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Article 5

Federal Insurance Company v. Lake Shore Inc. United States Court of Appeals, Fourth Circuit, 20 September 1989 886 F.2d 654

Alex Barnett '91

STOCKSTILL v. PETTY RAY *(Cont.)*

a notice of appeal from the dismissal of its claim against B&B. B&B did not file a notice of appeal from the dimissal of its claim against BMF.

BMF contends that B&B may not appeal this determination because it failed to file a notice of appeal and that Geosource has no standing to appeal this dismissal because it never filed a claim against BMF.

ISSUES: (1) Is B&B liable to Geosource?

(2) May appellate jurisdiction be exercised over the claim against BMF?

ANALYSIS: The District Court relied upon *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971) in dismissing Geosource's claim against B&B. Geosource's claim was based upon the fact that it would have been covered, had B&B included Geosource as an additional insured on B&B's P&I policy, as agreed. The *Lanasse* case stated that a charterer could be covered by an owner's P&I policy if (1) the accident was caused by a vessel or its crew and (2) liability flowed from the insured's status as vessel owner. The Court of Appeals for the Fifth Circuit, found, contrary to the district court, that Stockstill and Sandidge were crew members of the BB-300. In fact, the parties stipulated that Stockstill was a member of the crew of the fleet of vessels which included the barge. Geosource also passes the second requirment because, as a demise or bareboat charterer, it may be considered a vessel "owner" for the purposes of P&I coverage.

Since B&B breached its agreement to have its P&I insurance endorsed to name Goesource as an additional insured it must provide such coverage to Geosource.

The Court of Appeals rejected B&B's contention, relying on *Anthony v. Petroleum Helecoptors, Inc.*, 693 F.2d 495 (5th Cir. 1982) and *Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir. 1981), that an initial notice of appeal under Fed. R. App. P. (4)(a)(1) is mandatory and jurisdictional but a notice of protective or cross-appeal under Rule (4)(a)(3) is permissive and courts of appeal may retain all parties in order to do justice.

The Court stated that it is questionable whether *Anthony* or *Bryant* remains good law in light of *Torres v. Oakland Scavenger Co., 487* U.S. ___, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) which held that the requirments of Rules 3 and 4 are mandatory and jurisdictional and that although the courts of appeal may liberally construe those rules to determine whether they have been complied with, the courts may not waive non-compliance.

The Court held, that even if *Anthony* or *Bryant* is good law, the present case does not fall within the exception. The exception is only available when the appealed decision could be read as not being adverse to the party who failed to file timely notice of appeal. B&B may not take advantage of this exception because the dismissal of its claim was clearly adverse to it.

Seh-Yoon Park '91

FEDERAL INSURANCE COMPANY v. LAKE SHORE INC.

United States Court of Appeals, Fourth Circuit, 20 September 1989
886 F.2d 654

Where defendant does not have sufficient minimum contacts with the forum state to justify the exercise of personal jurisdiction, neither a general "stream of commerce" theory nor the unique nature of ocean-going vessels will support the exercise of personal jurisditction.

FACTS: In April of 1985, General Electric Company (GE) shipped a turbine accessory base aboard the M/V Paul Bunyon. While the base was being loaded aboard the vessel a cargo winch allegedly malfunctioned causing the base to fall and become damaged. At the time of the accident the vessel was docked in Charleston, South Carolina. Under its contract of insurance, Federal Insurance Company (Federal) paid GE $322,543.46 for the damaged base. Plaintiff-appellant, Federal, a New Jersey Corporation, thus became entitled to the subrogated claim of GE.

The M/V Paul Bunyon was designed and manufactured by defendant-appellee Peterson Builders Inc. (Peterson), a Wisconsin corporation with its principal place of business in Sturgeon Bay, Wisconsin, engaged in the design and manufacture of ocean-going vessels. Defendant-appellee, Lake Shore Inc. (Lake Shore), is a Michigan corporation engaged in the design, manufacture, and sale of cargo winches, with its principal place of business in Iron Mountain, Michigan.

The Lake Shore cargo winch installed on the M/V Paul Bunyon was manufactured in Michigan and the vessel was designed and manufactured in Wisconsin for American Heavy Lift Shipping Company (AHL), a Delaware corporation. The contract of sale between Peterson and AHL was executed in Wisconsin and Pennsylvania. AHL accepted delivery of the vessel in Wisconsin.

In March of 1988, Federal filed suit against Peterson, Lake Shore and American Ship Management (American) in the United States District Court for the District of South Carolina, involving the court's admiralty and maritime jurisdiction. American is a Delaware Corporation that hired the vessel's crew and handled the vessel's insurance needs. Federal sought to recover the $322,543.46 paid to GE plus interest and costs, for causes of action including: negligence, strict liability, and breach of express and implied warranties. Peterson and Lake Shore entered special appearances and moved to dismiss for lack of in personam jurisdiction. American moved for summary judgment. The district court held that it did not have personal jurisdiction over the Defendants and granted Federal's and Lake Shore's motion to dismiss and American's motion for summary judgment.

Federal appealed the district court's grant of Lake Shore's and Peterson's motion to dismiss.

Lake Shore and Peterson do not maintain offices in South Carolina and are not licensed to do business in that state. Neither has agents, employees or subsidiaries in South Carolina and neither maintains a bank account or owns real or personal property in the state. Also, all of Lake Shore's products and materials sold to South Carolina residents have been shipped F.O.B. Michigan.

ISSUES: 1) Do defendants have sufficient "minimum contacts" with South Carolina such that the exercise of in personam jurisdiction would not offend the "traditional notions of fair play and substantial justice" embodied in the constitutional principles of due process?

2) In the absence of such "minimum contacts" will a general stream of commerce theory or the unique nature of ocean-going vessels support the exercise of personal jurisdiction?

ANALYSIS: The Court of Appeals, for the Fourth Circuit, affirmed the district court's finding that defendants lacked sufficient "minimum contacts" with South Carolina to be amenable to suit there. The court also held that without such contacts neither the nature of ocean-going vessels nor a stream of commerce theory supported the exercise of in personam jurisdiction over defendants.

The court noted that Congress had not authorized nationwide service of process in admiralty cases so that South Carolina's long-arm statute (construed to extend jurisdiction "to

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FED. INS. v. LAKE SHORE *(Cont.)*

the outer limits" of due process, *Triplett v. R.M. Wade & Co.*, 261 S.C. 419 (1973)) had to be applied to determine whether the exercise of personal jurisdiction met the requirements of due process. The Court noted that, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum," *Burger King v. Rudzewicz,* 471 U.S. 467, 474 (1985) "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). Under the facts, the Court found that the defendant's contact with the forum state did not suggest a purposefulness, and thus personal jurisdiction could not be asserted without offending notions of due process.

The court also rejected Federal's argument that defendants were subject to South Carolina's personal jurisdiction under a stream of commerce theory. Citing *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1986), the Court noted that factors such as marketing and advertising by defendants in the forum state which might make a stream of commerce theory applicable were lacking. Moreover, in this case, defendants' products were transported into the forum by a consumer. To allow the state to use this as a means of exercising personal jurisdiction over defendants would effectively mean that, "amenability to suit would travel with the chattel." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 296 (1980). Also, this case did not involve multiple deliveries of units into South Carolina over a period of years. *Asahi,* 480 U.S. at 122. Though the court did not reject out of hand a stream of commerce theory, such a theory clearly did not apply in this case.

Finally, the court rejected Federal's assertion that the nature of an ocean-going vessel (designed and manufactured) to go from port to port is such that it sustains the exercise of personal juridsiction. Recognizing that the Supreme Court had already rejected such an argument in *World-Wide Volkswagen,* 444 U.S. at 296 n.11, the court added that all products are mobile to some extent and a product-by-product approach to personal jurisdiction would succeed only in drawing courts into an arcane and litigious search for meaningless distinctions. Thus, the question to ask in assessing whether personal jurisdiction can properly be asserted is not as to the nature of the product, but the nature of the defendants' contacts with the forum state.

Upon these findings, the Court held that it would not be reasonable for personal jurisdiction to be asserted over defendants, that this was sufficient independent grounds for dismissal. In support of this conclusion, the court noted certain factors that should be considered in determining whether the assertion of personal jurisdiction offends due process requirements. The court included among the factors; the defendant's burden in litigating in the forum, the forum state's interest, the plaintiff's interest in obtaining relief in the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental social policies. In this case, the court found that the defendant's contacts with the state of South Carolina are insufficient to warrant the proper assertion of personal jurisdiction. Based on the foregoing, the court affirmed the district court judgment granting defendants' motion to dismiss for lack of personal jurisdiction.

Alex Barnett '91

AMERICAN HOME ASSURANCE CO. v. L & L MARINE SERVICE INC.

United States Court of Appeals, Eight Circuit, 6 July 1989
875 F.2d 1351

Negligence by the operators of a vessel does not act to supervene the owners absolute duty to provide a seaworthy vessel for the voyage intended. All the resulting damages will be allocated by the comparative degree of fault of the parties. The work by a tug of pulling the vessel off a shoal is properly classified as towage rather than salvage.

FACTS: The barge Apex Chicago and the tug Maya went aground off the coast of Massachusetts on October 19, 1981, while enroute from Carteret, New Jersey to Boston, Massachusetts. The crew of the tug were employees of L & L Marine Service (L&L), which operated the barge and tug under an agreement with Apex Towing (Apex). The National Oceanic and Atmospheric Administration (NOAA) had issued small craft advisories along the route and upgraded them to gale warnings by 6:00 PM on October 18th. Instead of heeding the warnings, the Maya left the protected waters of Long Island Sound and proceeded into the open waters of Block Island Sound and Rhode Island Sound. While in Rhode Island Sound early on the morning of October 19th, severe weather was encountered, consisting of winds up to 35 knots, squalls, zero visibility and ten foot seas. During this rough leg of the voyage, the towing cable parted. Due to the intensity of the storm, the crew did not realize that the barge had come adrift for thirty minutes. Expert testimony showed that the breaking strength of the tow cable was significantly lower than that required by industry standards. This problem was exacerbated by the fact that the crew could not let out more cable to reduce the stress. The cable could not be slacked, because the winch had an antiquated manual release mechanism that was dangerous to operate in rough weather. By the tme the crew of the Maya sighted the barge Apex Chicago, she was aground on the Hen and Chicken Shoals, leaking gasoline through a gash in her hull. While attempting to pull the barge from the rocks, the tug further damaged the barge before going aground. The stranded tug and barge were freed when a U.S. Coast Guard vessel and two private tugs, the Chicopee and the Jaguar, arrived. The Jaguar pulled the Maya free with a floating hawser that had been connected by Coast Guard personnel; the Maya pulled the Apex Chicago free, and then the Jaguar and the Chicopee towed the two vessels to port where the cargo was lightered. In the aftermath of the accident, American Home Assurance Co. (American) paid several sizable claims to, or on behalf of, Apex Oil Company (Apex Oil). These claims included one by the Jaguar for "salavage" of the Maya. As a subrogee of Apex Oil, American brought an action against L&L to recover the damages resulting from the accident, which American alleges were proximately caused by the negligent operation of the Maya by L&L's crew. The United States District Court for the Eastern District of Missouri, awarded judgment to American for one half of the sum of provable damages based on the comparative degree of fault of the parties. American appealed the decision.

ISSUES: 1) Is the duty to provide a seaworthy vessel qualified by an assumption that the crew will navigate the vessel out of harm's way?

2) Was the allocation of damages according to the comparative degree of fault proper?

3) Was the Jaguar's pulling of the Maya off the shoals properly classified as "salvage" or "towage"?

ANALYSIS: The Court of Appeals, for the Eight Circuit, affirming in part and vacating in part, held that the duty of the owner to provide a seaworthy vessel is absolute. This absolute duty is not qualified by an assumption that the crew will navigate the vessel out of harm's way and is defined by the vessel's intended voyage, the hazards likely to be encountered and the vessel's ability to withstand these hazards. The measure of a vessel's seaworthiness is not a function of her crew's skill and foresight in navigation. The behavior of L&L's crew was negligent, but the substantially understrength cable and obsolete stern winch

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