RAYMOND ODE, Plaintiff-Appellant -vs- LUEDTKE ENGINEERING COMPANY, Defendant-Appellee

NO. 71473

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1997 Ohio App. LEXIS 3765

August 21, 1997, Date of Announcement of Decision

PRIOR HISTORY: [*1] Character of Proceeding: Civil appeal from Court of Common Pleas. Case No. 271617.

DISPOSITION: Judgment: Appeal dismissed in part; affirmed in part.

COUNSEL: For Plaintiff-Appellant: DENNIS M. O'BRYAN, ESQ., CHRISTOPHER D. KUEBLER, ESQ., O'Bryan, Baun & Cohen, Birmingham, MI.

For Defendant-Appellee: STEVEN B. BELGRADE, ESQ., JOHN A. O'DONNELL, ESQ., MICHAELA C. KUNC, ESQ., Belgrade & O'Donnell, P.C., Chicago, Illinois.

Of Counsel: CHRISTOPHER J. CARNEY, ESQ., Buckingham, Doolittle & Burroughs, Cleveland, Ohio.

JUDGES: JAMES M. PORTER, JUDGE. JAMES D. SWEENEY, C.J., CONCURS. DYKE, J., CONCURS IN PART AND DISSENTS IN PART. (See attached concurring and dissenting opinion.)

OPINION BY: JAMES M. PORTER

OPINION

JOURNAL ENTRY AND OPINION

JAMES M. PORTER, J.:

Plaintiff-appellant Raymond Ode appeals from decisions of the trial court in favor of his employer, defendant-appellee Luedtke Engineering Company on plaintiff's claim of a chest muscle injury during the scope of his employment on a derrick barge. Plaintiff's claims were based on injuries suffered as a "seaman" under the Jones Act (*46 U.S.C. § 688 et seq.*) or for compensation under the Longshore and Harbor Workers' Compensation Act (*33* [*2] *U.S.C. § 905(b)*). State courts have concurrent jurisdiction with the Federal Courts for admiralty suits of this nature. *Sun Ship, Inc. v. Pennsylvania (1980), 447 U.S. 715, 722, 65 L. Ed. 2d 458, 100 S. Ct. 2432.* We find no error in the result below and dismiss in part and affirm in part for the reasons hereinafter stated.

At the time of plaintiff's injury, he was employed by Luedtke as an operating engineer on Luedtke's dredge, Derrick Barge 16. On September 22, 1992, the day the injury occurred, Derrick Barge 16 was dredging a creek off Lake Michigan near Green Bay, Wisconsin. Two co-workers on plaintiff's shift were a crane operator, Jim Holtrey, and a foreman, Al Cropek. Derrick Barge 16 was used to remove muck, dirt, soil and other refuse from the bottom of a waterway to allow passage of freighters and

other boats. The removed debris was then loaded on a scow, which carried it to the shore.

Plaintiff's duties as operating engineer included lubricating, greasing and maintaining the derrick mounted on the barge, as well as the deck engine, the boiler, the compressors, and the welding machines. Derrick Barge 16 was not self-propelled and moved itself incrementally by implanting [*3] its clam shell bucket or was towed by a tug for longer distances.

On September 22, 1992, plaintiff reported to the dock for the 6:30 a.m. to 2:00 p.m. shift. He boarded a small transfer boat (the "Monark") that carried the men out to Derrick Barge 16. The Monark was 16 feet in length with a cab on it and had a square bow. Plaintiff's foreman, Al Cropek, was operating the Monark, while plaintiff was sitting in the cab with other workers.

On arrival at the dredging site, as was the custom, the Monark was driven up straight into the Derrick Barge 16. When the bow of the Monark was flush against Derrick Barge 16, the workers would climb off onto the barge.

There were two doors leading from inside the cab to the front of the Monark. Plaintiff chose to exit the Monark's cab through the back door. This required him to walk along an eight inch wide ridge that ran lengthwise along the side of the boat to get to the front or bow of the Monark.

As plaintiff walked along the ridge, one foot in front of the other, he claimed that he felt the boat strike the barge and the jar caused him to fall into the water. Plaintiff admits that he was not injured when he fell into the water.

Plaintiff swam [*4] toward the dredge and proceeded to climb up a large tractor tire that served as a fender. Plaintiff pulled himself onto the tire and then up onto Derrick Barge 16. It was at the top of the tire that plaintiff first started to feel pain in his chest.

After pulling himself onto the dredge, plaintiff says he laid on the deck for approximately 15 minutes and then began working. On that day, he never went to the hospital, never saw a doctor and never filled out or signed an accident report. He did testify that he asked his foreman three times to fill out a report. He worked the remainder of that season without seeking any time off from work.

He resumed work the following season in March or April, 1993. It was not until over a year later, on September 30, 1993, that he first sought medical attention for an injury to his left chest muscle which was the subject of the suit. Plaintiff acknowledged that he told his doctor that the injury he sought treatment for occurred in October 1992, rather than on September 22, 1992.

On December 13, 1995, Luedtke filed a motion for summary judgment which was granted as to plaintiff's Jones Act claim. The trial court held on July 5, 1995 that the Derrick [*5] Barge 16 was not a Jones Act vessel and in so doing, expressly followed *Hatch v. Durocher Dock and Dredge, Inc., 820 F. Supp. 314 (E.D. Mich. 1993)*, aff'd, *33 F.3d 545 (6th Cir. 1994)*

Thereafter, on July 15, 1996, a jury trial commenced on the remaining compensation claims. At the close of plaintiff's case, the trial court directed a verdict in Luedtke's favor, concluding that plaintiff had not "met his burden of proof with respect to the elements of negligence, that being the first element, which is that a dangerous condition actually existed on the ship." Plaintiff's motion for a new trial was denied on September 26, 1996, and this timely appeal ensued.

We will address plaintiff's assignments of error in the order asserted.

I. THE LOWER COURT ERRED IN HOLDING DERRICK BOAT [SIC] 16 NOT TO BE A JONES ACT VESSEL.

Plaintiff first contends the trial court erred in ruling on summary judgment that Derrick Barge 16 was not a Jones Act vessel thereby preventing plaintiff from claiming recovery as a "seaman" under the Act. However, we are unable to review this assignment of error as the plaintiff did not file his notice of appeal from the summary judgment on the Jones Act [*6] issue. Plaintiff only filed his notice of appeal from the trial court's judgment filed on September 26, 1996 which denied plaintiff's motion for a new trial regarding his claim under the Longshore and Harbor Workers' Compensation Act, *33 U.S.C. 901, et seq.*

App.R. 3(C) provides:

> (C) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. ***

Plaintiff's notice of appeal in the present case expressly refers to the trial court's denial of his motion for a new trial which was "based on the Court's judgment which granted a directed verdict during the trial of the within action at the close of all the evidence." He did not appeal from the trial court's earlier grant of summary judgment on his Jones Act claim.

This Court has held that it is without jurisdiction to review a judgment or order that is not designated in the appellant's notice of appeal. *Parks v. Baltimore & Ohio R.R. (1991), 77 Ohio App. 3d 426, 428, 602 N.E.2d 674*; *Schloss v. McGinness (1984), 16 Ohio App. 3d 96, 98, 474 N.E.2d* [*7] *666*; *Cavanaugh v. Sealey (Jan. 23, 1997), 1997 Ohio App. LEXIS 236*, Cuyahoga App. No. 69907, 69908, 69909, unreported at 5; *In re Estate of Carl Borgh (Jan. 4, 1996), 1996 Ohio App. LEXIS 11*, Cuyahoga App. Nos. 68033, 68145, unreported at 9; *Chotkevys v. Seman (Sept. 21, 1995), 1995 Ohio App. LEXIS 4069*, Cuyahoga App. No. 67812, unreported at 8; *McCarthy v. Stop-N-Shop Supermarkets, Inc. (July 28, 1994), 1994 Ohio App. LEXIS 3311*, Cuyahoga App. No. 65839, unreported at 5-7.

The Supreme Court in *Maritime Manufacturers, Inc. v. Hi-Skipper Marina (1982), 70 Ohio St. 2d 257, 436 N.E.2d 1034*, however, held that an appellate court possessed jurisdiction to hear an appeal even though the "notice of appeal mistakenly specified that the appeal was taken from the order denying the motion for a new trial rather than from the final judgment entered on the merits." *Id. at 258.* The instant case, however, is distinguishable from *Maritime.* In *Maritime* the order denying the motion for a new trial was in fact connected to the final judgment which was entered on the merits at trial.

In the case before us, the order granting summary judgment and the order denying plaintiff's motion for a new trial clearly dealt with separate issues. The summary judgment dealt only with the [*8] Jones Act claim, while the trial court's directed verdict and denial of plaintiff's motion for a new trial dealt with his claim under the Longshore and Harbor Workers' Compensation Act. Plaintiff is therefore precluded from asserting any assignment of error regarding the trial court's grant of summary judgment on his Jones Act claim. See *Parks v. Baltimore & Ohio RR., supra, at 428*; *McCarthy v. Stop-N-Shop Supermarkets, Inc., supra,* at 6.

Assignment of Error I is dismissed.

> II. THE LOWER COURT ERRED IN HOLDING THAT PLAINTIFF MUST DEMONSTRATE A NEGLIGENT CONDITION, AS OPPOSED TO ACTIVE NEGLIGENCE, TO ESTABLISH LIABILITY UNDER *33 USC 905(b).*

In essence, under this assignment of error, the plaintiff contends that the trial court erred in directing a verdict because plaintiff sustained his burden of proving vessel fault under *33 U.S.C. § 905(b).* We find this claim to be without merit.

In ruling on a motion for a directed verdict, the court construes the evidence in a light most favorable to the party opposing the motion. *Civ.R. 50(A)*; *Mitchell v. Cleveland Elec. Illum. (1987), 30 Ohio St. 3d 92, 93, 507 N.E.2d 352.* The trial court does not weigh the evidence [*9] when determining whether to grant a motion for a directed verdict, but, rather it determines whether only one result could be reached under the theories of law presented in the complaint. *Eldridge v. Firestone Tire & Rubber Co. (1985), 24 Ohio App. 3d 94, 95, 493 N.E.2d 293.* It is the legal sufficiency of the evidence to take that case to the jury that is being tested. *Id.*

Plaintiff amended his complaint to bring a claim against the defendant pursuant to the Longshore And Harbor Workers' Compensation Act, 33 U.S.C. § 900, *et seq.* ("LHWCA"), which is similar to state workers' compensation statutes. Under this Act, the employer must pay statutory benefits regardless of fault, but is shielded from any further liability to the covered employee. *33 U.S.C. §§ 903-905(a)*; *Howlett v. Birkdale Shipping Co., S.A. (1994), 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78, Randall v. Chevron U.S.A., Inc. (C.A.5, 1994), 13 F.3d 888, 894*; *Guilles v. Sea-Land Service, Inc. (C.A.2, 1993), 12 F.3d 381, 384*; *Thomas v. Newton Intern Enterprises (C.A. 9, 1994), 42 F.3d 1266, 1268.*

However, the longshoreman may bring a third party negligence suit against the vessel owner pursuant [*10] to *33 U.S.C. § 905(b)* even if the vessel owner is also the longshoreman's employer. *Jones & Laughlin Steel Corp. v. Pfeifer (1983), 462 U.S. 523, 530-31, 76 L. Ed. 2d 768, 103 S. Ct. 2541*; *Guilles v. Sea-Land, supra, 12 F.3d at 387*; *Koernschild v. W.H. Streit, Inc. (D. N.J. 1993), 834 F. Supp. 711, 714*. Plaintiff brought such a claim against the defendant as vessel owner.

33 U.S.C. § 905(b) states in pertinent part:

> In the event of injury to a person covered under this act 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 33 of this Act [*33 USCS section 933*], 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. ***.

Plaintiff can only recover under this provision if he can establish by the preponderance of the evidence that the vessel was at fault for the accident (vessel owner negligence), as opposed to the fault being attributable to Luedtke in its capacity as an employer, because a vessel [*11] owner/employer still retains its immunity for acts taken as an employer. *Morehead v. Atkinson-Kiewet (C.A. 1, 1996), 97 F.3d 603, 615*; *Digiovanni v. Traylor Bros. Inc. (C.A.1, 1996), 97 F.3d 624, 626*; *Randall, supra, 13 F.3d at 895*; *Levene v. Pintail Enterprises (C.A. 5, 1991), 943 F.2d 528, 531*; *Halpin v. Atkinson-Kiewet, J.V., supra,* at 492; *Koernschild v. W.H. Streit, Inc., supra, at 715*. As the Court in *Halpin* held:

> The liability of the employer/vessel owner is limited by what is denoted the "dual capacity doctrine." *Id.* Under that doctrine, the negligence of the vessel (as opposed to the negligence of the employer) is limited to those acts taken in connection with the vessel itself and does not extend to accidents which do not result from any defect in the vessel or acts taken in connection with the vessel. As stated by the Fifth Circuit in the *Levene* case:
>
> > "When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued 'qua vessel' for acts of vessel negligence."
>
> *Levene, 943 F.2d 528 at 531* (citations omitted)
>
> Put yet another [*12] way, the vessel owner is not liable for any and all hazards which a longshoreman might encounter in the course of his work, but the vessel owner is liable for injuries caused by hazards under control of the vessel. Typically, "the cases *** which *** have found such control by the vessel owner as to impose a duty generally have dangerous conditions on the owned vessel itself." *Levene, 943 F.2d at 535.*

Id. at 492. See, also, *Koernschild v. W.H. Streit, Inc., supra, at 715* ("Offenses 'qua vessel' include the failure to maintain the ship's gear, equipment, and work space in a condition that allows a reasonably prudent employee to conduct operations free from unreasonable risks.")

Therefore, the Plaintiff cannot bring a negligence action against the vessel owner/employer for the negligence of his fellow employees as that is precisely the type of fault-based inquiries the LHWCA was designed to cover. *Koernschild v. W.H. Streit, Inc., supra, at 715*. See, also, *Morehead v. Atkinson-Kiewit, supra, 97 F.3d at 615*. According to plaintiff, his fall from the Monark was caused by the alleged negligence of the helmsman, who was also his foreman, hitting the dredge twice instead [*13] of once to signal boarding. He completely denied that his fall had anything to do with the missing railing on the boat, which would go to vessel fault in maintaining a dangerous condition. Plaintiff testified as follows:

> Q. Okay, so today you are saying that

> the absence of that railing caused you to fall?
>
> A. No it wasn't. It was the operator's [his co-employee's] fault when he hit the 16 twice.
>
> Q. So are you telling us that this railing had something to do with your fall into the water?
>
> A. No, the operator [his co-employee] had the majority of it.
>
> Q. Did the fact that there was no railing have anything to do with it?
>
> A. No, it did not.
>
> Q. So the railing had nothing to do with your fall?
>
> A. Right.

(Tr. at 108-109).

Following these admissions, plaintiff cannot maintain an action pursuant to *§ 905(b)* as he has admitted that his fall was caused by the alleged negligence of his co-employee, not the vessel. This is the exact situation that the no-fault compensation features of LHWCA was meant to cover.

We agree with plaintiff that the duties a vessel owner owes to a longshoreman, as announced in *Scindia v. Steam Nav. Co., Ltd.* [*14] *v. De Los Santos (1981), 451 U.S. 156, 68 L. Ed. 2d 1, 101 S. Ct. 1614*, applies to dual capacity cases even though *Scindia* was not a dual capacity case. *Morehead, supra, 97 F.3d at 610*; *Halpin v. Atkinson-Kiewit, J.V., supra,* at 492. However, in some cases, the standards cannot be strictly complied with when the situation is different then the stevedoring activity that existed in *Scindia.* As the court in *Morehead, supra, at 613*, held:

> We agree with the Fifth Circuit, for similar reasons, that the duties of care described in *Scindia* should be applied in dual capacity cases insofar as the facts allow. *** On occasion, however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in *Scindia's* stevedoring context that *Scindia's* general analysis will become no more than a point of departure. Nonetheless, *Scindia's* general approach, at least, can be followed and, in many cases, some or all of its express analysis may be useable.

The standards in *Scindia* do not change our decision that the plaintiff cannot hold the vessel owner liable for plaintiff's co-employee's alleged negligence. The Supreme Court [*15] in *Scindia* recognized that the vessel owner owed several duties to the defendant:

> The shipowner thus has a duty with respect to the condition of the ship's gear equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman ***. It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment, under the active control of the vessel during the stevedoring operation.

Id. at 167.

Plaintiff contends the defendant is liable for his injuries pursuant to defendant's "active operations duty." *Doucet v. Diamond M Drilling (C.A.5, 1982), 683 F.2d 886*; *Jupitz v. National Shipping Co. of Saudi Arabia (D. MD. 1990), 730 F. Supp. 1358*; *Noel v. GeoSource, Inc. (E.D. LA. 1984), 585 F. Supp. 487.* We do not believe that [*16] *Scindia's* "active operation's duty" operates to hold the vessel owner liable for employee negligence, when the vessel owner is also the employer, as the vessel owner still retains its immunity as an employer. *Morehead; Randall; Levene; Halpin; Koernschild, supra.* In the case herein, the transfer boat operator was defendant's employee as was the plaintiff. Therefore, we

will not find the defendant liable for plaintiff's co-employee's negligence as this would not comport with the intent of the Act. As the court in *Morehead* held:

> The statutory language and the legislative history of the 1972 and 1984 Amendments plainly evidence Congress' intent that the worker's compensation scheme be the primary remedy for all covered workers, regardless of an employer's commercial practice in regard to vessel ownership. See *33 U.S.C. section 905(a)* (exclusiveness of employer's liability); 1984 U.S.C.C.A.N. at 2740 ("In the Committee's view the Longshore Act should be the *primary* source of compensation for covered workers who are disabled or who may die as a result of a job-related injury or disease.") H.R.Rep. No. 92-1441, 92nd Congress., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. [*17] 4698, 4705, ("The bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services *** The Committee's intent is that the *same principles* should apply in determining liability of the vessel which employs its own longshoremen *** as apply when an independent contractor employs such persons.") (emphasis supplied.) The 1972 Amendments carefully balanced the concerns of employers, vessels, and covered workers. We are not disposed to upset that balance by expanding the liability of employers that act simultaneously as vessel owners, when the statute does not call for such a reading and the Supreme Court has cautioned against it.
>
> As already observed, *Scindia,* will sometimes afford less direct guidance on those duties owed to harbor workers than it does on those owed to longshore workers. Courts will need to decide, on a case by case basis, whether the harbor workers' employment arrangement sufficiently resembles that in *Scindia* to make particular specifics germane.

Id. at 613.

The plaintiff cited several cases [*18] in support of the vessel owner's "active operation's duty", *Doucet v. Diamond M Drilling Co., supra; Jupitz v. National Shipping Co. of Saudi Arabia, supra; Noel v. GeoSource, Inc., supra.* The *Doucet* and *Jupitz* cases are not dual capacity cases and therefore are distinguishable. The *Noel* case is a dual capacity case, but we simply disagree with its conclusion and since it is not a case from this district we are not bound by it. The *Noel* case was also decided before the 1984 Amendments.

Based on our conclusion that the plaintiff did not establish the requisite vessel/owner fault required by the Act, the trial court did err in granting the directed verdict in the defendant's favor.

Assignment of Error II is overruled.

Judgment affirmed in part; and dismissed in part.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

[*19] JAMES D. SWEENEY, C.J., CONCURS.

DYKE, J., CONCURS IN PART AND

DISSENTS IN PART. (See attached

concurring and dissenting opinion.)

JAMES M. PORTER

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D)* and *26(A)*; Loc.App.R.

27. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

CONCUR BY: DYKE (In Part)

DISSENT BY: DYKE (In Part)

DISSENT

CONCURRING AND DISSENTING OPINION

DYKE, J., CONCURRING IN PART AND DISSENTING IN PART:

I respectfully dissent from the majority's disposition of plaintiff's first assignment of error. I would consider the merits of this contention and find any mistake in appealing from the order denying the motion for a new trial rather from the court's final judgment to be harmless error pursuant [*20] to the Supreme Court's holding in *Barksdale v. Van's Auto Sales, Inc. (1988), 38 Ohio St. 3d 127, 128, 527 N.E.2d 284* and *Maritime Manufacturer's, Inc. v. Hi-Skipper Marina (1982), 70 Ohio St. 2d 257, 258-260, 436 N.E.2d 1034.*