
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.

FILED

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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MOTION OF APPELLEE JOSEPH TALIK TO STRIKE ARGUMENTS III(A) AND III(B)(2) OF THE REPLY BRIEF OF FEDERAL MARINE TERMINALS, INC.

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I. INTRODUCTION

Pursuant to S. Ct. Prac. R. XIV, Section 4(A), Appellee Joseph Talik ("Mr. Talik") moves this Court to strike Arguments III(A) and III(B)(2) of the Reply Brief of Appellant Federal Marine Terminals, Inc. ("Reply Brief"). Federal Marine Terminals, Inc. ("Federal Marine") bases its arguments upon a gross and deceptive misrepresentation that Mr. Talik's having received Longshore Harbor Workers' Compensation Act ("LHWCA") benefits is "undisputed."

Mr. Talik's having received LHWCA benefits is not undisputed, and Mr. Talik has never testified, stipulated, or otherwise stated that he has received LHWCA benefits. Federal Marine, however, has demonstrated a penchant for not allowing such inconvenient truths to stand in its way. Much as Federal Marine has done with inapposite caselaw and inapplicable Rules of Practice of the Supreme Court of Ohio ("Rules of Practice"), Federal Marine has contorted Mr. Talik's deposition testimony to fit its arguments. Federal Marine's Arguments III(A) and III(B)(2) are premised entirely upon a gross and deceptive misrepresentation. Accordingly, Mr. Talik respectfully submits that this Court should strike Federal Marine's Arguments III(A) and III(B)(2).

II. FEDERAL MARINE HAS A PENCHANT FOR CONTORTING MATTERS TO FIT ITS ARGUMENTS

In its Appellant Brief, Federal Marine misrepresented the law to this Court by disingenuously "paraphrasing" *Fillinger v. Foster* (1984), 448 So.2d 321. In *Fillinger*, the Court held that a longshore worker could not maintain a negligence claim against his co-worker. *Id.* Federal Marine was undeterred that *Fillinger* is factually inapposite and

simply changed *Fillinger's* facts to fit its arguments. In *Fillinger*, 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..." *Id.* at 326 (emphasis added). Federal Marine changed *Fillinger's* meaning by writing, "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..." See Appellant Brief at p. 26 (brackets sic; emphasis added). This was not merely a convenient grammatical substitution. Rather, Federal Marine disingenuously changed a pivotal fact and thereby changed the holding of the case.

In its Reply Brief, Federal Marine adapted this Court's Rules of Practice to fit its assertion that Mr. Talik, as the Appellee, was required to set forth a proposition of law. Federal Marine wrote:

Contrary to Ohio Sup.Ct.R. VI(3)(A), *Talik's Opposing Brief ("Opp. Br.") offers no proposition of law* that Talik "contends is applicable to the facts and that could serve as a syllabus for the case ***.

Reply Brief at p. 1 (emphasis added). Next, Federal Marine presumed to create a proposition of law for Mr. Talik and then picked apart its own creation as "suffer[ing] from errors of logic, law, and constitutional interpretation, and...inconsistent with the governing federal law of preemption." Reply Brief at p. 1. Federal Marine's statement that the Rules of Practice required Mr. Talik to have offered a proposition of law is nonsensical and completely unsupported by any rational understanding of the Rules of Practice. The only proposition of law at issue is the one set forth by Federal Marine and

over which this Court granted jurisdiction. But as Federal Marine keeps demonstrating, inconvenient truths are of little concern.

III. FEDERAL MARINE'S ARGUMENTS III(A) AND III(B)(2), WHICH ARE BASED UPON FEDERAL MARINE'S GROSS AND DECEPTIVE MISREPRESENTATION, SHOULD BE STRICKEN

Federal Marine's Arguments III(A) and III(B)(2) are explicitly premised upon Mr. Talik's having received LHWCA benefits. Argument III(A) reads:

A. Employer Immunity Expressly Preempts State Tort Actions Seeking Damages for Injuries Compensated Under the LHWCA.

[N]o one is challenging Talik's right to the benefits he *has received* under the LHWCA. *The question in this case is whether the employer immunity triggered when Federal Marine did secure benefits for Talik's injuries (33 U.S.C. § 905(a)), preempts Talik's state law "Fyffe" claim for damages caused by those same injuries.* The clear and unambiguous statutory language set forth on page 8 of Talik's Opposing Brief can lead to only one answer to that question - "yes."

Reply Brief at p. 5 (emphasis added). Federal Marine's Argument III(B)(2) reads:

2. Unlike state compensation schemes, state tort law conflicts with the compensation scheme of the LHWCA.

Talik primarily relies on *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 2001), 785 So.2d 860, to argue that a *Fyffe* claim is wholly consistent with the LHWCA. *Taylor* surmises that intentional tort claims do not conflict with employer immunity under the LHWCA because Congress would not have intended that longshore workers be left with "*no remedy at all* in the case of an employer intentional tort, in either tort or compensation under the LHWCA ***." *Id.* at 864 (emphasis in original). *Whether that is a valid interpretation of Congressional intent must*

await another case with different facts. Talik has not been left with "no remedy at all"; he has received compensation through the LHWCA.

Reply Brief at p. 12 (emphasis added). Thus, Federal Marine pins Arguments III(A) and III(B)(2), and even the propriety of this Court's having granted jurisdiction, on Mr. Talik's having received benefits under the LHWCA. As with its argument based upon *Fillinger* and its argument that Mr. Talik was required to set forth a proposition of law, Federal Marine can support Arguments III(A) and III(B)(2) only by altering reality.

Federal Marine wrote, "[I]t is undisputed that Talik *is* receiving benefits through the LHWCA. Applying this logic of Talik's own argument, the fact that the LHWCA *did* provide benefits for the injuries he suffered on September 10, 2004, precluded his assertion that those injuries were caused by an employer intentional tort." Reply Brief at p. 1 (emphasis sic).¹ Federal Marine's sole basis of support is Mr. Talik's deposition testimony. The relevant testimony is as follows:

Q. You're currently getting benefits paid by the Ohio Bureau of Workers' Compensation; is that right?

A. Yes.

* * *

Q. Any other income? Do you have any disability insurance or anything.

A. No.

* * *

¹ Federal Marine repeats this misrepresentation throughout its Reply Brief. See Reply Brief at p. 5 ("Federal Marine *did* secure benefits for Talik's injuries.") (emphasis sic); Reply Brief at p. 12 ("Talik has not been left with 'no remedy at all'; he has received compensation through the LHWCA."); Reply Brief at p. 13 ("[Mr. Talik] *is* receiving benefits for his injuries.") (emphasis sic).

Q. Do you have any understanding of why you sought benefits under the Ohio Workers' Compensation statute as opposed to the Longshore and Harbor Workers' Compensation Act?

A. I thought I did go through the longshoremen's.

Talik Deposition at pp. 73-76 (emphasis added). From this patently equivocal testimony, Federal Marine has reached its unbelievable conclusion that Mr. Talik's having received LHWCA benefits is "undisputed."

In truth, (1) no court has found that Mr. Talik has received LHWCA benefits, (2) Mr. Talik and Federal Marine have not stipulated that Mr. Talik has received LHWCA benefits, (3) Mr. Talik has never testified that he has received LHWCA benefits, and (4) Mr. Talik is not, in fact, receiving LHWCA benefits. Federal Marine has twisted what Mr. Talik thought into an unqualified admission of "undisputed" fact. Never mind that Mr. Talik's statement is hardly definitive, that Mr. Talik had, moments earlier, testified that the only income he was receiving was from the Ohio Bureau of Workers Compensation, and that Federal Marine's own question implies that Mr. Talik was not receiving LHWCA benefits. Because Arguments III(A) and III(B)(2) are entirely premised upon a gross and deceptive misrepresentation, Mr. Talik respectfully submits that this Court should strike Federal Marine's Arguments III(A) and III(B)(2).

IV. CONCLUSION

Federal Marine has demonstrated a penchant for contorting reality to fit its arguments. It is not "undisputed" that Mr. Talik has received LHWCA benefits, and Federal Marine's assertion to the contrary is a gross and deceptive misrepresentation.

Accordingly and for the foregoing reasons, Mr. Talik respectfully submits that this Court should strike Federal Marine's Arguments III(A) and III(B)(2).

Respectfully submitted,



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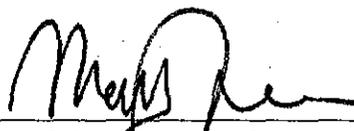
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CERTIFICATE OF SERVICE

A copy of the foregoing **Motion of Appellee Joseph Talik To Strike Arguments III(A) And III(B)(2) Of The Reply Brief Of Federal Marine Terminals, Inc.** was served this 29th day of May, 2007, via regular U.S. mail, postage prepaid, upon the following:

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