

IN THE SUPREME COURT OF OHIO

**06-1808**

JOSEPH TALIK )

Plaintiff-Appellee, )

-vs- )

FEDERAL MARINE TERMINALS, INC. )

Defendant-Appellant. )

Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. CA-05-87073

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**MEMORANDUM OF APPELLEE JOSEPH TALIK  
IN OPPOSITION TO JURISDICTION**

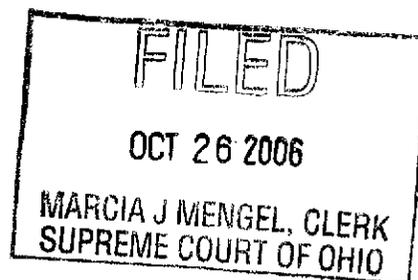
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**I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The well-reasoned, twenty page opinion issued by the Eighth District Court of Appeals (the "Appellate Opinion") is not a case of public or great general interest because:

- There is no record evidence that Plaintiff Joseph Talik ("Mr. Talik") was receiving benefits under the Longshoremen's & Harbor Workers' Compensation Act ("LHWCA" or the "Act"). Notwithstanding this fact, the Appellate Opinion correctly permits an injured longshoreman to pursue an employer intentional tort claim under well-established Ohio law.
- The Appellate Opinion does not rewrite the LHWCA; rather, it merely applies the Act, as rewritten by Congress in the 1972 amendments, correctly to state that the LHWCA does not cover an employer intentional tort claim. Ohio intentional tort claims are a matter of pure state law and are not supplanted by the LHWCA.
- The issue of whether Ohio's substantial certainty standard applies to an Ohio employee's intentional tort claim was properly before the Appellate Court.

None of these issues meets this Court's criteria for review. There are no issues raised by Appellant Federal Marine Terminals, Inc. ("FMT") that present issues of public or great general interest. Therefore, this Court should decline jurisdiction to review the Appellate Opinion.

First, this case does not present an issue of first impression on the interaction of federal statutory law and state common law. The LHWCA neither provides an exclusive remedy provision for injured longshoremen, nor does it impose exclusive liability on maritime employers. This issue was dealt with at length by the United States Supreme Court in *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715. According to the United States Supreme Court in *Sun Ship*, "The language of the 1972 amendments [allowing a longshoreman or harbor worker to receive benefits under both state workers'

compensation statutes and the LHWCA] cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA." *Id.* at 720. Thus, it is clear that employees may bring claims under either a state workers' compensation statute or the LHWCA or both. *Id.* The Supreme Court is clear that the LHWCA does not contain exclusive remedy and exclusive liability provisions that preempt state law.

Further, the LHWCA does not even cover employer intentional tort claims. Section 902 of the Act defines injuries covered by the Act to include (a) "accidental injury or death...arising out of and in the course of employment;" (b) "occupational disease or infection;" and (c) "willful acts of a third person directed against an employee because of his employment." Moreover, section 902 does not include "employer" in the definition of "third party." Compensating an employee for an intentional tort committed by his employer is clearly outside the scope of the LHWCA. There is no language in the Act evincing Congressional intent to deprive an injured worker like Mr. Talik of his state law employer intentional tort remedy.

Second, Appellant argues that federal common law should apply to the determination of Mr. Talik's employer intentional tort claim in order for the LHWCA to be uniformly applied throughout the United States. However, cases cited by FMT in support of this position borrow the prevailing state law standards for employer intentional tort claims. *See e.g., Sample v. Johnson* (9<sup>th</sup> Cir. 1985), 771 F.2d 1335; *Houston v. Bechtel Assocs. Prof'l Corp.* (D.D.C. 1981), 522 F.Supp. 1094. In Ohio, it is well established that the "substantial certainty" standard applies to the determination of employer intentional tort claims. Appellant incorrectly contends that the Appellate Opinion should be reversed in order to promote the uniform application of the LHWCA

within the fifty states. This issue was also addressed by the United States Supreme Court in *Sun Ship*. The Court stated that to adopt a position mandating the exclusive jurisdiction would "blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers. We decline to do so in the name of uniformity." *Id.* at 726 (emphasis added). The decision below is clearly supported by the highest court in this land, and this Court should decline jurisdiction to reevaluate that decision.

Third, the Appellate Opinion does not create conflicting compensation systems in Ohio; it poses no risk for injured maritime workers in Ohio to receive double recovery for their injuries. Ohio's workers' compensation statutes do not provide any mechanism by which an injured employee may recover damages for his or her pain and suffering. Further, "[t]here is no danger of double recovery under concurrent jurisdiction since employee's awards under one compensation scheme would be credited against any recovery under the second scheme." *Id.* at 725; see e.g., *Calbeck v. Traveler's Ins. Co.* (1962), 370 U.S. 114, 131. The United States Supreme Court has stated that the policy of compensating injured maritime employees outweighs a need for uniformity in the fifty states. The true thrust of Appellant's argument regarding this point seems to be a disagreement with Ohio's intentional tort standard. However, the substantial certainty standard is well established under Ohio law. See *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115.

Fourth, the Appellate Court did not rule *sua sponte* that material issues of fact existed entitling Mr. Talik to a jury trial on his employer intentional tort claim. The issue was properly before the appellate panel. As the appellate court stated, "We consider a final issue, however, not assigned as an error by [Mr.] Talik, but raised by [FMT] in its

brief before this court and in its motion for summary judgment before the trial court."

Appellate Opinion at 11. The appellate court notes that "[FMT] did argue that...[Mr. Talik] failed to demonstrate an intentional tort." *Id.* at fn. 3. Thus, the issue was properly before the appellate panel despite the fact that Mr. Talik did not raise it in his assignments of error. FMT had notice and an opportunity to be heard at the trial court level and the appellate court level on this issue. There is no risk of inconsistent enforcement or non-uniform application of the Rules of Appellate Procedure in Ohio's twelve appellate districts. Thus, this Court should decline to extend jurisdiction on this ground as well.

## **II. STATEMENT OF THE CASE AND FACTS**

This matter presents the employer intentional tort claim of Plaintiff/Appellant Mr. Talik, a longshoreman, against his employer FMT. FMT is a stevedore company operating under contract with the Port Authority for the City of Cleveland. Mr. Talik was a longshoreman for thirty-six uninterrupted years. He was also an employee of FMT's predecessor, Cleveland Stevedore. He was an employee of FMT's since January 1, 1998.

On the day of his injury, September 10, 2004, Mr. Talik was working in a two-man team that consisted of Mr. Talik as the "checker" and Robert Holchin ("Bob Holchin") as the tow motor operator. Together they were required to load trucks with a variety of goods that had arrived from ships in weeks past and were stored at FMT's location. The goods were off-loaded from ships and stored in a warehouse or docks by other FMT employees in a manner required by FMT. In the days or weeks after storage, the goods would be scheduled for customer pick-up and would be loaded onto trucks. When the daily work list was distributed by FMT, a checker was required to examine the

goods for identification and plan which items would be loaded in what sequence so that the fullest, safest truck load could be achieved. For pipe, the identifying information was stamped on the surface of the pipe itself. The tow motor operator would then move the identified goods onto the truck.

Mr. Talik and Bob Holchin were provided with the daily work list by FMT on the morning of September 10, 2004, and this was the first notice of the work to be done that day. This work list detailed the number of trucks scheduled to arrive and which goods were required to be loaded upon them. The work list for September 10, 2004 required the Talik/Holchin team to load 13 trucks. This heavy workload was typical of the heightened production burden placed on the longshoremen by FMT beginning in the summer of 2004. The work list described a full day of work that ruled out any time for any break down and sorting of the goods prior to the time for loading. This heightened production burden required the goods to be sorted as the loading process took place.

The first truck arrived at 7:45 a.m. and was scheduled to receive a load for transport to FMT's customer, Specialty Pipe. That load consisted of thin and thick-walled steel pipe that had been off-loaded from the Federal St. Laurent ship approximately two or three weeks prior. The steel pipe had been stacked in a dock by other FMT employees in a manner required by FMT. This dock had a sloped approach that then leveled out and terminated at a dock wall. The pipe was stacked against the dock wall on the level portion of the dock. The pipe stack was 5 - 6 feet high and 12 - 15 feet deep. The pipes were massive, thin and thick-walled pipe of varying lengths and outside diameters. Their length averaged about 20 feet. The weight of the individual pipes ranged from 5,000 to 20,000 pounds.

The pipe stack was not broken down and sorted. Breaking the pipe stack down to one-pipe high was done in the past in order to eliminate the risk of collapse. The pipes would then be sorted by outside diameter to facilitate product identification and loading. The first layer of pipe placed on the truck bed would be of uniform outside diameter thus resulting in a level course that would safely accommodate another layer on top. However, breaking down and sorting a pipe stack of this size could take hours to accomplish. With the number of truck loads scheduled by FMT that day and the amount of goods FMT required Mr. Talik and Bob Holchin to load, there was no time allotted to prepare the pipe in this manner.

The fact that this pile was not previously broken down and sorted by FMT had been the subject of complaints by the longshoremen in the two or three week period preceding the date of Mr. Talik's injury. Pipe stacks were known to spontaneously collapse and stacks of this height could not be properly blocked or chocked to prevent collapse. In addition, the haphazard nature of the pipe stack required the checker to identify pipes in the stack for attempted capture by the tow motor operator. Pipes of similar outside diameter had to be found, and these were randomly dispersed throughout the pile. This required Mr. Talik, as the checker, to measure pipes as they rested within the large pipe stack. If a particular pipe was shorter than the pipes around it in the stack, Mr. Talik was then required to reach into the stack to place a measuring tape on the pipe to measure its outside diameter. The heightened risk of injury attendant to this more intimate work at and around the pipe stack, occasioned by the failure by FMT to break down and sort the pile, was well-known to FMT and was the source of these explicit complaints.

On the day of Mr. Talik's injury, Bob Holchin's first capture from the pile designated for delivery to Specialty Pipe was three pipes of the same outside diameter. Mr. Talik stood away from the pipe stack to the left of the pile while Bob Holchin accomplished this. Bob Holchin secured these pipes on his forks and exited the dock area and drove to the truck to load the pipe. The next pipe of similar outside diameter was embedded in the pile with pipe around it. The pipe was also shorter than the pipe around it. As Mr. Talik waited for Bob Holchin to return, he carefully reached around the left side of the pile and placed the measuring tape on the end of the embedded pipe. It was at this point that the pipe stack spontaneously collapsed and crushed Mr. Talik's right leg under the released pipes. When Bob Holchin returned, he found Mr. Talik trapped under the pipe and he used the tow motor to lift the pipe from Mr. Talik's leg. Mr. Talik was admitted to Cleveland Metropolitan General Hospital, and his right leg was amputated above the knee.

The Occupational Safety and Health Administration ("OSHA") cited FMT for a serious violation related to Mr. Talik's injury. That citation was for failure to comply with 29 CFR 1917.14: "Cargo, pallets and other material stored in tiers were not stacked in such a manner as to provide stability against sliding and collapse." The specific condition described was: "In the dock area, large pipe was not properly stacked or blocked to prevent collapse or rolling."

As a result of this injury, Mr. Talik received benefits under the Ohio Workers' Compensation statute, as well as through social security disability. There is no record evidence that Mr. Talik ever received benefits under the LHWCA.

Following discovery, Mr. Talik and FMT both filed for summary judgment. In FMT's motion, FMT argued that even if employer intentional torts constituted an exception under the LHWCA, the court should not apply Ohio's standard for proving such claims. FMT made the same argument in response to Mr. Talik's motion for summary judgment. The trial court granted FMT's motion for summary judgment, but the court did not specify the grounds upon which it was granting the motion.

On appeal, Mr. Talik argued that (a) the LHWCA did not preempt Ohio intentional tort claims and that (b) the correct standard to apply to an intentional tort claim is Ohio's *Fyffe* standard and not "federal common law," as asserted by FMT.

In a well-developed and well-reasoned twenty-page opinion, the appellate court concluded that the LHWCA did not preempt an employer intentional tort claim, and Mr. Talik could assert such a claim against FMT. Further, the appellate court concluded, pursuant to Appellate Rule of Procedure 12(A)(1)(b), that evidence presented by certain affidavits created material issues of fact entitling Mr. Talik to his day in court on his employer intentional tort claim.

### III. ARGUMENT

#### A. RESPONSE TO FIRST PROPOSITION OF LAW

##### The LHWCA does not preempt an employer intentional tort claim brought under Ohio law.

The LHWCA was passed in 1927 to provide workers' compensation benefits for maritime workers suffering workplace injuries. As originally enacted, only employees working on the seaward side of the pier were covered by the Act. In 1972, the Act was amended, extending the reach of the LHWCA landward. The LHWCA was thus extended into an environment where full-blown state remedies validly existed. The United States Supreme Court noted that "the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law." *Sun Ship*, 447 U.S. at 720; see also *State ex rel. Pittsburgh & Conneaut Dock Co.* (10<sup>th</sup> Dist. 2005), 160 Ohio App.3d 741, 744. (stating that the LHWCA does not preempt state law claims for compensation).

Both the LHWCA and the United States Supreme Court's interpretation of it in *Sun Ship* clearly state that there is concurrent jurisdiction to provide benefits for injured maritime workers between state workers' compensation statutes and the LHWCA. *Id.* at 720. It is clear that Congress intended to eliminate any exclusivity of the LHWCA when it deleted the following language from the 1927 Act: "If recovery through workmen's compensation proceedings may not be validly provided by state law...." 33 U.S.C. § 903(a) (1927). According to the United States Supreme Court, deletion of this language "may logically only imply...that the LHWCA operates within the same ambit of state workers remedies.... It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting

[Congressional] intent to command such jurisdiction." *Sun Ship*, 447 U.S. at 720-21 (emphasis in original). Further, the Court notes that to read the 1972 amendments as forcing employees to seek compensation under two mutually exclusive systems would lead to prejudicial consequences that "defeat the purpose of the federal act, which 'seeks to give these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principles of compensation, and the state Acts...which aim at 'sure and certain relief for workmen.'" *Id.* (citing *Davis v. Dept. of Labor* (1942), 317 U.S. 249, 254).

Furthermore, when prompted to adopt an exclusivity rule in the name of uniformity, the United States Supreme Court refused, stating that a policy of uniformity was outweighed by Congress' intent of aiding injured maritime employees. *Id.* at 726 (citing G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975), which notes that "a theory of concurrent jurisdiction...seems to be the only sensible way of dealing with state and federal statutes which meet at some vaguely defined line"). The United States Supreme Court noted that "the 1972 extension of federal jurisdiction supplements, rather than supplants state compensation law." *Id.* at 720.

The few cases on point fully acknowledge the propriety of an employer intentional tort exception. *See e.g., Seide v. Bethlehem Steel Corp.* (Ca. App. 1985), 169 Cal App.3d 985, 989-990 (stating "[t]he second exception, judicially created, permits an employee to maintain a tort action if he can establish that his injury was inflicted as the result of an intentional tort by his employer"); *Houston v. Bechtel Assoc. Prof'l Corp.* (D.D.C. 1981), 522 F.Supp. 1094, 1096; *Austin v. Johns-Mansville Sales Corp.* (D. Me. 1981), 508 F. Supp. 313, 316; *see also Taylor v. Transocean Terminal Operators, Inc.*

(La. App. 2001), 785 So.2d 860, 861-63 (stating that uncontradicted case law holds that an employer's intentional tort is an exception to the exclusive remedy provision of the LHWCA and that the employee may bring an intentional tort action against the employer). Further, the appropriate standard to apply is Ohio's substantial certainty standard enunciated in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115.

In fact, the very case that Appellant cites for the proposition that federal common law should apply to the determination of Mr. Talik's intentional tort claim supports this proposition by implication. In *Seide*, the court determined that the plaintiff could not bring a wrongful death action because the employee's death occurred on the navigable waters of the United States, and any tort claim was covered by the LHWCA. *Id.* at 989. The court also determined that because plaintiff's cause of action was a maritime tort, federal common law should apply to the determination of the injured employee's wrongful death claim. *Id.* Here, however, Mr. Talik was neither injured on the navigable waters of the United States, nor is he asserting a maritime tort. Because Mr. Talik was injured on land, within the sphere of concurrent jurisdiction, and he is asserting an employer intentional tort claim, Ohio law should apply. The appellate court properly determined this issue, and this Court should decline jurisdiction to review that determination.

**B. RESPONSE TO SECOND PROPOSITION OF LAW**

**The appellate court properly determined that Ohio's substantial certainty standard applies to Mr. Talik's employer international tort claim.**

The Ohio Rules of Appellate Procedure (the "Rules") proscribe the source and scope of the twelve appellate district's jurisdiction. Appellant's contention that the Rules limit an appellate court's jurisdiction to the appealed order and assignments of error mischaracterizes the clear language of the Rules. Rule 12(A)(1)(b) of the Rules clearly and unambiguously states:

On an undismissed appeal from a trial court, a court of appeals shall...determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and unless waived, the oral argument under App.R. 21.

*Id.*

Further, Rule 9 provides that the record includes "the original papers and exhibits thereto filed in the trial court." This clearly contemplates that any motions for summary judgment and responses thereto are part of the appellate court's record. The appellate court unambiguously premised its *Fyffe* ruling upon the fact that the issue was "raised by [FMT] in its brief before this court and in its motion for summary judgment in the trial court." App. Op. at 11. Further, one of the very cases cited by Appellant states that a court would not consider an attorney's fee request where an appellant did not "advance any argument on this issue in his brief." *Andreyko v. City of Cincinnati* (2003), 153 Ohio App.3d 108. Here, FMT did advance the issue in its brief--twice--once before the trial court and again before the appellate court.

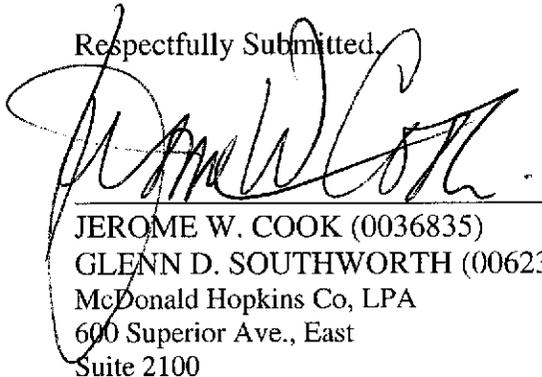
Thus, the issue of whether *Fyffe* was applicable to Mr. Talik's employer intentional tort claim was properly before the appellate court, and it had jurisdiction,

pursuant to Rule 12(A)(1)(b), to determine that issue. This Court should decline jurisdiction to determine this issue because the appellate court properly complied with Ohio's Rules of Appellate Procedure.

#### IV. CONCLUSION

This Court is not confronted with any conflicting law or novel legal issues in this case. This is not a case of public or great general interest. The Court of Appeals properly applied well-settled law in making its determinations that (a) Mr. Talik's employer intentional tort claim was not preempted by the LHWCA and (b) Ohio's substantial certainty test applied to Mr. Talik's claim. Appellant's arguments are baseless and lack merit. Accordingly, for the reasons stated herein, Appellee Joseph Talik respectfully requests this Court to reject Appellant's propositions of law and decline jurisdiction over this appeal.

Respectfully Submitted,



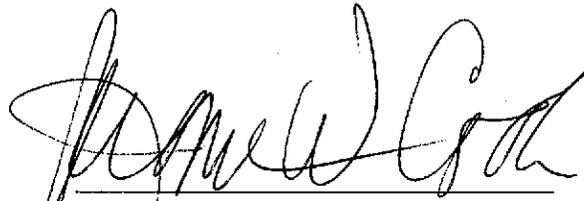
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**CERTIFICATE OF SERVICE**

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