No. 2006-1808

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-05-87073

JOSEPH TALIK,
Plaintiff-Appellee,

v.

FEDERAL MARINE TERMINALS, INC.,
Defendant-Appellant.

REPLY BRIEF OF APPELLANT FEDERAL MARINE TERMINALS, INC.

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I. INTRODUCTION

Contrary to Ohio Sup.Ct. R. VI(3)(A),[1] Talik's Opposing Brief ("Opp. Br.") offers no proposition of law that Talik "contends is applicable to the facts and that could serve as a syllabus for the case ***." The rule of law Talik appears to propose is:

> Longshore workers under the jurisdiction of the Longshore Harbor Workers' Compensation Act ("LHWCA") may assert a "*Fyffe*" claim against their stevedore employers for full tort damages arising out of workplace injuries, in addition to benefits secured by their employer for those same injuries. "*Fyffe*" torts are not preempted by 33 U.S.C. § 905(a), even though that statute requires proof that an employer has failed to secure benefits for an employee injury as a prerequisite to any action "at law or admiralty."

That proposition of law suffers from errors of logic, law, and constitutional interpretation, and is inconsistent with the governing federal law of preemption.

The error of logic arises from Talik's reliance on a Louisiana state court case holding that the LHWCA provides no benefits (and therefore no employer immunity) for injuries caused by employer intentional torts.[2] It is undisputed that Talik *is* receiving benefits through the LHWCA.[3] Applying the logic of Talik's own argument, the fact that the LHWCA *did* provide benefits for the injuries he suffered on September 10, 2004 precludes his assertion that those injuries were caused by an employer intentional tort.

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[1] Ohio Sup. Ct. R. VI(3)(A) requires appellees to file a merit brief that, with the exception of the statement of facts, "compl[ies] with the provisions in Section 2(B) of this rule ...."

[2] See, e.g., Opposing Brief ("Opp. Br.") at 7, quoting *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 2001), 785 So.2d 860, 863.

[3] Supp. 157, Talik Dep. 74; see, also, Appellate Opinion ("App. Op.") at 4, n.9 (Appx. 9).

The error of law arises out of Talik's misinterpretation of the LHWCA's provision for concurrent state and federal jurisdiction over injuries to "twilight zone" workers. The 1972 amendments to the LHWCA establish concurrent jurisdiction of state and federal *workers' compensation schemes* – i.e., the LHWCA and the Ohio Workers' Compensation Act ("OWCA") – *not* state *tort* claims. *All* of the cases Talik cites to support his right to pursue a "state law" remedy (e.g., Opp. Br. at 12-13) involve longshore workers seeking a remedy provided by a state workers' compensation statute. Talik's *Fyffe* cause of action is not a claim under the OWCA.

Finally, Talik's arguments that this Court should apply Ohio law to determine the "double recovery" effect of, and public policy offered to support a "*Fyffe*" cause of action (Opp. Br. at 15-22), misconstrue the analysis required by the Supremacy Clause.[4] Federal law determines whether employer immunity under the LHWCA preempts Talik's attempt to assert a state tort claim against an employer that fulfilled its LHWCA obligation to secure benefits compensating his workplace injuries. *Darby v. A-Best Products Co.* (2004), 102 Ohio St.3d 410; *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721. Accord *Hetzel v. Bethlehem Steel Corp.* (C.A.5, 1996), 50 F.3d 360, 363 (citation omitted) ("The *Erie* doctrine does not apply *** in matters governed by the federal Constitution or by acts of Congress").

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[4] Cl. 2, Art. VI, U.S. Constitution ("[T]he Laws of the United States *** shall be the supreme Law of the Land; *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

The federal law issue before this Court is whether Ohio's common law "*Fyffe*" tort is expressly preempted by the exclusive remedy provision of the LHWCA; conflicts with the LHWCA scheme of compensation; and/or stands as an obstacle to the purposes of the LHWCA to provide uniform compensation to longshore workers. Express preemption resides in statutory immunity from suit "at law or in admiralty" accorded maritime employers that secure compensation benefits for injured maritime employees. 33 U.S.C. § 905(a) (Appx. 40). In the alternative, clear and unmistakable conflicts requiring preemption include:

LHWCA	**"*FYFFE*" CLAIM**
• Compensation benefits secured by employer constitute exclusive employee remedy "in place of all other liability" of employer "at law or admiralty." 33 U.S.C. § 905(a) (Appx. 40).	• Because "substantial certainty" intentional torts are "within the course of" employment, but do not "arise out of" employment,[5] receipt of benefits under the OWCA does not preclude employee action at law against employer for full tort damages. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624.

[5] The jurisprudential basis for finding an injury to be both within and outside of Ohio's workers' compensation scheme is not clear. *Brady* (at 634) expressly adopts the analysis of the dissent in *Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St. 149. That dissent explains (emphasis in original):

> [A]n injury *intentionally* inflicted on an employee may be received in the course of employment, but such an injury *never* arises out of the employment.

36 Ohio St. 149.

LHWCA	"*FYFFE*" CLAIM
• "[P]laces a burden on a plaintiff to establish, as a prerequisite to his pursuit of an action at law, that the employer failed to secure payment of compensation." *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4.	• No statutory prerequisite to employee's pursuit of an action at law; Section 35, Article II of the Ohio Constitution *precludes* legislative regulation of the employer intentional tort. *Brady*, supra.
• Requires credit to employer of lesser benefits when longshore employee seeks state and federal benefits under LHWCA. 33 U.S.C. § 903(c) (Appx. 35-36).	• Allows full tort damages in addition to no-fault compensation benefits, with no set-off. *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, paragraph three of the syllabus.[6]

II. RELEVANT MARITIME TERMS

Certain definitions and clarifications may assist this Court in its analysis of the LHWCA. Talik is a longshore worker, "a worker who loads and unloads ships." *Addison v. Ohio River Co.* (1997), 120 Ohio App.3d 172, 175. Federal Marine Terminals, Inc. is a stevedore, engaged "in the loading or unloading of ships." Id. Longshore employees of stevedores are the quintessential "twilight zone" workers because they engage in land-based activities of a maritime character.

The 1972 amendments to the LHWCA created concurrent "no-fault" compensation sources – state and federal – for "twilight zone" employees. As a result, stevedores must secure *two* forms of insurance for their longshore employees: they must contribute to the relevant state compensation fund *and* obtain private insurance (or self-insure) for federal compensation benefits. See, e.g., *Dir. Ofc. of Workers' Comp. Prog., U.S. Dept. of Labor v. Perini North River Assoc., Inc.* (1983), 459 U.S. 297 ("*Perini*"),

[6] See fn. 5, supra.

308, fn. 18 (acknowledging the requirement of "duplicative insurance" created by the 1972 amendments and *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, 720). Injured longshore workers then have the option to receive the most generous of the two forms of coverage.

III. ARGUMENT

A. Employer Immunity Expressly Preempts State Tort Actions Seeking Damages for Injuries Compensated Under the LHWCA.

Talik asks this Court to interpret the statutory provisions of the LHWCA as providing neither benefits nor employer immunity for "non-accidental" injuries. See Opp. Br. at 6-10. This Court need not engage in any such analysis; no one is challenging Talik's right to the benefits he has received under the LHWCA. The question in this case is whether the employer immunity triggered when Federal Marine *did* secure benefits for Talik's injuries (33 U.S.C. § 905(a)), preempts Talik's state law "*Fyffe*" claim for damages caused by those same injuries. The clear and unambiguous statutory language set forth on page 8 of Talik's Opposing Brief can lead to only one answer to that question – "yes."

Sections 907, 908, and 909 of the Act establish an employer's obligation to furnish medical care and disability (or death) payments for employees whose injuries occur upon navigable waters.[7] To enforce that obligation, maritime employers are "liable for" and

[7] "Navigable waters" are broadly defined to include longshore and other land-based workers engaged in maritime pursuits.

"shall secure the payment" of, the benefits set forth in sections 907, 908, and 909. See 33 U.S.C. § 904 (Appx. 38):

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title.

Compliance with their obligation to secure the compensation payments set forth in Section 904(a) constitutes employers' "exclusive" liability to an injured employee. See 33 U.S.C. § 905(a) (Appx. 40):

> (a) Employer liability; failure of employer to secure payment of compensation
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee *** and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure compensation as required by this chapter, an injured employee *** may elect to claim compensation under the chapter, or to maintain an action at law or admiralty for damages on account of such injury or death.

Sections 904 and 905 "codify the compromise at the heart" of the LHWCA. *Washington Metropolitan Area Transit Auth. v. Johnson* ("*Johnson*) (1984), 467 U.S. 925, 932.[8]

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[8] Talik's argument that the 1972 amendments did nothing to strengthen employer immunity (Opp. Br. at 13) misinterprets federal law. The elimination of a longshore workers' strict liability remedy against shipowners increased employer immunity by eliminating shipowners' indemnity actions against the stevedore. See *Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Perini North River Associates* (1983), 459 U.S. 297, 321-322 (emphasis added, citations omitted):

> As mentioned above, the 1972 amendments had other purposes apart from an expansion of coverage to shoreside areas. Two other purposes involved ***the elimination*** of a

Here, the majority below erroneously concluded that Talik's "*Fyffe*" claim was not preempted because no provision of the LHWCA specifically addressed, or provided penalties for, employer intentional torts. (Appx. 12-13, App. Op. 9-10.) But the employer immunity "at the heart of" the LHWCA *does* address and provide penalties for "substantial certainty" torts, gross negligence torts, and any other state tort scheme that could conceivably provide damages to maritime workers injured in the workplace. It addresses such torts in § 905(a), which provides that *unless* the maritime employer "fails to secure" benefits for a worker injury occurring on navigable waters, adjoining piers, etc., ***all*** other liability – "at law or admiralty" – is preempted. That same section provides the penalty – exposure to common law liability is the statutory "penalty" for employers that fail to secure benefits for employee injuries. See *Johnson*, 467 U.S. at 937 ("Immunity is not cast as a reward for employers that secure compensation; rather, loss of

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> strict liability unseaworthiness remedy against a vessel owner afforded to longshoremen *** and ***an indemnity claim against the stevedore by the vessel owner*** ***.

Accord *Peter v. Hess Oil Virgin Island Corp.* ("*Peter*") (C.A.3, 1990), 903 F.2d 935, 947-948 (explaining how the "serious diminution of the employer's protection from tort liability" caused by shipowners' indemnity actions against stevedores was remedied in the 1972 amendments):

> Maritime labor interests desired markedly higher LHWCA benefits. Maritime employers indicated they could provide higher benefits "only if the [LHWCA]were to again become the exclusive remedy against the stevedore as it had been intended since its passage in 1927 until modified by various Supreme Court decisions.

Id. at 949, quoting S.Rep. No. 92-1125, 92nd Cong. 2d Sess., 5 (1972); H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess, 5 (1972), 1972 U.S. Code Cong. & Admin. News 4698.

immunity is levied as a penalty on those that neglect to meet their statutory obligations"). And proof that an employer has "failed to secure payment of compensation ... is a prerequisite to [an employee's] pursuit of an action at law" against his employer. *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4.

Talik attempts to carve his cause of action completely out of the LHWCA by arguing that the federal statute only provides compensation for maritime injuries of an "accidental" nature. (Opp. Br. at 6-10. See, also, Appx. 8-9, App. Op. 5-6.) That is incorrect – the test is not the nature of the injury. Rather, to be compensable under the LHWCA, an injury must satisfy "a 'status' and a 'situs' test." See, e.g., *Herb's Welding, Inc. v. Gray* (1985), 470 U.S. 414, 415-416. The injured worker must be "engaged in 'maritime employment'" (such as longshore work), and the injury must occur "upon the navigable waters or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel." Id. at 415. The circumstances of the injury do not determine its compensability.

In short, Talik's rights derive from his status as a longshore employee covered by the LHWCA. The LHWCA obligated Federal Marine to secure benefits for employee disabilities arising from injuries occurring on piers adjoining navigable waters. Unless Federal Marine "fails" to secure such benefits, it is immune from "all" liability to its longshore employees. The broad coverages and broad immunity leave no room for state tort law that permits tort damages based on the particular "knowledge" of the stevedore at the time of the incident that resulted in injury.

Talik's proposed rule is also illogical. If a "*Fyffe*" action is available to maritime workers because the LHWCA does not cover or address injuries caused by "non-accidental" torts, then the converse must also be true: An injury that *has* been compensated through the LHWCA *must* have been "accidental." Since Talik concedes that benefits through the LHWCA are his exclusive remedy for "accidental" injury, and it is undisputed that Federal Marine secured benefits for his injuries pursuant to its obligations under the LHWCA, the Trial Court properly entered summary judgment on Talik's "*Fyffe*" claim.

By requiring stevedores to both contribute to the relevant state workers' compensation fund *and* purchase private policies of insurance or self-insure for federal compensation benefits, the LHWCA ensures that longshore workers have access to the most generous "no-fault" benefits available for their injuries. The quid pro quo, however, is that a longshore worker cannot assert tort claims against a stevedore that has complied with those statutory mandates. Such unambiguous statutory language expressly preempts state tort actions seeking damages for the same injuries.

B. Ohio's "*Fyffe*" Common Law Tort Conflicts with, and/or Stands as an Obstacle to, the Effectuation of Congress' Purpose in the LHWCA.

1. The 1972 LHWCA Amendments, as interpreted by *Sun Ship*, provide concurrent state and federal *compensation schemes*; Talik makes no claim under the OWCA.

Although it is inconsistent with his claim that "substantial certainty" torts fall completely *outside* of the LHWCA, Talik also attempts to shoehorn his claim *into* the

LHWCA by invoking the Act's concurrent state and federal jurisdiction over "twilight zone" workers. See Opp. Br. at 11-13. Talik misconstrues stevedores' obligation to secure dual forms of compensation for longshore workers (and concurrent state and federal jurisdiction over those dual forms of compensation) as evidence of a Congressional intent to engraft state *tort* remedies onto the LHWCA. The U.S. Supreme Court case relied on by Talik – *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715 (see Opp. Br. at 11-13) – does not support his argument.

The plaintiff in *Sun Ship* sought benefits under Pennsylvania's Workers' Compensation Act. The issue before the Court was whether state *compensation benefits* – not state *tort claims* – were available to "twilight zone" workers. See 447 U.S. at 715 (emphasis added):

> The single question presented by these consolidated cases is whether a State may apply *its workers' compensation scheme* to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act ***.

The *Sun Ship* quote offered by Talik is no different:

> "To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits."

(Opp. Br. at 11, quoting *Sun Ship*, 447 U.S. at 724.) Reading these two sentences together, it is clear that *Sun Ship*'s reference to state and federal "remedial schemes,"

refers to no-fault ***benefit*** schemes – "federal benefits" and "state benefits" – not common law tort claims. Accord *Peter*, 903 F.2d at 948-949 (emphasis in original):

> [*Sun Ship*] held that a longshoreman injured on a land-based LHWCA situs could receive *both* an award under state compensation law and LHWCA, since the two awards were complementary rather than exclusive, and a prior award under state law would be credited against the LHWCA award.

The cases Talik cites at pages 12-13 of his Brief, like *Sun Ship*, allow claims asserted under a state workers' compensation statute, *not* state tort claims. See *Wallace v. Ryan-Walsh Stevedore & Co., Inc.* (E.D. Tex. 1989), 708 F.Supp. 144 (action under article 837c of the Texas Workers' Compensation Act); *Lenane v. Continental Maritime of San Diego, Inc.* (1998), 61 Cal.App.4th 1073, 1082 (action under section of California's Workers' Compensation Act appearing "in the same section which sets forth the exclusive remedy provision of the CWCA").[9] Ohio courts have also recognized that "concurrent jurisdiction" permits a "twilight zone" worker (or his employer) to seek relief under Ohio's workers' compensation statutes. See, e.g., *State ex rel. Pittsburgh & Conneaut Dock Co. v. Industrial Commission of Ohio* (2005), 160 Ohio App.3d 741 (maritime employer was entitled to mandamus requiring Ohio Industrial Commission to comply with R.C. 4123.54 and provide employer a credit in the amount of federal benefits

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[9] *Wallace* and *Lenane* represent a minority view in that the claims allowed, although codified in each state's workers' compensation statute, are "fault-based" remedies. Compare *Spearman v. Exxon Coal USA, Inc.* (C.A.7, 1994), 16 F.3d 722, 725 ("a fault-based regime with common law damages is not a 'workmen's compensation law' no matter what the state calls it"). This Court need not consider the wisdom of those cases, however, since the OWCA does not codify a "*Fyffe*" tort.

previously paid to "twilight zone" employee). But these cases do not benefit Talik, who seeks a rule of law engrafting a state *tort* claim onto the LHWCA.

2. Unlike state compensation schemes, state tort law conflicts with the compensation scheme of the LHWCA.

As the Third Circuit explains in *Peter*, supra, state and federal worker compensation schemes are "complementary" because both "ensure that every worker [has] access to a no-fault remedy ***." 903 F.2d at 952. Fault-based tort claims do not "complement" no-fault benefit schemes. There is a "substantial difference between liability for a fixed and determinable compensation award and liability for unlimited damages in tort." Id. Such conflicts require preemption of state tort claims, which "obstruct[] the purposes of LHWCA ***." Id. at 953.

Talik's attempts to find common ground between *Fyffe* torts and the LHWCA founder on the inherent conflicts identified in *Peter*. Talik primarily relies on *Taylor v. Transocean Terminal Operators, Inc.* (La. App. 2001), 785 So.2d 860, to argue that a *Fyffe* claim is wholly consistent with the LHWCA. *Taylor* surmises that intentional tort claims do not conflict with employer immunity under the LHWCA because Congress would not have intended that longshore workers be left with "*no remedy at all* in the case of an employer intentional tort, in either tort or compensation under the LHWCA ***." Id. at 864 (emphasis in original). Whether that is a valid interpretation of Congressional intent must await another case with different facts. Talik has not been left with "no remedy at all"; he has received compensation through the LHWCA.

Talik's attempts to show that the LHWCA embodies the principles and public policy of an Ohio "*Fyffe*" cause of action (Opp. Br. at 17-22) do nothing more than establish that both the LHWCA and OWCA provide "no-fault" benefits. Talik points to no provision in the LHWCA suggesting that the availability of LHWCA benefits depends on the "intentional" nature of the conduct resulting in injury, rather than the "status" and "situs" tests. Talik offers no legislative history even suggesting that the "no-fault" compensation benefits secured by employers under the LHWCA should be duplicated and supplemented by state tort law. Nor do the cases Talik cites at pages 18-19 of his Brief support any such interpretation of the LHWCA. As noted above, the quote from *Taylor* (Opp. Br. at 18) – "the LHWCA does not provide any benefits for injuries caused by an intentional tort by an employer" – does not apply to Talik, who *is* receiving benefits for his injuries. *Roy v. Bethlehem Steel Corp.* (E.D. Tex. 1993), 838 F.Supp. 312 (Opp. Br. at 18) granted summary judgment *against* the plaintiff's intentional tort claim, while allowing her to pursue a claim under the Texas Workers' Compensation Act. *Gorman v. Garlock, Inc.* (2004), 121 Wash. App. 530 (Opp. Br. at 19) affirmed a *dismissal* for failure to state a claim, noting:

> An employer's LHWCA liability is exclusive. That is, its LHWCA liability replaces all other liability to which the employer may be subject, unless the employer fails to pay compensation as required.

Id. at 536 (footnote omitted).

Equally unavailing is Talik's argument (Opp. Br. at 20) that his pursuit of a *Fyffe* claim would not result in a double recovery because "Mr. Talik intends to recover only

damages to which he is entitled under [Ohio] common law." The question before this Court is not what damages are available under Ohio common law. The question is whether, under *federal* law, those damages are inconsistent with the LHWCA and thus preempted. Full tort damages in addition to no-fault benefits is contrary to the LHWCA's express intent to a single, swift and certain no-fault compensation benefit. See, e.g., *Sun Ship*, supra, 447 U.S. at 725, n. 8 ("[T]here is no danger of double recovery under concurrent jurisdictions since employers' awards under one compensation scheme would be credited against any recovery under the second scheme"); *State ex rel Pittsburgh & Conneaut Dock Co. v. Indus. Comm'n* (2005), 160 Ohio App.3d 741 (Ohio Industrial Commission must credit prior federal benefits to prevent double recovery precluded by LHWCA).

These cases are part of a uniform body of law establishing that tort claims arising out of the same injuries for which the stevedore secured benefits under the LHWCA, conflict with the exclusive remedy of LHWCA. See *Peter*, supra, 903 F.2d at 953:

> Here, Hess arranged coverage for Peter under both LHWCA and the Virgin Islands' Compensation Act. The application of Virgin Islands tort law in situations like this does not further the availability of no-fault compensation for injured maritime workers; it simply obstructs the purposes of LHWCA by depriving maritime employers of their side of LHWCA's *quid pro quo*.
>
> We hold that where an employer has obtained workmen's compensation coverage for its LHWCA employee under both LHWCA and the state or territorial statute, § 905(a) and the Supremacy Clause bar a state or territorial tort recovery against the employer.

Accord *Hetzel v. Bethlehem Steel Corp.* (C.A.5, 1996), supra, 50 F.3d at 366-367:

> Congressional policy would be frustrated if an injured worker were allowed to collect benefits under the Act, and then sue his employer under a state statutory tort theory. Not only does the function of the LHWCA depend on the exclusiveness of the remedy, but the language of the Act plainly mandates such a result. Preemptions of the state act is required to avoid frustration of the policies and purpose behind the LHWCA.

See, also, *Daley*, supra, 61 Ohio App.3d at 724 ("[P]reemptive intent is apparent both from the pervasiveness of the federal regulation and the likelihood of conflicts between state and federal law"); *Hill v. Knapp* (Md.App. 2007), 914 A.2d 1193, 1203 ("Permitting the negligence claim disrupts the uniformity of benefits Congress intended to provide to longshoremen in the 1972 amendments and does not further the availability of no-fault compensation. *** Maryland law, which conflicts with this immunity, must therefore yield").

Daley – on-point Ohio authority supporting the Trial Court's grant of summary judgment in this case – is simply ignored by Talik. The analysis in *Daley* begins with the incontrovertible principle that Section 905(a) of the LHWCA precludes any additional employer liability arising from the death or disability of a longshore worker. The question in *Daley* was whether "the exclusivity provision was intended to encompass liability *beyond* that arising from the injury or death of an employee." 61 Ohio App.3d at 724 (emphasis added). The court concluded that the dock worker's "*Balyint*" intentional

tort claim[10] was preempted by the LHWCA, based on "both *** the pervasiveness of the federal regulation and the likelihood of conflicts between state and federal law." Id. at 724.

The majority below attempted to distinguish *Daley* on the grounds that: 1) the intentional tort at issue in *Daley* related to the payment of benefits, not the cause of the injuries; and 2) the LHWCA has provisions addressing employers' duties and penalties relating to the payment of benefits, but none addressing duties and penalties relating to employee injuries caused by a "substantial certainty" tort. (Appx. 12-13, App. Op. 9-10.) These are distinctions without a difference.

First, the *Baylint* tort at issue in *Daley* and *Fyffe* tort at issue here are both intentional torts. No basis is offered for treating different intentional torts differently in a preemption analysis. Second, the LHWCA *does* address employer duties and penalties for workplace injuries. See p. 7, supra; *Johnson*, 467 U.S. at 937 ("loss of immunity is levied as a penalty on those [maritime employers] that neglect to meet their statutory obligations").

Daley has been followed by other courts[11] and remains good law. Here, this Court need not decide whether Section 905(a) "was intended to encompass liability *beyond*"

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[10] *Balyint v. Arkansas Best Freight System, Inc.* (1985), 18 Ohio St.3d 126, allowed employees to maintain claims against self-insured employers for intentional and wrongful termination of workers' compensation benefits because, like a "*Fyffe*" tort, the employer's conduct fell outside the scope of Ohio's Workers' Compensation Act.

[11] E.g., *Barnard v. Zapata Haynie Corp.* (C.A.1, 1992), 975 F.2d 919, 921, citing and following *Daley* as the majority view.

that arising from employee injury (*Daley* at 724). Here, Talik seeks to assert a tort claim for the *same* liability arising from employee injury. Such tort liability is in clear conflict with, and is preempted by, the broad immunity provided employers that secure benefits for employee injury pursuant to their obligations under the LHWCA.

3. Allowing "*Fyffe*" claims would obstruct the purpose of the LHWCA to provide uniform compensation to longshore workers.

Talik does not deny that allowing longshore workers in Ohio to pursue an Ohio common law "*Fyffe*" claim would destroy uniformity under the LHWCA. Instead, he argues (Opp. Br. at 16) that this Court has no power to prevent the destruction of such uniformity. In fact, this Court not only has the power, but the duty to do so. *Darby v. A-Best Products Co.* (2004), 102 Ohio St.3d 410. *Daley*, and the numerous state and federal decisions cited above, accord with this Court's decisions in *Darby*. Talik offers no reasoned basis for his argument that this Court should abandon those principles, reject the virtually unanimous authorities finding preemption, and create Ohio law that is in clear conflict with the language and purpose of the LHWCA.

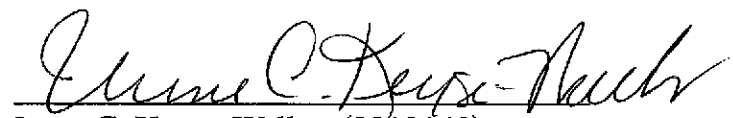
IV. CONCLUSION

The LHWCA provides a uniform scheme for longshore workers engaged in maritime activity in maritime locales across the nation. Ohio's "*Fyffe*" tort – which allows an employee receiving workers' compensation benefits to sue his employer for a "substantial certainty" intentional tort – conflicts with the "no fault" benefit scheme of the LHWCA and stands as an obstacle to Congress' purpose to provide a uniform system of compensation for maritime workers. Under *Darby v. A-Best Products Co.* (2004), 102

Ohio St.3d 410, and as held in *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721, Talik's common law tort is preempted.

Federal Marine therefore respectfully requests reversal of the majority decision below and reinstatement of the Trial Court's summary judgment in Federal Marine's favor. .

Respectfully submitted,



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A copy of the foregoing has been served this 11th day of May, 2007, by U.S. Mail, postage prepaid, upon the following:

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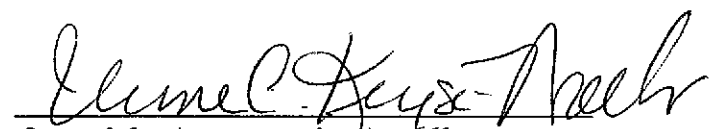

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