

No. 2006-1808

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# In the Supreme Court of Ohio

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

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JOSEPH TALIK,  
*Plaintiff-Appellee,*

v.

FEDERAL MARINE TERMINALS, INC.,  
*Defendant-Appellant.*

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## APPELLANT'S MEMORANDUM OPPOSING APPELLEE'S MOTION TO STRIKE

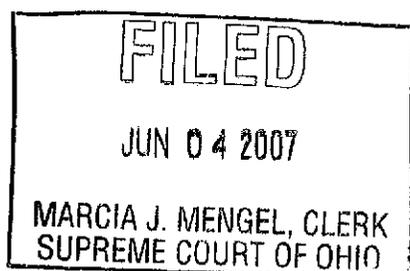
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Appellant Federal Marine Terminals, Inc., (“Federal Marine”) opposes the Motion of Appellee Joseph Talik (“Talik”) to “strike” arguments appearing at pages 5-9 and 12-17 of Federal Marine’s Reply Brief. Talik’s “Motion” is nothing more than a poorly disguised surreply brief prohibited by Supreme Court Rules of Practice. It is also wrong, and levels serious charges against Federal Marine that are wholly unjustified.

Talik’s primary complaint is that Federal Marine’s Reply Brief states that Talik is receiving benefits for his injuries “through” or “under” the Longshore Harbor Workers’ Compensation Act (“LHWCA”). Motion, p. 1. Talik claims that such a statement constitutes “a gross and deceptive misrepresentation” that Talik is receiving *federal* worker compensation benefits – i.e., benefits at the levels prescribed under the LHWCA – as opposed to *state* worker compensation benefits – i.e., benefits at the levels prescribed by the Ohio Workers’ Compensation Bureau. *Id.* Talik’s accusations are factually incorrect and legally irrelevant.

Federal Marine did not state that Talik is receiving “federal” benefits. Federal Marine stated, accurately, that Talik is receiving “benefits” “through” and “under” the LHWCA. The distinction is critical. The “type” of benefit – state or federal – that Talik is receiving is not relevant to this appeal. In contrast, the undisputed facts that: 1) Talik is receiving benefits because his employment falls within the jurisdiction of the LHWCA; and 2) those benefits were secured by his maritime employer (Federal Marine) pursuant to its obligations under the LHWCA, are dispositive of this appeal.

Talik's employment as a longshore worker involves traditional maritime activities conducted on land, placing him in the "twilight zone" of concurrent state and federal jurisdiction codified in the 1972 Amendments to the LHWCA. Because Talik is a "twilight zone" worker in Ohio, his stevedore employer (Federal Marine), must contribute to the Ohio Bureau of Workers' Compensation *and* either self-insure or purchase an insurance policy for federal compensation benefits, in order to comply with its LHWCA-imposed obligation to secure "no-fault" compensation for its maritime employees.

As an injured "twilight zone" worker, Talik had the option of seeking Ohio benefits secured by Federal Marine, federal benefits secured by Federal Marine, or both (if he received both, Federal Marine could "credit" the lower benefit, effectively giving Talik the higher benefit scheme). Whether Talik chose to seek state benefits, federal benefits, or the higher of the two benefit schemes, the choice itself is a product of the LHWCA and Federal Marine's obligations thereunder. It is thus the fact that Talik is receiving "benefits" secured by his maritime employer – not the nature or amount of those benefits – that precludes Talik's state, common law "*Fyffe*" cause of action against his maritime employer.

**I. FEDERAL MARINE DOES NOT HAVE "A PENCHANT FOR CONTORTING MATTERS TO FIT ITS ARGUMENTS" (Motion, p. 2).**

Talik's attack at pages 2-3 of his "Motion" is factually incomplete and legally misguided.

Talik first accuses Federal Marine of “disingenuously ‘paraphrasing’” a quote from *Fillinger v. Foster* (1984), 448 So.2d 321 on page 26 of its Opening Brief. The paraphrased paragraph (with paraphrased matter in brackets) appears in Federal Marine’s summary and conclusion of its discussion of a recent Maryland case on implied preemption, *Hill v. Knapp* (M.D. App. 2007), 914 A.2d 1193. As Federal Marine explains, *Hill*:

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\* \* \* analyzes the claim of a longshore worker who “was injured when a load of plywood dropped on him from a forklift” operated by a co-employee. 914 A.2d at 1194. The worker filed a negligence action against the co-employee forklift operator, as permitted under Maryland law. *Id.* at 1199.

Opening Brief, p. 23. Following an extensive analysis of the legislative history of the LHWCA, the *Hill* court held that the longshore worker’s state, common law action against his co-employee was preempted. Preemption was required, in part, by the need for uniformity in maritime law. As Federal Marine explains at page 24 of its Opening Brief, the *Hill* opinion quotes *Fillinger* to illustrate the “conflict” that requires preemption of state, common law torts:

First, the [*Hill*] court held that the plaintiff’s status as a “twilight zone” worker did not give him greater rights than maritime workers injured on a navigable waterway:

“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. \* \* \*.”

[*Hill*] at 1203, quoting *Fillinger v. Foster* (Ala. 1984), 448 So.2d 321, 326.

Opening Brief, p. 24. When Federal Marine summarizes and concludes its argument on page 26 of its Brief, it reiterates the *Fillinger* quote appearing two pages earlier, paraphrasing its facts to emphasize the general application of the reasoning therein:

In short, allowing “twilight zone” workers additional or different remedies would discriminate against co-employees injured in other ports or on navigable waters. To paraphrase the Alabama Supreme Court:

We can proceed 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.

*Fillinger*, 448 So.2d at 326.

Opening Brief, p. 26. Talik has seriously distorted Federal Marine’s argument by lifting sections of the Brief out of context and failing to mention that Federal Marine also included the “unparaphrased” quote.

Further, Talik’s allegation that the paraphrasing somehow “contorts” the reasoning of *Fillinger* is both unsupported and insupportable. The preemption question before this Court does not depend upon *what* state law tort is at issue—the question is whether allowing longshore workers to pursue whatever common law claims may be available in the state where a dock happens to be located results in unequal treatment of injured maritime employees. *Fillinger* is directly applicable.

Talik's second example of Federal Marine's alleged "penchant for contorting matters to fit its arguments" is nothing more than his disagreement with this Court's rules of practice. Specifically, at page 3 of his Motion to Strike, Talik takes umbrage at his own failure to comply with Ohio Sup. Ct. R. VI(3)(A). He does not disagree that the rule requires opposing briefs to set forth a proposition of law. He does not claim that his opposing brief does set forth a proposition of law. Rather, he asserts that the requirement "is nonsensical and completely unsupported by any rational understanding" of the rules of practice. Motion, p. 3. To the contrary, this Court's rule requiring both briefs to present a proposition of law makes eminent sense. An appellee may: 1) agree with the proposition of law set forth by the appellant and argue that application of the rule of law to the facts of the case requires affirmance; or 2) propose a different proposition of law. Talik did neither.

This Court accepts jurisdiction of a case to establish a rule of law—not to correct appellate court error. It is because this Court's decisions will govern a wide variety of fact patterns that its rules impose on *both* parties the discipline of formulating a broadly applicable "proposition of law." Contradictions and lapses of logic in superficially appealing arguments are quickly exposed in the crucible of a proposition of law. Talik's Opposing Brief perfectly illustrates why this Court requires propositions of law from both parties. When his arguments are stripped of inconsistencies and irrelevant matter, the remaining legal proposition is clearly contrary to the mandates of the Supremacy Clause of the United States Constitution.

**II. FEDERAL MARINE'S REPLY BRIEF ARGUMENTS ARE NOT BASED UPON "GROSS AND DECEPTIVE MISREPRESENTATION" (Motion, p. 4).**

The attacks against Federal Marine found in pages 4-6 of Talik's "Motion" are equally devoid of merit.

Talik first accuses Federal Marine of "gross and deceptive misrepresentation" in stating in its Reply Brief that: 1) Talik's right to the benefits he has received "under the LHWCA" has not been challenged; and 2) the employer immunity triggered "when Federal Marine did secure benefits for Talik's injuries" preempts Talik's state law claim for damages caused by those same injuries. Motion, p. 4. Both statements are true and accurate. As explained more fully at the beginning of this Memorandum, the LHWCA requires Federal Marine to both contribute to the Ohio's Workers' Compensation fund and purchase a private insurance policy for its "twilight zone" longshore workers, and Talik is receiving benefits secured by Federal Marine in compliance with its obligations under the LHWCA. Talik is eligible to receive "no-fault" compensation benefits "under" and "through" the LHWCA because he meets the LHWCA's "status" and "situs" definition of maritime employees. Because Federal Marine was obligated to, and did, secure compensation benefits for Talik, it has complied with its "exclusive" liability "in law or admiralty" under the LHWCA (33 U.S.C. § 905(a)).

Talik's next accusation of "gross and deceptive misrepresentation" arises out of Federal Marine's quotation from *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 2001), 785 So.2d 860, 863-864. *Taylor* held that intentional tort claims are not preempted by 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 \* \* \*.” (Emphasis in original). Both the Court of Appeals majority and Talik relied heavily on *Taylor*. See App. Op., Appx. 8-9; Talik’s Opp. Br. 7, 9, 18. Federal Marine utilizes the quote to explain why *Taylor* is not relevant to this case. Talik “has not been left with ‘no remedy at all’; he has received compensation through the LHWCA.” Motion to Strike, pp. 4-5, quoting Federal Marine’s Reply Brief at 12. That is absolutely true. Talik has received workers’ compensation benefits because the LHWCA required his employer to “secure” state (Ohio) as well as federal benefits, such that Talik could seek either (or both). *Whichever* option provided benefits, Talik received those benefits “through” his status as a “maritime employee,” as defined in the LHWCA.

Contrary to Talik’s assertion at page 5 of his Motion, Talik’s deposition testimony is not the “sole basis” of Federal Marine’s statement that Talik is receiving workers’ compensation benefits “under” and “through” the LHWCA. Although it is true that Talik correctly understood that his Ohio benefits were received “through” the LHWCA (i.e. by virtue of his employer’s obligation to contribute to the Ohio Workers’ Compensation fund), that was not Federal Marine’s “sole support.” The plain language and structure of the LHWCA itself establishes that Talik received compensation by virtue of his status and situs of injury, governed by the LHWCA.

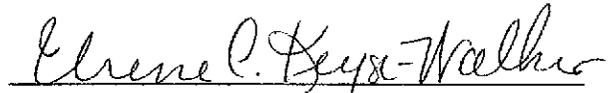
Talik goes on to state (Motion, p. 6) that “Mr. Talik is not, in fact, receiving LHWCA benefits.” Presumably, Talik is referring to his option to seek federal benefits. Whether Talik did or did not timely apply for such benefits, and whether he is or is not receiving such benefits, is not a part of this record. Nor is it an issue in this appeal. What

is the issue is Talik's undisputed receipt of benefits secured by Federal Marine, pursuant to its obligations under the LHWCA.

**III. CONCLUSION.**

Talik's surrogate surreply brief violates this Court's rules of practice, while the unfounded accusations therein illustrate the fundamental flaws of his argument. His Motion to Strike should be summarily denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

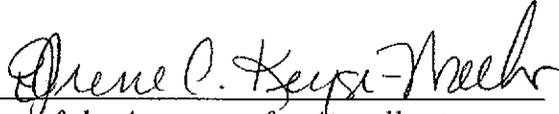
A copy of the foregoing has been served this 1<sup>st</sup> day of June, 2007, by U.S. Mail,

postage prepaid, upon the following:

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