the response of the man at the wheel rendered the vessel unseaworthy." (*Id.* at p. 193.) The court also reasoned that "sudden operational changes of a vessel, without warning, may likewise support a finding of unseaworthiness. There can be no doubt that a negligent or improvident act of a competent officer can result in unseaworthiness if it renders otherwise seaworthy equipment unfit for its intended use." (*Ibid.*) The court made clear that "[p]laintiff is entitled to present his theory of unseaworthiness to the jury." (*Id.* at p. 194.)

In contrast to *Bozanich,* here the trial court instructed the jury on unseaworthiness. The jury decided against him. *Bozanich* requires nothing more. Moreover, Chizmar's argument that Kuhn's failure to correct Chizmar's stance on the DUKW rendered the Zodiac unseaworthy is undermined by his own expert's testimony that the Zodiac played no role in Chizmar's injuries.

2. Alleged Instructional Error

As we explain, Chizmar fails to show any prejudicial error in the jury instructions. "When deciding whether an instructional error was prejudicial, `we must examine the evidence, the arguments, and other factors to determine whether it is reasonably probable that instructions allowing application of an erroneous theory actually misled the jury.' [Citation.] A

`reasonable probability' in this context `does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682, italics omitted.)

A. Assumption of Risk

The doctrine of assumption of the risk does not bar recovery in a lawsuit by a seaman under the Jones Act. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 568.) Based on this principle, Chizmar argues that the trial court erred in rejecting his instruction stating that assumption of the risk is not a defense under the Jones Act. However, Chizmar forfeited this argument because his counsel withdrew the proposed instruction. (*Swails v. General Elec. Co.* (1968) 264 Cal.App.2d 82, 85 ["A party who has agreed at the trial that an instruction proposed by him shall be deemed withdrawn cannot contend on appeal that the instruction should have been given"].)

Even if the issue were preserved, Chizmar demonstrates no error. The trial court properly instructed the jury on assumption of the risk as follows: "[w]ith respect generally to claims of negligence under the Jones Act or of unseaworthiness, a plaintiff may not be found negligent simply because such plaintiff, upon the request or direction of a defendant, worked at a dangerous job, or in a dangerous place, or under dangerous conditions." Federal courts have held this instruction to be sufficient to prevent a jury from improperly applying an assumption of the risk doctrine in a lawsuit under the Jones Act. (See *Sauer v. Burlington Northern R. Co.* (10th Cir. 1996) 106 F.3d 1490, 1493, & cases cited therein.)

Chizmar's heavy reliance on *Collins v. National Railroad Passenger Corp.* (Ct.App.Md. 2010) 9 A.3d 56 is misplaced. Although *Collins* held that an instruction on assumption of the risk is mandatory in circumstances similar to this case, the instruction recommended by *Collins* is almost identical to the instruction given by the trial court in this case. (*Id.* at p. 69.) Therefore, the trial court properly instructed the jury on assumption of the risk as required even though it did not use Chizmar's proposed instruction. (See *id.* at p. 70, fn. 17 ["an instruction that distinguishes assumption of risk from contributory negligence without mentioning the verbiage `assumption of risk' is an acceptable instruction"].)

B. Jones Act

Under the Jones Act, an employer has a duty to provide a safe place for a seaman to work. (*Colburn v. Bunge Towing, Inc.* (5th Cir. 1989) 883 F.2d 372, 374.) Chizmar argues that the court erred in failing to instruct the jury that "Warner [had an] essential legal duty to provide Chizmar with a reasonably safe place to work under the Jones Act . . . ." Chizmar argues that this instruction was needed because his "workplace on the DUKW's ledge . . . was manifestly unsafe," and Kuhn had a mandatory duty to correct the unsafe working condition.

Assuming that the instruction should have been given, the failure to give it could not have prejudiced Chizmar. First, as Chizmar acknowledges the accident did not occur on the

ledge.[7] Second, under other instructions, the jury must have rejected Chizmar's theory that Warner was negligent because Kuhn failed to correct Chizmar's stance on the ledge. Specifically, the jury was instructed that Warner was responsible for any negligence caused by Kuhn. Third, it was undisputed that Warner provided a reasonably safe place to work as Chizmar states in his opening brief in this court: Warner "sought to provide as safe a workplace as reasonably possible on the water." Assuming the court should have given the instruction, Chizmar does not show any prejudice.

C. Unseaworthiness

The jury was instructed on the definition of unseaworthiness. Chizmar, however, argues that the jury was not properly instructed that the duration of the unseaworthy condition is irrelevant. Assuming that the court should have given this instruction, there was no prejudice from its absence. At trial, Chizmar focused on the absence of steps in the DUKW for his unseaworthiness claim, and the DUKW always lacked steps. The instruction therefore would not have assisted Chizmar.

Next, Chizmar argues that the court should have instructed the jury that he was not required to prove the entire vessel was unseaworthy. The concept was covered in the court's instruction that "[a] vessel is unseaworthy if the vessel, or any of its parts and equipment, is not reasonably fit for its intended purpose or if its crew is not reasonably adequate or competent to perform the work assigned."

Finally, Chizmar argues that the court erred in failing to give the following requested instruction: "It is the vessel owner's absolute and non-delegable duty to furnish to the seamen a seaworthy vessel. The plaintiff's duties were to do the work as ordered by their superiors. They were not obligated to protest against the method of operation which they had been instructed to follow or to devise a safer method, nor were they obligated to call for or seek out additional or different equipment or gear." The first sentence of this instruction was given when the court instructed the jury that "[a] vessel owner has a duty to provide and maintain a seaworthy vessel. That duty cannot be delegated to anyone else." With respect to the remainder of the instruction, Chizmar cites no legal authority for the proposition that it was required and therefore fails to show error in the court's refusal to give it. Moreover, he fails to show that he had been instructed to follow any specific method of operation or that different equipment or gear was relevant to any issue at trial and therefore fails to demonstrate any prejudice.

3. 998 Offer

Chizmar argues that the court erred in concluding he failed to validly accept Malpaso's 998 offer. We first provide background and then discuss Chizmar's argument.

On June 4, 2010, Malpaso made Chizmar a 998 offer for $250,000. On June 28, 2010, Chizmar and his counsel orally told Malpaso's counsel that Chizmar accepted the offer.

Chizmar's counsel believed he signed the 998 offer and faxed it to Malpaso's counsel. Malpaso's counsel, however, never received a signed written offer and revoked its offer on the first day of trial. Prior to trial, the court found Malpaso's revocation was effective because Chizmar's oral acceptance was invalid. The trial court implicitly found that Chizmar's counsel did not send a written acceptance to Malpaso's counsel.

On appeal, Chizmar incorrectly argues that his oral acceptance was sufficient to accept the 998 offer. Code of Civil Procedure section 998, subdivision (b) expressly provides: "Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, *shall be in writing* and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (Italics added; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 12:615, p. 12(II)-34 (rev. #1 2010).) Section 998 requires that acceptances of 998 offers be in writing. (*Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1272.) The language is clear and unambiguous, and its plain meaning must be effectuated. (*Ibid.*) In addition to the statutory requirement, Malpaso's 998 offer required a written acceptance, specifically providing: "The plaintiff may indicate his acceptance of this offer *by signing the statement* to that effect set forth below." (Italics added.) Thus, under the terms of the statute and the terms of the contract, Chizmar did not validly accept the offer.[8]

4. Costs and Fees

Chizmar appealed from the posttrial cost and fees order. His argument that the posttrial order should be reversed is contingent on reversal of the judgment. Because we conclude that reversal of the judgment is unwarranted, Chizmar's contingent argument also fails.

DISPOSITION

The judgment is affirmed. The postjudgment order awarding costs and fees is affirmed. Respondents are entitled to costs on appeal.

BIGELOW, P. J. and GRIMES, J., concurs.

[1] "`[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, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of vessels) that is substantial in terms of both its duration and its nature.'" (*Spears v. Kajima Engineering & Construction, Inc.* (2002) 101 Cal.App.4th 466, 474, quoting *Chandris, Inc. v. Latsis* (1995) 515 U.S. 347, 368.)

[2] State courts have concurrent jurisdiction with federal courts over Jones Act claims. (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 506.) The only questions on the special verdict concerned the Jones Act and the unseaworthiness claim. The jury was not asked about a general negligence claim.

[3] Chizmar's purported challenges to the sufficiency of the evidence of causation and the absence of contributory negligence are necessarily invalid because the jury made no finding on causation or contributory negligence. Therefore, we do not further consider these arguments.

[4] Title 46 of the United States Code section 30104 provides: "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer."

[5] Contrary to Chizmar's argument, the reasonableness of the jury verdict is not undermined by the fact that Vollmer and O'Connell were not aware of the specific order. Chizmar cites no evidence indicating that O'Connell and Vollmer should have been involved in every decision and in every location on the set. The record shows that Chizmar's own expert, Waters, testified that a marine coordinator cannot oversee every member of the crew throughout the day.

[6] In *Terrebonne v. B & J Martin, Inc.* (La.App. 1st Cir. 2004) 906 So.2d 431, the court found that an employer was required to provide a safe means of ingress and egress onto and out of a vessel. (*Id.* at p. 437.) Because there was evidence that there was no need for a gangway or handrail, the absence of those did not show a breach of duty to provide safe ingress and egress. (*Ibid.*) However, the appellate court found negligence when the vessel did not have a ladder to board or exit when such ladder was required by the defendant's safety manual. (*Ibid.*) Here, no similar evidence was presented that the absence of steps violated a provision in the safety manual.

[7] Chizmar concedes "the accident did not occur while Chizmar was crouched on the ledge assisting in the special effects transfer, but rather only after its successful completion and upon Chizmar being specifically ordered by his captain to transfer into the DUKW . . . ."

[8] Chizmar relies heavily on *Hofer v. Young* (1995) 38 Cal.App.4th 52. Because that case applied a prior version of Code of Civil Procedure section 998, which did not include the relevant language requiring an acceptance be in writing, we do not find it persuasive on the issue of whether, under the version of the statute relevant here, an acceptance must be written.