

---

## In The Supreme Court of Ohio

---

APPEAL FROM THE COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO  
CASE NO. CA-05-87073

---

JOSEPH TALIK,  
*Appellee,*

v.

FEDERAL MARINE TERMINALS, INC.,  
*Appellant.*

---

### MERIT BRIEF OF APPELLEE JOSEPH TALIK

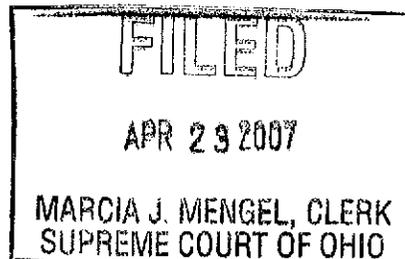
---

JEROME W. COOK (0036835)  
GLENN D. SOUTHWORTH (0062324)  
MATTHEW M. NEE (0072025)  
ELIZABETH A. WAMBSGANS (0080456)  
MCDONALD HOPKINS LLC  
600 Superior Ave., E., Suite 2100  
Cleveland, Ohio 44114-2653  
Tel: (216) 348-5400  
Fax: (216) 348-5474  
E-mail: [jcook@mcdonaldhopkins.com](mailto:jcook@mcdonaldhopkins.com)  
[gsouthworth@mcdonaldhopkins.com](mailto:gsouthworth@mcdonaldhopkins.com)  
[mnee@mcdonaldhopkins.com](mailto:mnee@mcdonaldhopkins.com)  
[ewambsgans@mcdonaldhopkins.com](mailto:ewambsgans@mcdonaldhopkins.com)

*Attorneys for Appellee Joseph Talik*

IRENE C. KEYSE-WALKER (0013143)  
(COUNSEL OF RECORD)  
JEFFREY A. HEALY (0059833)  
TUCKER ELLIS & WEST LLP  
1150 Huntington Bldg.  
925 Euclid Avenue  
Cleveland, Ohio 44115-1414  
Tel: (216) 592-5000  
Fax: (216) 592-5009  
Email: [ikeysewalker@tuckerellis.com](mailto:ikeysewalker@tuckerellis.com)  
[jhealy@tuckerellis.com](mailto:jhealy@tuckerellis.com)

*Attorneys for Appellant Federal  
Marine Terminals, Inc.*



**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE..... 1

II. STATEMENT OF THE FACTS ..... 2

III. ARGUMENT..... 6

    A. The LHWCA Does Not Expressly Preempt Ohio’s Common Law Employer Intentional Tort Cause of Action ..... 6

        1. Congress clearly and explicitly expressed that its purpose in enacting the LHWCA was to ensure compensation to maritime workers who suffer an “accidental” injury “in the course of employment.” ..... 6

        2. The LHWCA’s “exclusiveness of liability” section applies to only the liability of an employer for an accidental injury in the course of employment ..... 8

        3. An employer intentional tort necessarily does not occur in the course of employment..... 9

    B. The LHWCA Does Not Implicitly Preempt Ohio’s Common Law Employer Intentional Tort Cause of Action. .... 10

        1. The United States Supreme Court has unequivocally held that the LHWCA does not implicitly preempt the field of state workers’ remedies ..... 11

        2. The 1972 amendments do not enhance employers’ immunity from state law claims of employees..... 13

        3. The cases upon which Federal Marine relies are inapposite and do not support implicit preemption of state law intentional tort claims ..... 14

    C. The Fyffe Standard, and Not “Federal Common Law,” Applies to Mr. Talik’s Employer Intentional Tort Cause of Action ..... 15

    D. Holding that the LHWCA Does Not Preempt Employer Intentional Tort Claims Would Be Consistent with this Court’s Precedent that the Analogous Ohio Workers’ Compensation Act Does Not Preempt Employer Intentional Tort Claims ..... 17

    E. Mr. Talik’s Employer Intentional Tort Cause of Action Will Not Result in a “Double Recovery.” ..... 20

    F. Mr. Talik’s Pursuing an Employer Intentional Tort Cause of Action Will Serve Ohio Public Policy ..... 21

IV. CONCLUSION..... 22

CERTIFICATE OF SERVICE ..... 24

## TABLE OF AUTHORITIES

### **Cases**

<i>Blankenship v. Cincinnati Milacron Chemicals, Inc.</i> (1982), 69 Ohio St.2d 608, 433 N.E.2d 608 .....	5, 7, 9, 10, 18, 19, 20, 21, 22,
<i>Boek v. Wong Hing</i> (1930), 180 Minn. 470, 471, 231 N.W. 233 .....	19
<i>Brady v. Safety-Kleen Corp.</i> (1991), 61 Ohio St.3d 624, 576 N.E.2d 722 .....	10, 17, 18, 19
<i>English v. General Electric Co.</i> (1990), 496 U.S. 72 .....	6
<i>Federal Marine Terminals, Inc. v. Illinois Workers' Comp. Comm. Div.</i> (Ill. App., Mar. 6, 2007), 2007 Ill. App. LEXIS 189 .....	13
<i>Fillinger v. Foster</i> (1984), 448 So.2d 321 .....	14, 15
<i>Fyffe v. Jenos Inc.</i> (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.....	5, 15, 20
<i>Gorman v. Garlock, Inc.</i> (Wash. App. 2004), 121 Wn.App. 530, 89 P.3d 302.....	19
<i>Hess v. Norfolk S. Ry. Co.</i> (2005), 106 Ohio St.3d 389, 835 N.E.2d 679.....	16
<i>Hill v. Knapp</i> (Md. App. 2007), 396 Md. 700 .....	14
<i>Jones v. VIP Devel. Co.</i> (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046 .....	5, 10, 20
<i>Lenane v. Continental Maritime of San Diego, Inc.</i> (Cal. App. 1998), 61 Cal. App. 4 <sup>th</sup> 1073.....	12, 13
<i>Malone v. White Motor Corp.</i> (1978), 435 U.S. 497 .....	6
<i>Mandolidis v. Elkins Indus., Inc.</i> (W.Va. 1978), 246 S.E.2d 907.....	19
<i>Metro. Life Ins. Co. v. Massachusetts</i> (1985), 471 U.S. 724 .....	11
<i>Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs.</i> (1983), 461 U.S. 624.....	17, 21, 22
<i>Northeast Marine Terminal Co. v. Caputo</i> (1977), 432 U.S. 249, 258 .....	17
<i>Ohio State Bldg. &amp; Constr. Trades Council v. Cuyahoga Cty. Bd. of Comm'rs</i> (2002), 98 Ohio St.3d 214, 781 N.E.2d 951 .....	10, 11
<i>Roy v. Bethlehem Steel Corp.</i> (E.D. Tex. 1993), 838 F.Supp. 312, 316.....	18
<i>State ex rel. Pittsburgh &amp; Conneaut Dock Co. v. Industrial Comm.</i> (9 <sup>th</sup> Dist. 2005), 160 Ohio App.3d 741, 828 N.E.2d 712 .....	11

<i>State ex rel. Crawford v. Indus. Comm.</i> (1924), 110 Ohio St. 271, 143 N.E. 574.....	20
<i>Sun Ship, Inc. v. Pennsylvania</i> (1980), 447 U.S. 715 .....	11, 12, 13
<i>Taylor v. Transocean Terminal Operators, Inc.</i> (La. App. 4 Cir. 2001), 785 So. 2d 860. 7, 9, 18	
<i>Wallace v. Ryan-Walsh Stevedoring Co., Inc.</i> (E.D. Tex. 1989), 708 F.Supp. 144.....	12
<i>Whirlpool Corp. v. Marshall</i> (1980), 445 U.S 1.....	21

**Statutes**

33 U.S.C. § 902.....	6, 7
33 U.S.C. § 903.....	6
33 U.S.C. § 904.....	8
33 U.S.C. § 905.....	8, 9, 15
33 U.S.C. § 907.....	8
33 U.S.C. § 908.....	8
33 U.S.C. § 909.....	8
33 U.S.C. § 933.....	14
R.C. § 2745.01 .....	15

**Legislative History**

S. Rep. No. 92-1125 (1972); H.R. Rep. No. 92-1441 (1972).....	12
---	----

## I. STATEMENT OF THE CASE

Joe Talik brought his employer intentional tort claim based upon conduct that arose outside the course of his employment. Mr. Talik's job as a longshoreman for Federal Marine Terminals, Inc. ("Federal Marine") was to handle cargo passing through the Port of Cleveland. As he worked with heavy cargo in the vicinity of impressive machinery, Mr. Talik's job entailed an inherent degree of risk. But on the day Mr. Talik lost his leg, Federal Marine added such an unnatural degree of risk that no reasonable employee could contemplate being in the course of employment.

Federal Marine seeks to avoid liability for its intentional tort by hiding behind the Longshore Harbor Workers' Compensation Act (the "LHWCA"). As Federal Marine is quick to point out, the LHWCA contains an "exclusiveness of liability" provision, which limits the liability of longshore employers. Federal Marine, however, fails to explain that the LHWCA cannot preempt employer *intentional* torts, which necessarily arise *outside the course of employment*, because the LHWCA encompasses only *accidental* injuries that arise *in the course of employment*. Moreover, the "exclusiveness of liability" provision explicitly limits employer liability to only such accidental injuries that arise in the course of employment.

To adopt Federal Marine's proposition of law, this Court would have to find that Congress intended that Ohio employees have no redress beyond the limited coverage of the LHWCA and that employers are permitted to intentionally put their employees in harm's way with impunity. A plain reading of the LHWCA clearly shows that Congress neither explicitly nor implicitly preempted Ohio's common law employer intentional tort cause of action. Moreover, this Court has repeatedly held that an employer intentional

tort necessarily arises outside the employment relationship such that employees may recover workers' compensation benefits and damages for employer intentional torts. Accordingly, Mr. Talik respectfully submits that this Court should reject Federal Marine's unsupportable proposition of law and affirm the well-reasoned holding of the Eighth District Court of Appeals of Ohio that the LHWCA does not preempt Ohio's common law employer intentional tort cause of action.

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

On September 10, 2004, a stack of massive pipes, weighing between 5,000 and 20,000 pounds each, collapsed and crushed Mr. Talik's right leg. The damage was so severe that Mr. Talik's leg had to be amputated above the knee. Mr. Talik sought redress for his loss, including medical expenses, lost wages, pain and suffering, and punitive and other damages by filing an employee intentional tort claim against Federal Marine.

On the day of his injury, Mr. Talik and Robert Holchin ("Mr. Holchin") were working as a team to load a variety of goods, including the pipes, onto trucks. Mr. Holchin operated a tow motor to "capture" and move the pipes, and Mr. Talik was the "checker," identifying which pipes should be moved and in what order. The goods had been off-loaded from ships in weeks past and were stored in a warehouse or on docks by other Federal Marine employees and in a manner required by Federal Marine.

On the morning of September 10, 2004, Federal Marine provided Mr. Talik and Mr. Holchin with a daily work list. This was their first notice of work to be done that day. The work list indicated the number of trucks scheduled to arrive and detailed which goods were to be loaded upon them. The work list required the Talik/Holchin team to load 13 trucks. This heavy workload was typical of the heightened production burden

placed on the longshoremen by Federal Marine beginning in the summer of 2004. (Supp. at 150, 152-53). The work list described a full day of work that ruled out any time for breaking down and/or sorting the goods prior to loading. (Supp. at 165). The goods had 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 of pipes for transport to Federal Marine's customer, Specialty Pipe. (Supp. at 121). Two to three weeks earlier, Federal Marine left the massive pipes on its dock in disorganized five to six feet high and twelve to fifteen feet deep stacks. (Supp. at 118, 165). Mark Chrzanowski, a warehouse manager for Federal Marine and Mr. Talik's immediate supervisor, knew that loading a truck from a stack of pipes more than one-pipe high while, at the same time, attempting to sort the stack was particularly dangerous. (Deposition of Mark Chrzanowski ("Chrzanowski Depo.") at p.44 , attached as Exh. 3 to Mr. Talik's Motion for Summary Judgment). Accordingly, Mr. Chrzanowski had recommended that Federal Marine should reduce the risk of injury to its employees by unstacking the pipes and laying them flat on the dock. (Chrzanowski Depo. at 40).

Breaking down pipe stacks to one-pipe height and sorting the pipe by the size of their outside diameters had been done in the past to eliminate the risk of collapse and facilitate loading the pipes onto trucks. That way the first layer of pipe placed on a truck bed would be of uniform outside diameter, resulting in a level base that would safely accommodate another layer on top. (Supp. at 125).

The fact that this pile had not been broken down and sorted by Federal Marine had been the subject of complaints by the longshoremen in the two or three week period preceding Mr. Talik's injury. (Supp. at 42-43). Pipe stacks were known to

spontaneously collapse, and stacks of this height could not be properly blocked or chocked to prevent collapse. (Supp. at 109-10, 165). Mark Chrzanowski was aware of the risk of injuries to employees where steel pipes were stacked improperly and had witnessed pipe stacks collapse as a result of improper stacking. (Chrzanowski Depo. at pp. 12, 16-18, 23, 64).

To begin the loading process, Mr. Talik tried to check the identifying stamps located on the outside rim of the pipes. Pipes of similar outside diameter had to be found, yet they were randomly dispersed throughout the pile. Thus, Mr. Talik had to reach into the stack to measure each pipes' outside diameter. (Supp. at 125).

Mr. Holchin's first capture from the pile was three pipes of the same outside diameter. (Supp. at 126). Mr. Talik stood away from the pipe stack to the left of the pile while Mr. Holchin secured the pipes on his fork lift and drove the pipes to the truck. (Supp. at 128). The next pipes of similar outside diameter were embedded with shorter pipes around it. (Supp. at 136). As Mr. Talik waited for Mr. Holchin to return, he carefully reached around the left side of the pile and placed a measuring tape on the end of the embedded pipe. (Supp. at 53-54). Suddenly, the stack collapsed and brutally crushed Mr. Talik's right leg. When Mr. Holchin returned, he found Mr. Talik trapped under a pipe. (Supp. at 77). Perhaps saving Mr. Talik's life, Mr. Holchin 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 Federal Marine for a serious violation. The citation was for failure to comply with 29 CFR 1917.14, which provides, "Cargo, pallets and other material stored in tiers shall be

stacked in such a manner as to provide stability against sliding and collapse.” The specific violation was that “[i]n the dock area, large pipe was not properly stacked or blocked to prevent collapse or rolling.” (Appellee’s Supp. at pp.1-2).

In November 2004, Mr. Talik filed his Complaint in the Court of Common Pleas for Cuyahoga County. Mr. Talik alleged that, under the common law of Ohio established by this Court, Federal Marine committed an employer intentional tort by requiring him to load the pipes despite knowing that the pipe stack was dangerous and that Mr. Talik was substantially certain to be harmed.<sup>1</sup>

On November 3, 2005, the trial court granted summary judgment in favor of Federal Marine. But in a comprehensive and well-reasoned opinion, the Eighth District Court of Appeals of Ohio reversed. Relying on a host of Ohio Supreme Court cases, including *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 608, *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046, and *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, the court of appeals held that the LHWCA does not preempt an employer intentional tort cause of action and that a genuine issue of material fact existed as to whether Federal Marine is liable to Mr. Talik.

On October 2, 2006, Federal Marine filed its notice of appeal to this Court. This Court accepted jurisdiction to determine whether the LHWCA preempts Ohio’s common law employer intentional tort cause of action.

---

<sup>1</sup> Mr. Talik filed his employer intentional tort claim before the April 7, 2005 effective date of R.C. 2745.01. Accordingly, Mr. Talik’s employer intentional tort claim is brought under the requirements this Court established in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

### III. ARGUMENT

#### A. **The LHWCA Does Not Expressly Preempt Ohio's Common Law Employer Intentional Tort Cause of Action.**

- I. *Congress clearly and explicitly expressed that its purpose in enacting the LHWCA was to ensure compensation to maritime workers who suffer an "accidental" injury "in the course of employment."*

In determining whether the LHWCA preempts Ohio's common law cause of action for employer intentional torts, this Court's focus must be on Congress' purpose in enacting the LHWCA. See *Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504. The United States Supreme Court has held that express preemption occurs where Congress explicitly defines the extent to which its enactments preempt state law. *English v. General Elec. Co.* (1990), 496 U.S. 72, 78.

The coverage and definition sections of the LHWCA leave no room for debating the LHWCA's scope of coverage and explicitly define Congress's purpose in enacting it. 33 U.S.C. § 903(a) states that coverage exists "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a) (emphasis added). Thus, a prerequisite to coverage under the LHWCA is that a maritime worker suffers an "injury."

The LHWCA defines "injury" as "accidental injury or death arising out of and in the course of employment...and includes the willful act of a third person directed against an employee because of his employment." 33 U.S.C. § 902(2) (emphasis added). Read together, 33 U.S.C. §§ 903(a) and 902(2) clearly express Congress's purpose that

coverage under the LHWCA should exist only where a maritime employee has suffered an “accidental” (as opposed to intentional) injury that arose “in the course of employment” (as opposed to merely at the job site). See *Blankenship*, 69 Ohio St.2d at 614, n.8. (“Indeed, it would be travesty on the use of the English language to allow someone who intentionally inflicts an injury on another to call the injury a work incident.”). Moreover, Congress considered even “the willful act of a third person” (such as a co-worker) not to be a covered injury unless the act was directed at an employee “because of his employment.” 33 U.S.C. § 902(2). These clauses express, in harmony, that an intentional tort suffered outside the course of employment is beyond the scope of the LHWCA and that Congress’s purpose in enacting the LHWCA was not to provide the exclusive remedy for employees against their employers.

Thus, a plain reading of the LHWCA reveals that Congress did not expressly preempt employer intentional tort claims. See *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 4<sup>th</sup> Cir. 2001), 785 So.2d 860, 863 (“[B]ecause the LHWCA provides benefits only for injuries caused by (1) accidents, (2) occupational disease and (3) willful acts of third persons (and “third persons” does not include employers)<sup>2</sup>, and an intentional tort by an employer fits none of these categories, the LHWCA does not provide any benefits for injuries caused by an intentional tort by an employer”), cert. denied, 534 U.S. 1020; c.f. *Blankenship*, 69 Ohio St.2d at 614, n.8 (“An intentional tort . . . is clearly not an ‘injury’ arising out of the cause of employment.”)

---

<sup>2</sup> See 33 U.S.C. § 902(4). (“The term ‘employer’ means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).”).

2. *The LHWCA's "exclusiveness of liability" section applies to only the liability of an employer for an accidental injury in the course of employment.*

Finding no help under the coverage and definitional sections of the LHWCA, Federal Marine vainly attempts to find coverage for, and thus preemption of, employer intentional torts under 33 U.S.C. § 905 – the LHWCA's "exclusiveness of liability" section. Under that section, Congress established that the liability of employers to their maritime employees is limited to the benefits provided under the LHWCA. But the limit applies as to only injuries covered under the LHWCA. 33 U.S.C. § 905 states:

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 4 [33 USCS § 904] shall be exclusive and in place of all other liability of such employer to the employee...

33 U.S.C. § 905 (emphasis added). Thus, the "exclusiveness of liability" section is qualified by 33 U.S.C. § 904, which provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USCS §§ 907, 908, and 909]...

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 904 (emphasis added).<sup>3</sup>

---

<sup>3</sup> 33 U.S.C. § 907 states, "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (emphasis added).

33 U.S.C. § 908 sets forth compensation payable for "permanent total disability," "temporary total disability," "permanent partial disability," and "temporary partial disability" and sets forth various procedural requirements and limits related to "the injury." 33 U.S.C. § 908 (c)(13)(D), (c)(22), (d)(1), (e), (f)(1), (g), and (h).

33 U.S.C. § 909 sets forth benefits payable "[i]f the injury causes death." 33 U.S.C. § 909 (emphasis added).

Federal Marine, however, reads out this qualification. Only by doing so can Federal Marine reach the erroneous presumption that 33 U.S.C. § 905(a) evidences Congress's intent to preempt an employer intentional tort. Pursuant to 33 U.S.C. § 905(a), the exclusivity, from which Federal Marine attempts to manufacture express preemption, applies to only the liability of an employer as to compensation payable for an "injury." In other words, 33 U.S.C. § 905(a) applies to only an "accidental" injury that occurred "in the course of employment" and does not exclude coverage for employer intentional torts. See *Taylor*, 785 So.2d at 863 ("Because the LHWCA's benefit provisions do not apply to injuries caused by employer intentional torts, it logically follows that [the] LHWCA's exclusive remedy provision does not apply to an employer intentional tort"). Accordingly, 33 U.S.C. § 905(a) does not take employer intentional tort causes of action away from employees.

3. *An employer intentional tort necessarily does not occur in the course of employment.*

This Court has repeatedly held that an employer intentional tort necessarily does not occur in the course of employment. In *Blankenship*, this Court held that Ohio's workers' compensation system does not preempt an employer intentional tort. *Id.* at the syllabus. Although *Blankenship* dealt with the Ohio's workers' compensation system, rather than the LHWCA, this Court unequivocally declared, as a general principal, that under Ohio law, an employer intentional tort cannot occur in the course of employment.

This Court wrote:

[W]here an employee asserts in his complaint a claim for damages based on an intentional tort, "\*\*\* the substance of the claim is not an 'injury \* \* \* received or contracted by any employee in the course of or arising out of his employment' within the meaning of

R.C. 4123.74 \* \* \*.” *Id.* No reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such individual contemplate the risk of an intentional tort as a natural risk of employment.

*Id.* at 613 (emphasis added); see, also, *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 631, 576 N.E.2d 722 (stating that the Court reasoned in *Blankenship* that an employer’s injurious act did not arise out of the employment relationship, was not a natural hazard of employment, and therefore fell outside the Ohio Workers’ Compensation Act); *Jones* at paragraph two of the syllabus (“The receipt of workers’ compensation benefits does not preclude an employee or his representative from pursuing a common-law action for damages against his employer for an intentional tort”) (emphasis added).

The explicit language of the LHWCA expresses Congress’s clear intent that only common law actions based on accidental injuries arising in the course of employment are preempted. As this limited preemption does not include a common law action for employer intentional torts, which necessarily arise outside the course of employment, Congress did not expressly preempt employer intentional tort causes of action. Accordingly, Mr. Talik respectfully submits that this Court should affirm the holding of the Court of Appeals.

**B. The LHWCA Does Not Implicitly Preempt Ohio’s Common Law Employer Intentional Tort Cause of Action.**

The LHWCA does not implicitly preempt Ohio’s employer intentional tort cause of action “unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.” *Ohio State Bldg. & Constr. Trades*

*Council v. Cuyahoga County Bd. of Comm'rs* (2002), 98 Ohio St. 3d 214, 222, 781 N.E.2d 951, quoting *Metro. Life Ins. Co. v. Massachusetts* (1985), 471 U.S. 724, 747-748 (internal quotations omitted).

1. *The United States Supreme Court has unequivocally held that the LHWCA does not implicitly preempt the field of state workers' remedies.*

In *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, the United States Supreme Court held that the LHWCA does not preempt the entire field of state law remedies for longshore employees. The Court's analysis focused largely on 1972 amendments to the LHWCA. Those amendments upgraded the benefits available to employees and extended the LHWCA's coverage to include workers injured in the "twilight zone" – land areas contiguous to waterways to which coverage was previously limited. *Id.* at 723-724. The Court explained that this "landward extension" of benefits under the 1972 amendments "cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA." *Id.* at 720 (emphasis added).

Rather, Congress clearly intended the LHWCA to be an optional benefits scheme that "supplements, rather than supplants, state compensation law." *Id.* (emphasis added); c.f. *State ex rel. Pittsburgh & Conneaut Dock Co. v. Industrial Comm.* (9<sup>th</sup> Dist.), 160 Ohio App.3d 741, 2005-Ohio-2206, 828 N.E.2d 712. In *Sun Ship*, the Supreme Court wrote:

To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits.

*Sun Ship, Inc.*, 447 U.S. at 724 (emphasis in original). In other words, the LHWCA is the baseline for compensation to injured workers, and Congress did not intend to occupy the field of state workers' remedies. See *id.* at 724-725 ("Indeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the [congressional Bill] Reports dwell upon the rejection of the unseaworthiness action, and do not mention pre-emption of state remedies") (emphasis added), citing S. Rep. No. 92-1125 (1972); H.R. Rep. No. 92-1441 (1972).

Federal and state courts have overwhelmingly adopted the precept that the LHWCA "supplements, rather than supplants" state workers' remedies. For example, in *Wallace v. Ryan-Walsh Stevedoring Co., Inc.* (E.D. Tex.1989), 708 F.Supp. 144, the court held that a state law retaliatory discharge claim brought by an employee who was injured in the twilight zone was not preempted by the LHWCA. The court wrote:

The twilight zone...is a specie of maritime law in which overlapping jurisdictional spheres create concurrent jurisdiction between the LHWCA and state laws. Currently, maritime injuries fall within three jurisdictional spheres. At the seaward extreme, the LHWCA is the exclusive remedy. For injuries occurring on land outside the jurisdictional grasp of the LHWCA, state law alone governs. In the twilight zone, however, "maritime but local" injuries may be compensated by federal or state law. *Id.* at 2436. [citations omitted]. Since Carroll Wallace was injured on land, yet is covered by the LHWCA, he falls within the twilight zone and the LHWCA does not pre-empt his state law retaliatory discharge claim.

*Wallace*, 708 F.Supp. at 153. Similarly, in *Lenane v. Continental Maritime of San Diego, Inc.* (1998), 61 Cal. App. 4<sup>th</sup> 1073, the Court held that a maritime employee's common law tort claim that his employer knowingly removed or failed to install a guard on a power press was not preempted by the LHWCA. The Court embraced *Sun Ship* and its

progeny, holding that the Supreme Court has given “free rein” to “twilight zone” workers’ to pursue remedies under state law. *Id.* at 1089.

2. *The 1972 amendments do not enhance employers’ immunity from state law claims of employees.*

Federal Marine has mischaracterized the 1972 amendments as including enhanced employer immunity from state law claims as a *quid pro quo* for enhanced employee benefits. See Appellant’s Merit Brief at 21. Certainly, Congress intended that the LHWCA, like all workers’ compensation schemes, should provide predictable liability for employers. But “[t]he thrust of the amendments was to upgrade the benefits” and not to enhance employers’ protection from common law tort claims. *Sun Ship, Inc.*, 447 U.S. at 723 (citation omitted). Specifically, “the *quid pro quo* to the employers for the landward extension of the LHWCA by the 1972 amendments was simply abolition of the longshoremen’s [remedy for injuries resulting from unseaworthy crafts].” *Id.* at 724. In contrast to Federal Marine’s arguments, nothing in the amendments gave employers protection from common law intentional tort claims.

An Illinois appellate court has already explained this to Federal Marine. See *Federal Marine Terminals, Inc. v. Illinois Workers’ Comp. Comm. Div.* (Ill. App., Mar. 6, 2007), 2007 Ill. App. LEXIS 189 at \*18 (“[T]he only identifiable benefit to employers intended by Congress in the enactment of the 1972 amendments to the LHWCA was the elimination of the longshoremen’s strict liability remedy against ship owners for injuries resulting from a craft’s unseaworthiness”). Thus, Federal Marine’s argument that the *quid pro quo* for the 1972 amendments was “strengthened employer immunity,” which somehow translates into implicit preemption is baseless.

3. *The cases upon which Federal Marine relies are inapposite and do not support implicit preemption of state law intentional tort claims.*

Federal Marine bases its argument for implicit preemption largely on *Hill v. Knapp* (Md. App. 2007), 396 Md. 700. See Merit Brief of Appellant at pp. 23-24. *Hill*, however, is readily distinguishable from the case at bar. In *Hill*, a longshore employee was injured when his co-employee dropped a load of plywood. *Id.* at 704. After being awarded workers' compensation benefits under the Maryland Workers' Compensation Act, the injured worker filed a negligence claim against his co-employee. *Id.* at 705. Unlike Mr. Talik, the injured worker in *Hill* did not bring an intentional tort cause of action against his employer. Moreover, the court noted that the 1972 amendments, coupled with *Sun Ship*, did not "evidence a Congressional intent to preempt any state legislation affecting events occurring within the twilight zone." *Id.* at 712.

Federal Marine also bases its argument for implicit preemption on *Fillinger v. Foster* (1984), 448 So.2d 321. The issue before the Alabama Supreme Court in *Fillinger* was whether the LHWCA, pursuant to 33 U.S.C. § 933(i), preempted a longshore employee's negligence claim against a co-employee.<sup>4</sup> *Id.* at 322. The Court wrote:

We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit; therefore, we are persuaded to hold that the exclusivity provisions of 33 U.S.C. § 933(i) apply and that the state action was barred.

---

<sup>4</sup> 33 U.S.C. § 933(i) provides for exclusivity of remedy for an employee's claim against a co-employee, as follows: "The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ..." (emphasis added).

*Id.* at 326. Clearly, the issue before the court was not, as it is here, whether the LHWCA, pursuant to 33 U.S.C. § 905(a), preempted an intentional tort claim against an employer.<sup>5</sup>

Nothing in Congress's expressed purposes for enacting the LHWCA, nothing in the Supreme Court's interpretation of the LHWCA or its amendments, and nothing in any case cited by Federal Marine establishes or even suggests implicit preemption of state common law employer intentional tort claims. Mr. Talik's employer intentional tort claim does not conflict with federal law, would not frustrate the federal scheme, and does not contravene any of the LHWCA's enumerated purposes. Accordingly, the LHWCA does not implicitly preempt Mr. Talik's employer intentional tort claim, and Mr. Talik respectfully submits that this Court should affirm the holding of the Court of Appeals.

**C. The *Fyffe* Standard, and Not "Federal Common Law," Applies to Mr. Talik's Employer Intentional Tort Cause of Action.**

This Court's *Fyffe* standard applies to Mr. Talik's Ohio common law employer intentional tort claim. See *Fyffe*, 59 Ohio St.3d at paragraph one of the syllabus. When Mr. Talik filed his common law employer intentional tort claim in November 2004, R.C. 2745.01 was not in effect. Accordingly, upon holding that the LHWCA does not preempt

---

<sup>5</sup> *Fillinger's* being so readily distinguishable did not deter Federal Marine, however. In its Merit Brief, Federal Marine creatively "paraphrased" the Court's holding to fit its purpose. Federal Marine wrote:

We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his *[employer]* because he was a land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit; therefore, we are persuaded to hold that the exclusivity provisions of 33 U.S.C. *[§ 905(a)]* apply and that the state action was barred.

Merit Brief of Appellant at p. 26 (brackets sic; emphasis added).

employer intentional tort claim, the Court of Appeals correctly held that the Trial Court must apply the *Fyffe* standard to Mr. Talik's claim.

Federal Marine argues that, if the LHWCA does not preempt employer intentional tort claims, this Court must, in the name of "uniformity," hold that a "federal common law" standard for proving employer intentional torts supplants Ohio's standard. See Appellant's Merit Brief at p. 17 *et seq.* Federal Marine purports to be concerned that workers in Ohio will be able to bring claims under one standard, while workers in "Wisconsin, Louisiana or California" bring claims under another standard. See Appellant's Merit Brief at p. 20. How Federal Marine expects the Ohio Supreme Court to accomplish interstate uniformity is a mystery. Perhaps Federal Marine hopes that this Court's holding will start a national trend. Perhaps Federal Marine intends to seek review of this issue in every state supreme court in the land. Perhaps Federal Marine should try convincing the United States Supreme Court to reverse the "Erie doctrine."

Setting aside a debate as to whether a federal common law applicable to *state* common law causes of action even exists, there is certainly no federal common law that governs employer intentional tort claims. Another example of Federal Marine's contorting cases to fit its purpose is Federal Marine's citation to *Hess v. Norfolk S. Ry. Co.*, 106 Ohio St.3d 389, 2005-Ohio-5408, 835 N.E.2d 679, for the proposition that "federal common law would govern any potential intentional tort claim asserted against a maritime employer." *Hess* is patently off target. Federal Marine acknowledges that *Hess* involved a railroad worker subject to the Federal Employees Liability Act and not subject to the LHWCA. Moreover, in *Hess*, this Court applied a federal common law standard to a federal statute. This Court did not apply a federal common law standard to a state

common law tort. Certainly, federal courts create federal common law applicable to federal causes of action – just as this Court creates state common law applicable to state causes of action. Federal courts simply do not, nor can they, create common law applicable to state causes of action, as argued by Federal Marine.

**D. Holding that the LHWCA Does Not Preempt Employer Intentional Tort Claims Would Be Consistent with this Court’s Precedent that the Analogous Ohio Workers’ Compensation Act Does Not Preempt Employer Intentional Tort Claims.**

The LHWCA and the Ohio Workers’ Compensation Act (the “OWCA”) are typical workers’ compensation systems. See *Northeast Marine Terminal Co. v. Caputo* (1977), 432 U.S. 249, 258. Like all typical workers’ compensation systems, the LHWCA and the OWCA were designed to benefit employees by ensuring compensation to injured workers and to benefit employers by limiting their liability for common law tort actions. In *Morrison-Knudsen Constr. Co. v. Director, Office of Workers’ Compensation Programs* (1983), 461 U.S. 624, the Court explained the design of the LHWCA as follows:

[The LHWCA] was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

*Brady*, 61 Ohio St.3d. at 636. Using parallel language, in *Brady*, this Court explained the design of the OWCA as follows:

The [Workers’ Compensation] Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish the common law remedy and accept lower benefit levels coupled with the greater assurance

of recovery and employers give up their common law defenses and are protected from unlimited liability.

*Id.* at 634-635, quoting *Blankenship*, 69 Ohio St.2d at 614. The LHWCA and the OWCA are typical workers compensation acts that share parallel purposes and designs.

But that is not all the two workers' compensation systems share. Federal courts, interpreting the LHWCA, and this Court, interpreting the analogous OWCA, have uniformly held that the respective workers' compensation systems provide an exclusive remedy as to only negligent, and not as to intentional, conduct of the employer. In *Taylor*, the Court held:

[B]ecause the LHWCA provides benefits only for injuries caused by (1) accidents, (2) occupational disease and (3) willful acts of third persons (and "third persons" does not include employers), and an intentional tort by an employer fits none of these categories, the LHWCA does not provide any benefits for injuries caused by an intentional tort by an employer. Because the LHWCA's benefit provisions do not apply to injuries caused by employer intentional torts, it logically follows that [the] LHWCA's exclusive remedy provision does not apply to an employer intentional tort.

*Id.* at 863; see, also, *Roy v. Bethlehem Steel Corp.* (E.D. Tex. 1993), 838 F.Supp. 312, 316 ("The LHWCA is an exclusive remedy to those entitled to benefits, and bars actions alleging negligence and gross negligence...The employer can be sued under the LHWCA, however, if he committed an intentional tort, i.e., genuine, intentional injury [as opposed to gross or wanton negligence]") (emphasis added). Likewise, in *Blankenship*, this Court held:

[T]he protection afforded by the [OWCA] has always been for negligent acts and not for intentional conduct. Indeed, workers' compensation [acts] were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.

*Blankenship*, 69 Ohio St.3d at 614 (emphasis added); see, also, *Brady*, 61 Ohio St.3d at 634 (“We hereby...reiterate our firm belief that the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship.”) (emphasis added); c.f. *Gorman v. Garlock, Inc.* (Wash. App. 2004), 121 Wn.App. 530, 534, 89 P.3d 302 (“The only exception [to Washington’s workers’ compensation statute] allows an employee to sue an employer where the employer has deliberately injured the employee...[The statute] is designed to deter employers from intentionally wrongful workplace behavior because employer who act egregiously should not burden and compromise the industrial insurance risk pool.”) (quotation omitted); *Mandolidis v. Elkins Indus., Inc.* (W.Va. 1978), 161 W.Va. 695, 705, 246 S.E.2d 907, 913 (“The workmen’s compensation system completely supplanted the common law tort system only with respect to [n]egligently caused industrial accidents.”) (emphasis in original); *Boek v. Wong Hing* (1930), 180 Minn. 470, 471, 231 N.W. 233 (It would be a ‘perversion of’ the Workmen’s Compensation Act’s purpose to allow employers immunity from intentional torts).

This Court’s rationale for holding that Ohio’s workers’ compensation system does not preempt employer intentional tort claims is equally applicable to resolving that the LHWCA does not preempt employer intentional tort claims. Holding otherwise would create an arbitrary and unjustifiable philosophical and logical dichotomy. Accordingly, Mr. Talik respectfully submits that this Court should hold, consistent with its precedent as to the OWCA, that the LHWCA does not preempt employer intentional tort causes of action.

**E. Mr. Talik's Employer Intentional Tort Cause of Action Will Not Result in a "Double Recovery."**

Federal Marine's argument that a *Fyffe* intentional tort claim "permits an employee to receive a double recovery of compensation benefits" is meritless. Mr. Talik neither is seeking, nor will he receive, a double recovery of benefits.

In *Blankenship*, this Court held:

It must also be remembered that the [workers'] compensation scheme was specifically designed to provide less than full compensation for injured employees. Damages such as pain and suffering and loss of services on the part of a spouse are unavailable remedies to the injured employee. Punitive damages cannot be obtained. Yet, these damages are available to individuals who have been injured by intentional tortious conduct of third parties, and there is no legitimate reason why an employer should be able to escape from such damages simply because he committed an intentional tort against his employee.

*Id.*, 69 Ohio St.2d at 614-615 (emphasis added) quoting *State, ex rel. Crawford, v. Indus. Comm.* (1924), 110 Ohio St. 271, 275, 143 N.E. 574 ("[Workers' compensation] was never intended by the most ardent advocates of \* \* \* [it] to give full and adequate remuneration..."); see, also, *Jones*, at paragraph three of syllabus ("An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative").

Mr. Talik has asserted a cause of action expressly permitted under Ohio common law that is not preempted by the LHWCA. Mr. Talik intends to recover only damages to which he is entitled under Ohio common law. Accordingly, Mr. Talik will not receive a "double recovery" and respectfully submits that this Court should affirm the holding of the Court of Appeals.

**F. Mr. Talik's Pursuing an Employer Intentional Tort Cause of Action Will Serve Ohio Public Policy.**

Under Ohio law, employers are required to provide a safe workplace for their employees. *Blankenship*, 69 Ohio St.3d at 615, n13; c.f. *Whirlpool Corp. v. Marshall* (1980), 445 U.S. 1 (under federal law, no employee may be discriminated against for refusing to work in an unsafe environment). The LHWCA, like the OWCA, precludes employees from bringing negligence claims against their employers. Should this Court hold that employees also may not bring an intentional tort cause of action against their employers, no common law cause of action will remain to ensure full compensation to employees and accountability of employers. Employers would be able to perform a simple calculus as to whether protecting employees from substantially certain harm is worth the certain and foreseeable liability that will result from not implementing remedial measures. See *Morrison-Knudsen Constr. Co.*, 461 U.S. 636 ("Under the [LHWCA], [e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability").

This Court recognizes the hazard that would accompany stripping the employer intentional tort cause of action from employees' arsenal. In *Blankenship*, this Court wrote:

[T]here is no legitimate reason why an employer should be able to escape from [common law] damages simply because he committed an intentional tort against his employee.

\* \* \*

Affording an employer immunity for his intentional behavior certainly would not promote such an environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly.

*Blankenship*, 69 Ohio St.3d at 614-615 (emphasis added). Sound public policy requires that this Court continue to recognize that the employer intentional tort cause of action is necessary for protecting the health and safety of Ohio's workers. Accordingly, Mr. Talik respectfully submits that this Court should affirm the holding of the Court of Appeals that the LHWCA does not preempt employer intentional tort causes of action.

#### **IV. CONCLUSION**

The LHWCA is designed to provide longshore workers with compensation for only accidental injuries arising in the course of employment. There is nothing in the LHWCA that evidences Congress's intent to explicitly or implicitly preempt Ohio's common law employer intentional tort cause of action.

Furthermore, the LHWCA was not designed to, nor can it, fully compensate Ohio's injured workers or adequately protect Ohio's workers from hazardous working environments. Holding that the LHWCA preempts employer intentional tort causes of action would leave Ohio's longshore workers without the ability to attain full remuneration and will result in more dangerous workplaces.

For these reasons, Mr. Talik respectfully submits that this Court should affirm that the LHWCA does not preempt Ohio's common law employer intentional tort cause of action and remand this case to the trial court so that Mr. Talik may obtain the full remuneration to which he is entitled under Ohio law.

Respectfully submitted,



JEROME W. COOK (0036835)

GLENN D. SOUTHWORTH (0062324)

MATTHEW M. NEE (0072025)

ELIZABETH WAMBSGANS (0080456)

McDonald Hopkins LLC

600 Superior Ave., E., Suite 2100

Cleveland, Ohio 44114-2653

Tel: (216) 348-5400

Fax: (216) 348-5474

E-mail: [jcook@mcdonaldhopkins.com](mailto:jcook@mcdonaldhopkins.com)

[gsouthworth@mcdonaldhopkins.com](mailto:gsouthworth@mcdonaldhopkins.com)

[mnee@mcdonaldhopkins.com](mailto:mnee@mcdonaldhopkins.com)

[ewambsgans@mcdonaldhopkins.com](mailto:ewambsgans@mcdonaldhopkins.com)

*Attorneys for Appellee Joseph Talik*

**CERTIFICATE OF SERVICE**

A copy of the foregoing **Merit Brief of Appellee Joseph Talik** was served this  
21<sup>st</sup> day of April, 2007, via regular U.S. mail, postage prepaid, upon the following:

Irene C. Keyse-Walker  
Jeffrey A. Healy  
Tucker, Ellis, & West LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1414



---

One of the Attorneys for  
Appellee Joseph Talik