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Kirksey v. Tonghai Maritime, et al, United States Court of Appeals for the Fifth Circuit 535 F.3d 388 (Decided July 15, 2008)

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THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HELD THAT AN OPEN AND OBVIOUS DANGER IN A CARGO STOW PRECLUDED A FINDING THAT A SHIPOWNER VIOLATED A TURNOVER DUTY.

The United States Court of Appeals for the Fifth Circuit found that that a defect in cargo stow was open and obvious and, therefore, the vessel had no turnover duty to warn against the defect or to correct the unsafe condition. Consequently, the vessel had no liability to longshoreman under 33 U.S.C. § 905(b).

Kirksey v. Tonghai Maritime, et al,
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This was an appeal in a 33 U.S.C. § 905(b) action which arose out of the defendant-appellants' alleged failure to exercise reasonable care when they turned the ship over to the stevedore in such a condition which rendered it impossible for the stevedore to safely unload it. As a result, the plaintiff-appellee, a longshoremen working for the stevedore, suffered serious injuries.

While sailing across the Pacific Ocean from Korea to Houston, Texas the M/V TONGHAI had encountered rough seas. Patrick Kirksey was working as a longshoreman for P&O Ports Texas, Inc., a stevedore, to unload the M/V TONGHAI which was owned by Tonghai Maritime. The vessel was chartered by Pan Ocean and operated by Cosco Bulk Carrier Co., Ltd. Prior to the accident Pan Ocean and P&O surveyed the cargo before unloading efforts began. During the survey, a representative of Pan Ocean found the cargo to be safely stowed, however a representative of P&O disagreed and found that the stow was unstable. Neither representative reported any dangerous conditions to the stevedore nor did they warn anyone of any perceived unsafe conditions.

On the day of the accident five men were working to discharge steel coils from the vessel's hold. In the process of unloading one of the coils tipped over and fell on Kirksey. As a result, he lost a leg and suffered serious injuries. Kirksey brought an action against the owner, operator and charterer of the MV/TONGHAI in the United States District Court for the Southern District of Texas for violations of 33 U.S.C. § 905(b).[1]

The court accepted the testimony of P&O's representative as well as that of plaintiff and other crew members who observed the unsafe conditions and testified that the steel coils were improperly stowed. The testimony was based on the examination of leaning coils and uneven dunnage prior to unloading. Based on testimony and evidence the district court found for plaintiff that due to the negligence of the stevedore as well as the shifting of cargo in the heavy seas during the ship's voyage across the Pacific the cargo was unstable, and thus created a dangerous condition. The court held that "the vessel owner failed to exercise reasonable care to have the vessel in such condition that an expert and experienced stevedore could safely unload the vessel…[and the vessel is liable] for failing to warn the stevedore that [it] encountered heavy seas

[1] 33 U.S.C. § 905(b) provides: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

on the voyage, which would have alerted the stevedore to possible shifting of the cargo, creating a danger to the unloading longshoremen."[2]

Upon the present appeal, the appellate court did not contest the district court's finding of fact but did conclude that the unstable coil was an open and obvious condition, thus questioning the duty owed by the shipowner to the longshoremen, and whether breach of such duty occurred. According to the court, Kirksey's rights under 33 U.S.C.§905(b) have been limited by the Supreme Court's decision of *Scindia Steam Nav. Co., Ltd. v. De Los Santos* where the duty owed by the vessel owner regarding the longshoremen's safety has shifted primary to the stevedore. The court outlined three limited duties shipowners owe to longshoremen by relying on the Supreme Court's decision in *Howlett v. Birkdale Shipping Co., S.A.* The duties include: (1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under active control of the vessel, and (3) a duty of intervene. Kirksey's suit rested on the vessel owner's turnover duty. Therefore the issue before this court was whether the district court erred in concluding that the shipowner breached the turnover duty.

Even though the shipowner owes a duty to warn the stevedore of latent or hidden dangers which are known to the vessel owner or should have been know to it...the duty to warn of hidden dangers is narrow and does not include (1) open and obvious or (2) dangers reasonable competent stevedore should anticipate encountering. Citing *Howlett,* the court concluded that the shipowner did not have a duty to warn the stevedore of an open and obvious danger. Kirksey argues, however, that shipowner owed a duty to warn the stevedore of the increased risk of unstable tow due to the ship's rocky voyage across the Pacific. The court dismissed that argument since such knowledge would not significantly influence the stevedore's assessment of risk since the stevedore had actual knowledge of the cargo's condition as per inspection.

In *Clay v. Daichi Chhuo Shiping (America), Inc.*, an unpublished decision, this court reaffirmed that the shipowners general duty to turn over a reasonably safe vessel was not owed when the condition is open and obvious to the longshoremen. The court further stated that even though such a decision may seem "harsh, it is motivated by the conviction that a contrary result would put all costs on the party who is least able to avoid the accident: the vessel...imposing liability on the vessel owner would completely remove the incentive to act with caution from the party who is in the best position to avoid accidents: the stevedore."[3] Therefore, since the dangerous condition was open and obvious to the stevedore the vessel owner did not owe a duty to exercise reasonable care to turn the ship over to the stevedore in such condition that a reasonably competent stevedore could safely unload it.

For the foregoing reasons the Court of Appeals for the Fifth Circuit reversed and rendered judgment for defendant-appellants.

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[2] *Kirksey v. Tonghai Maritime, et al.* No.07-40616.
[3] *Id.*(citing *Clay v. Daiichi Shipping, 74 F.Supp.2d 665 (E.D. La. 1999)).*