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# Becker v. Poling Transportation Corp. United States Court of Appeals for the Second Circuit 356 F.3d 381 (Decided February 2, 2004)

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## APPELLATE JURISDICTION UNDER 28 U.S.C. § 1292(a)(3)

**Court of Appeals have appellate jurisdiction under 28 USC § 1292(a)(3) when a district court sitting in admiralty decides the merits of a case but does not rule on claims of indemnity and contribution.**

Becker v. Poling Transportation Corp.
United States Court of Appeals for the Second Circuit
356 F.3d 381
(Decided February 2, 2004)

Poling Transportation Corporation ("Poling") employed plaintiffs, Philip Becker ("Becker") and John Jurgens ("Jurgens"). On August 18, 1995, plaintiffs were transferring petroleum from a decrepit barge to a dockside truck. The barge was owned by Poling but was about to be sold. The terms of the sale required that the barge be delivered empty. Poling's dispatcher offered the petroleum contained in the barge to Metro Fuel Oil Corp. ("Metro") free of charge provided that Metro arrange to transfer the raw material from the barge. Due to the barge's broken pumping mechanism, Poling advised Metro that a vacuum truck would be needed to transfer the petroleum. Despite this warning, Metro asked Ultimate Transport Inc. ("Ultimate") to pick up the petroleum. At trial, it was established that Metro was aware that Ultimate lacked the proper equipment to transfer the petroleum.

On the morning of August 18th, Becker and Jurgens removed water from barge using a portable pump. Poling's dispatcher informed them that later in the day a vacuum truck would be arriving to remove the petroleum. At approximately 5:30 p.m., Ultimate's truck arrived to transfer the petroleum. The truck was not equipped with a vacuum and the driver informed the plaintiffs that Ultimate did not own any vacuum trucks. The truck driver from Ultimate and the two plaintiffs decided to utilize the portable pump to transfer the petroleum from the barge to Ultimate's truck. Plaintiffs used the portable pump to fill the first holding compartment of the truck without incident. However, after the pump was restarted in the truck's second holding tank a fire broke out severely burning both Becker and Jurgens. It was undisputed that the use of the portable pump instead of a vacuum truck was the cause of the fire.

Plaintiffs brought this suit against Poling, Ultimate, and Metro asserting claims under general maritime law and the Jones Act, 46 U.S.C.S. § 688. Poling filed for bankruptcy; Ultimate defaulted and then settled for $250,000 each to Becker and Jurgens, leaving Metro as the only defendant to stand trial. Before trial, Metro moved for summary judgment on the grounds that it owed no duty to plaintiffs and that their behavior was the superseding and intervening cause of the injuries sustained. This motion was denied and a jury trial was held on the issue of liability before Magistrate Judge Levy.

The jury was given a special verdict form which solicited answers on questions relating to Ultimate's status as an independent contractor, the inherently dangerous nature of the work performed, Metro's knowledge of Ultimate's incompetence to perform the work, Ultimate's negligence, and Ultimate's negligence as a substantial cause of the plaintiff's injuries. The jury returned answers of yes to all of these questions. While the

jury did find Poling negligent its actions were not found to be the proximate cause of the plaintiffs' injuries. However, no question was posed as to whether Metro's negligence in contracting Ultimate was a substantial or proximate cause of the plaintiffs' injuries. The omission of this question proved troublesome for the Magistrate Judge and the parties. Considering that available options were limited by the lack of a finding on proximate cause with respect to Metro's negligence, the Magistrate Judge felt compelled to find Metro only vicariously liable.

The Magistrate then declined to apply the rule of *McDermott, Inc v. AmClyde*, 511 U.S. 202 (1994), which holds that when multiple parties contribute to a plaintiff's injury, a settlement by one defendant does not affect the amount of liability of the non-settling defendants. The Magistrate decline to apply *McDermott* because he felt it was only applicable when defendants are joint tortfeasors and not applicable in situations, like this, where a party is only vicariously liable. The Magistrate then entered a judgment against Metro for the amount of the verdict, $530,000 and $505,000 for Jurgens and Becker respectively, reduced by the amount of the settlement with Ultimate resulting in a judgment of $255,000 for Becker and $280,000 for Jurgens.

On appeal, the Court of Appeals for the Second Circuit affirmed the final judgment of the Magistrate Judge. The Circuit Court first considered its jurisdiction to hear the appeal. The Magistrate Judge failed to address Metro's claims against Ultimate for indemnity and contribution, which were neither never served upon Ultimate nor dismissed. The fact that these claims were never decided gave the Circuit Court authority to considered the entire interlocutory appeal.

Generally, where a pending indemnification claim is undecided at the district court level, the decision from which the appeal is made is not final and therefore a Circuit Court cannot have appellate jurisdiction under 28 U.S.C. §1291. However, 28 U.S.C. §1292(a)(3) allows Circuit Courts to hear "Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." The Second Circuit in *Thypin Steel Co. v. Asoma Corp.*, 215 F.3d 273, 279 (2d Cir. 2000), has interpreted this statute to allow appellate jurisdiction where a court sitting in admiralty had decided the merits but left unsettled the issue of assessing damages to the defendants. The crucial inquiry for an appellate court in matters such as this is "whether the judgment has determined the rights and liabilities of the parties which...means deciding the merits of the controversies between them." The court found that the Magistrate's judgment below met this test because the jury's affirmative answers to the questions of Ultimate's incompetence to perform the work and Metro's knowledge of Ultimate's incompetence rendered Metro jointly and severally liable for the plaintiffs' injuries, therefore deciding the rights and liabilities of the parties. The court found this ruling consistent with the holdings of other Circuits.

On the issue of Metro's liability the court found it unnecessary to determine whether the jury's findings could impose liability based on the theory that an employer, who hires an independent contractor and has reason to know that the work is inherently dangerous, is vicariously liable for injuries caused by the contractor. The court instead found that Metro was directly liable to the plaintiffs because when a party itself is negligent in selecting the contractor, it is directly liable to the plaintiff for their injuries. In analyzing the case of *Kleeman v. Rheingold*, 81 N.Y.2d 270 (1993), the court found

that negligent hiring is not a form of vicariously liability but a form of direct liability. This finding was also in agreement with the Restatement (Second) of Torts § 411 (1965). The fact that no question of proximate cause was put to the jury on this question created no injustice according to the court. Metro was deemed to have waived the issue of proximate cause when it failed to submit the proximate cause issue to the jury under Rule 49(a) of the Federal Rules of Civil Procedure.

Assuming *arguendo*, that failing to put this issue to the jury was error; it was not prejudicial to Metro. The jury's findings that Becker's and Jurgens' injuries were caused by Ultimate's failure to use a vacuum truck and that Metro was negligent in knowingly selecting Ultimate despite its lack of a vacuum truck lead to the conclusion that the injuries caused by Ultimate and Metro are factually indistinguishable. Under Restatement (Second) of Torts §433A (1965) and *United States v. Alcan Aluminum Corp.,* 990 F.2d 711, 722 (2d Cir. 1993), where the acts of joint tortfeasors cause a single harm, the damages are not severable and each tortfeasor is liable for the full amount.

The court then rejected Metro's argument that Becker's and Jurgens' use of the portable pump was a superseding, intervening cause of their injuries that should absolve Metro of liability. Metro's argument was framed as an appeal from the district court's denial of summary judgment. The court held that such an appeal was procedurally inept as the "denial of a motion for summary judgment is moot in light of the fact that the case has since been tried before a jury." Such an argument would be procedurally valid only when an appropriate objection was made at trial or if the error would result in an injustice. The court found no evidence of Metro raising the issue of superseding, intervening cause at trial and could find "no possible miscarriage of justice" by affirming the lower court's decision.

Finally, the court refused to hear the issue of offsetting the judgment amount by the amount of settlement with Ultimate because there was no cross-appeal by the plaintiffs. Thus, the court affirmed the decision of the Magistrate Judge leaving Metro jointly and severally liable for plaintiffs' injuries.

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