

Admiralty Practicum

Volume 2006
Issue 1 *Fall 2006*

Article 7

Norfolk Dredging Company v. John L. Wiley United States Court of Appeals for the 4th Circuit 439 F.3d 205 (Decided March 3, 2006)

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the relevant inquiry was whether the project on which Maumau was working was connected to the servicing of ships, not whether his specific job duties were of a uniquely maritime nature. Petitioner sought review.

The Court of Appeals noted that to qualify for benefits under the Act, an individual must be an “employee,” defined in the Act as “any person engaged in maritime employment, including ...any harbor worker...” The Court adopted the interpretation of “harbor worker” urged by the Director of OWCP, which would extend coverage to any worker directly engaged in the construction of a maritime facility, even if the worker’s specific job duties were not maritime in nature. The Court found the Director’s interpretation to be a reasonable, liberal construction consistent with the Act’s remedial purpose. The Court also observed that the text of the statute showed that Congress considered the construction of a maritime facility to be fully within the scope of the Act. Furthermore, the Director’s interpretation conformed with past Benefits Review Board decisions extending benefits to employees engaged in building a maritime facility, even though their duties were not maritime in nature.

The Court rejected Petitioner’s argument that the interpretation of “harbor worker” was foreclosed by Supreme Court precedent limiting coverage of the Act to individuals whose specific job duties had “a tangible connection to the ‘traditional’ maritime activities of ship repair and loading/unloading.” The Court recognized that although certain job duties of workers constructing a maritime facility could be so tangential as to exclude them from the Act’s coverage, “[i]f...the test were whether the subcontractor’s immediate work product had a maritime purpose in and of itself, few if any workers on a marine construction project would ever qualify for benefits.”

On the issue of the ALJ’s calculation of benefits, the Court held that substantial evidence supported the ALJ’s award of \$1,166.67 per week. Petitioners argued that the ALJ erred in estimating the decedent’s future earnings based solely on his wages from the berthing project. The Court held that Title 33 U.S.C. § 910 provided three bases for determining an employee’s average annual earnings, which serve as the basis for “average weekly wage:” 1) an employee’s earnings from the previous year, if the employee worked in the field in which he was injured for “substantially the whole of the year immediately preceding his injury;” 2) the average daily wage of a similarly situated employee in the year preceding the employee’s injury; or 3) a combination of factors, including the employee’s previous earning in the job at which he was injured, his other employment and previous earnings of similarly situated employees.

The Court found that the ALJ properly applied § 910(c) because there was substantial evidence to support his determination that the decedent’s wages from the berthing project reflected his future earning capacity. In addition, according to the Court, the claimant was well within her rights to make a tactical decision to skip § 910(b) and avail itself of § 910(c).

For the foregoing reasons the Court of Appeals denied Petitioners’ appeal for review.

Robert O’Connor
Class of 2010

**CLAIMANT’S STIPULATIONS AS TO SHIPOWNER’S RIGHT TO LIMIT LIABILITY
DEEMED ADEQUATE TO PROTECT SHIPOWNER’S LIMITATION OF LIABILITY CLAIM
AND PERMIT CLAIMANT TO PROCEED WITH JONES ACT CLAIMS IN STATE COURT**

After claimant seaman was injured aboard plaintiff’s tug, plaintiff commenced a suit in admiralty under the Limitation of Liability Act to limit its liability to the value of the vessel, and was further granted an injunction pursuant to Maritime Claims Rule F(3) enjoining all other actions against it arising from the accident. Claimant filed a claim exceeding the vessel’s value and was granted a motion dissolving the injunction and allowing him to pursue Jones Act claims in state court. The

Court of Appeals affirmed the district court's action, holding that the claimant's stipulation as to the plaintiff's general right to limit liability was adequate to protect plaintiff's Limitation of Liability claim, and that therefore claimant's state court action could proceed.

Norfolk Dredging Company v. John L. Wiley
United States Court of Appeals for the 4th Circuit
439 F.3d 205
(Decided March 3, 2006)

Seaman John L. Wiley ("Wiley"), a deckhand on the tug PUSHER #10, was injured when a heavy line snapped and struck him in the face. Norfolk Dredging Company ("Norfolk"), owner of the tug, commenced an action in admiralty to limit its liability to the value of the tug pursuant to the Limitation of Liability Act, 46 U.S.C. § 30505, and to enjoin further action against it, pursuant to Supplemental Admiralty and Maritime Claims Rule F(3). Rule F(3) provides that, after a vessel owner has filed a complaint in district court for limitation of liability pursuant to statute and deposited with the court a sum equal to the amount or value of the owner's interest in the vessel and pending freight, for the benefit of claimants, all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease, and, upon application of the plaintiff, the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

The district court approved the value of the tug tendered by Norfolk -- \$80,000 -- and enjoined all other actions against it arising from the incident. Wiley, however, filed a claim of \$1.25 million, vastly exceeding the tug's value. Wiley also moved to dissolve the injunction and stay the federal proceeding, permitting him to pursue his Jones Act claim in state court. While conceding stipulations to exclusive federal jurisdiction over Plaintiff's right to limit liability and all Limitation of Liability Act matters, and that the value of PUSHER #10 was \$80,000, Wiley contested that the limit of Plaintiff's liability was the value of PUSHER #10; rather, Wiley alleged that pursuant to the "flotilla doctrine," the maximum limit of Norfolk's liability included the value of three other vessels operating when the accident occurred and accordingly moved to increase the "limitation fund" to the value of all four vessels. Wiley contended that the aggregation principle of the flotilla doctrine was controlling because all four vessels were: 1) working together; 2) owned by Norfolk; and 3) contractually engaged in a common enterprise under a single command.

The district court entered an order dissolving the injunction, staying the federal court action and temporarily denying Wiley's motion to increase the limitation fund. Norfolk appealed, claiming Wiley's stipulations did not adequately protect its federal right to limit its liability and that, regardless, Wiley had waived his right to move for dissolution of the injunction by filing motions for affirmative relief and by pursuing discovery in the action.

The Court of Appeals presented the main issue for resolution on appeal to be whether the district court's order permitting Wiley to pursue his Jones Act claim in a separate action improperly denied Norfolk its Limitation of Liability right, particularly when the district court postponed making a determination as to the amount of the limitation fund. The Court reviewed for an abuse of discretion.

The Court first noted the text of Title 28 § 1333, which states "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled* [emphasis added]." The Court then observed that the United States Supreme Court, in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, had previously addressed the tension between an injured seaman's right to trial in a state or federal court, before a jury, or not, as he chooses, for his Jones Act claim and related admiralty claims and the right of a shipowner to limit its liability in federal court to the value of the vessel. In *Lewis* the Supreme Court approved a procedure permitting a seaman to pursue his suit and,

at the same time, permitting a shipowner to limit its liability on that claim to the value of the ship. In that case, the Supreme Court upheld a district court's dissolution of an injunction that had prevented petitioner from pursuing state court claims, concluding that respondent's right to seek limitation of liability would be adequately protected by petitioner's stipulation that his claim did not exceed the limitation fund, petitioner's waiver of any defense of res judicata with respect to limitation of liability, and the district court's decision to stay the Limitation Act proceedings pending state court proceedings. The Court in *Lewis* added that "state courts, with all their remedies, may adjudicate claims like petitioner's against vessel owners so long as the vessel owner's right to seek limitation of liability is protected."

Turning to the facts of the case at bar, the Court of Appeals concluded that Wiley's stipulations preserved Norfolk's Limitation of Liability right. To wit, Wiley had agreed that Norfolk's liability would be limited to the amount of the limitation fund in whatever amount the district court fixed. The failure of Wiley to agree to the amount of the limitation fund did not prejudice Norfolk's Limitation of Liability right. The Court held that the district court's decision to postpone determination of the liability fund was consistent with the district court's broad power to manage cases and reserve determination of important yet potentially irrelevant issues until later in the proceedings. Accordingly, the Court of Appeals affirmed the district court's order.

Charles I. Steerman
Class of 2008

DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEGLIGENT ENTRUSTMENT CASE AFFIRMED IN PART AND MODIFIED IN PART.

Plaintiffs commenced an action seeking damages for injuries sustained by their daughter when the power boat on which she was a passenger collided with another power boat operated by a minor defendant and owned by another defendant. The Appellate Division held that the Supreme Court properly denied the motion of the parents of the boat operator (also named as defendants) for summary judgment on the claim of negligent entrustment, but erred in denying that part of the motion with respect to the boat owner.

Kelly v. Di Cerbo
Supreme Court of New York, Appellate Division, Fourth Department
27 A.D.3d 1082
(Decided March 17, 2006)

Plaintiffs Shelly Kelly and Thomas Kelly brought suit in the Supreme Court, Cattaraugus County, against Christopher Di Cerbo, a minor, his parents ("the Di Cerbos") and Jerome T. Morgan ("Morgan"), after the Kellys' infant daughter was injured when the power boat on which she was a passenger collided with a power boat operated by Christopher DiCerbo ("Christopher") and owned by Morgan.

The Di Cerbos and Morgan moved for summary judgment seeking to dismiss the claim against them that they negligently entrusted the boat to Christopher. The Appellate Division concluded that the Supreme Court properly denied summary judgment with respect to the Di Cerbos, but erred in denying summary judgment with respect to Morgan.

The Appellate Division noted that "it is well established that a parent owes a duty to protect third parties from harm that is clearly foreseeable from an infant child's improvident use of a dangerous instrument...when the parent is aware of and capable of controlling its use." *Merle v. Baderman*, 305