No. 2008-1305

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-Appellant,

v.

FEDERAL MARINE TERMINALS, INC.,
Defendant-Appellee.

DEFENDANT- APPELLEE FEDERAL MARINE TERMINALS, INC.'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. THIS CASE HAS NO PUBLIC OR GREAT GENERAL INTEREST

The ruling of the Court of Appeals in this case was fact specific and entirely consistent with the well-established principles of "notice pleading" set forth in the Ohio Rules of Civil Procedure. The Court of Appeals held that the Answer of Defendant-Appellee Federal Marine Terminals, Inc. ("Federal Marine") sufficiently pled, and did not waive, the defense of federal preemption where:

- Federal Marine's Answer pled "subject matter jurisdiction" as a defense;
- Plaintiff-Appellant Joseph Talik ("Talik") had notice that Federal Marine was raising federal preemption as a defense more than four months prior to the scheduled trial date;
- Approximately three months prior to the scheduled trial date, Talik responded extensively on the merits to Federal Marine's motion for summary judgment asserting federal preemption;
- At no time did Talik ever claim that Federal Marine's assertion of the defense surprised him or caused him any unfair prejudice, or that he was hindered in any way from addressing the merits of the defense;
- Two months prior to the scheduled trial date, after Talik claimed that Federal Marine's Answer was defective in not listing "federal preemption" as a defense, Federal Marine requested that the Trial Court grant it leave to amend its Answer if the court did not consider Federal Marine's Answer to have sufficiently pled the defense; and
- The Trial Court did not grant Talik's request for a finding that Federal Marine's Answer waived the defense, and did not deem it necessary that Federal Marine amend its Answer.

The appellate decision is in accord with Civ.R. 1(B) (the rules of civil procedure are to be construed and applied to effect just results); Civ.R. 8(B) (defenses are to be pled in short and plain terms); Civ.R. 8(C) (matters constituting an avoidance or affirmative

defense are to be set forth affirmatively); Civ.R. 8(E) (no technical forms of pleading are required); Civ.R. 8(F) (pleadings to be construed to do substantial justice); Civ.R. 15(A) (leave to amend is to be freely given when justice so requires); and Civ.R. 15(B) (pleadings are to be amended as necessary to raise issues tried with express or implied consent, even after judgment).

Talik's request that this Court accept jurisdiction to review the ruling below is based upon his inaccurate description of the ruling as holding that an Answer asserting lack of subject matter jurisdiction preserves all affirmative defenses. Based on that incorrect assumption, Talik alleges that the decision "turn[s] the affirmative defense of 'lack of subject matter jurisdiction' into a wild card affirmative defense" (Mem. in Support at 2); "declare[s] that 'notice pleading' requires that this affirmative defense apparently be deemed to include within it all manner of waivable immunity defenses, thus protecting them from waiver and permitting them to be raised at any time" (Mem. in Support at 2); "imbues the subject matter jurisdiction defense with such new breadth and utility that it will certainly lead to unpredictability, surprise, inefficiency and severely and adversely affect judicial economy" (Mem. 3); and "compromises the integrity of the Ohio Civil Rules for the singular advantage of avoiding the clear waiver resulting from Federal Marine's undisputed failure to raise the LHWCA immunity/preemption." (Mem. in Support at 3).

The Court of Appeals made no such holding. It simply held that pursuant to the principles of notice pleading, Federal Marine sufficiently pled, and did not waive, the

defense of federal preemption under the facts of this case. Were it to accept jurisdiction, this Court would be called upon to decide merely whether Federal Marine waived the defense of federal preemption under the circumstances of this case where Talik had notice and suffered no prejudice.

Talik's hyper-technical argument that a "subject matter" defense only preserves a "*Garmon*-type" federal preemption argument, and that other forms of federal preemption are waived, is without merit. Nor does he address the basis for the court's holding – i.e., "notice" pleading. Having conceded that the assertion of lack of subject matter jurisdiction gives adequate notice of a defense based on *some* form of federal preemption, Talik has conceded the requirements of notice pleading. Nothing in the civil rules or cases supporting them support the type of hair-splitting Talik urges.

Further, Talik bases his hair-splitting argument entirely upon the wording of Federal Marine's Answer, ignoring his actual notice of the federal preemption defense and lack of prejudice. Under the facts of this case, Talik's *actual* notice was so clear that both the Trial Court and the Court of Appeals deemed it unnecessary to address Federal Marine's alternative request to amend its Answer to correct any technical defect in asserting the defense. Clearly, Federal Marine would have been entitled to amend its Answer, if necessary. Talik therefore cannot prevail even if this Court were to accept his hyper-technical interpretation of Civ.R. 8(C).

The Court should decline to accept jurisdiction. The Court of Appeals properly applied well-established principles of civil procedure to a specific set of circumstances.

Addressing the issue formulated by Talik's proposition of law would be a purely academic exercise because the issue is not presented here.

II. STATEMENT OF THE CASE AND FACTS

The pertinent facts are contained within the procedural history of the case in the Trial Court:

- November 1, 2004: Talik files his Complaint.
- January 6, 2005: Federal Marine files its Answer, asserting several defenses, including lack of subject matter jurisdiction.
- January 24, 2005: The Trial Court schedules trial for September 26, 2005.
- May 12, 2005: Talik's counsel questions Federal Marine's witness at deposition regarding the exclusivity of remedy provided by the Longshoremen's & Harbor Workers' Compensation Act ("LHWCA").
- June 2, 2005: Federal Marine files its motion for summary judgment asserting that the exclusivity provision of the LHWCA preempts Talik's claim.
- July 6, 2005: Talik files his brief in opposition, presenting extensive argument addressing the merits of the preemption defense and also claiming that Federal Marine waived the defense.
- July 22, 2005 Federal Marine files its reply brief requesting, *inter alia*, that the Court grant it leave to amend its Answer if it deems assertion of defenses in original Answer to be insufficient.
- August 30, 2005 The Trial Court grants Federal Marine's motion for summary judgment.

III. ARGUMENT

Counter-Proposition of Law No. 1:

> **The defense of federal preemption is not "waived" under Civ.R. 8(C) when a defendant asserts "lack of subject matter jurisdiction" in its Answer and files a motion for summary judgment based on federal preemption; the plaintiff has ample opportunity to, and does, address the merits of the defense by opposing summary judgment; and the plaintiff is neither surprised nor prejudiced by the defense.**

Talik claims that the decision of the Court of Appeals should be construed as holding that asserting "subject matter jurisdiction" in an Answer preserves any and all affirmative defenses for all time. The Court of Appeals made no such holding – expressly, impliedly or otherwise. The Court of Appeals held that Federal Marine did not waive the defense of federal preemption because, under the principles of "notice pleading," Federal Marine sufficiently pled the defense in this case.

A. Talik Had Actual, Adequate Notice of Federal Marine's Federal Preemption Defense.

Talik's legal argument not only concedes, but in fact asserts, that Federal Marine's Answer raised, and did not waive, one type of federal preemption – i.e., "*Garmon*-type" preemption. Further, Talik does not dispute (nor could he given the clear record) that he had notice of, and a full opportunity to address, the merits of Federal Marine's preemption defense in the Trial Court, and that he was not prejudiced by the absence of the words "federal preemption" in Federal Marine's Answer. Nevertheless, he contends that the provision of Civ.R. 8(C) which states, "a party shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense," together with the fact

that the words "federal preemption" do not appear in Federal Marine's Answer, require that Federal Marine be deemed to have waived a particular type of federal preemption as a defense. The argument is self defeating, given the principles of "notice pleading." The Ohio Rules of Civil Procedure consistently state throughout that they must not be applied in the hyper-technical fashion that Talik urges this Court to apply here.

Rule 1(B) states that the Ohio Rules of Civil Procedure "shall be construed and applied to effect just results." Rule 8(B) states that a party "shall state in short and plain terms the party's defenses." Rule 8(E) states that "no technical forms of pleading or motions are required." Rule 8(F) states that "all pleadings shall be construed to do substantial justice." Rule 15(A) states that leave of to amend a pleading "shall be freely given when justice so requires." Finally, Rule 15(B) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Talik's argument does not even acknowledge, let alone address, the application of the foregoing fundamental principles of notice pleading, yet it is the Court of Appeals' application of those principles to the facts of this case that is the basis for its holding that, "because Ohio is a notice pleading state," Federal Marine sufficiently pled, and did not waive, the defense.

The principles of notice pleading are controlling here. Instead of addressing those issues, Talik has presented cases in support of his legal argument that although "*Garmon*-type" preemption deprives a state court of subject matter preemption, the type of federal

preemption this Court ultimately found to apply to this case – "conflict" preemption – did not deprive the Trial Court of subject matter jurisdiction. Notably, at the time Federal Marine filed its Answer, the only Ohio case to have addressed the issue held that when a claim is barred by the exclusivity provision of the LHWCA, *the trial court is "barred of jurisdiction."* *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4 (emphasis added; also holding that defendant was not required to raise the exclusivity of the LHWCA as an affirmative defense). But even if correct, Talik's legal argument is irrelevant on the question of whether Federal Marine "waived" the defense of federal preemption. Similarly, cases cited by Talik in which courts refused to allow a defense to be raised for the first time in the midst of trial,[1] or after a verdict had been rendered for the plaintiff,[2] or in the court of appeals,[3] are irrelevant. None of those cases addresses a claim of waiver where the plaintiff had actual notice of the defense in the trial court,

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[1] *Spence v. Liberty Twp. Trustees* (1996), 109 Ohio App.3d 357 (governmental immunity defense first raised at trial after close of plaintiff's case); *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St. 2d 55 (statute of limitations defense first raised after the beginning of trial).

[2] *International Longshoreman's Association v. Davis* (1986), 476 U.S. 380 (preemption defense first raised after jury verdict rendered).

[3] *Colonial Village Ltd. v. Washington Cty. Bd. of Revision* (2007), 114 Ohio St.3d 493 (personal jurisdiction defense first raised on appeal); *Jenkins v. Keller* (1966), 6 Ohio St.2d 122 (subject matter jurisdiction defense first raised on appeal); *Violette v. Smith & Nephew Dyonics, Inc.* (1st Cir. 1995), 62 F.3d 8, 11 (federal preemption defense asserted in Answer but not raised in the trial court and first raised in court of appeals); *Haudrich v. Howmedica, Inc.* (1996), 169 Ill.2d 525 (federal preemption defense first raised on appeal).

addressed the defense on the merits extensively in opposition to a dispositive motion, and could not claim any surprise or other prejudice.

Under circumstances comparable to those presented here, the court in *Blakeman v. Moore, Owen, Thomas & Co. v. Coffey,* 992 F.2d 1439, 1445 (6th Cir.1993) explained the principle of notice pleading as follows (citations omitted, emphasis added):

> The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. * * * "Thus, if a plaintiff receives notice of an affirmative defense by some means other than pleadings, 'the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice.'" * * * Here, Moore raised the issue of fraud *in his response to the Coffeys' motion for summary judgment* and in his affidavit in opposition to the Coffeys' motion. As a result, the Coffeys were aware, or at least should have been aware, that Moore intended to rely on a fraud defense.

Talik concedes that he had notice of Federal Marine's preemption defense and was not prejudiced by the wording of Federal Marine's Answer. Therefore, the legal issue of whether or not preemption under the LHWCA deprives a state court of subject matter jurisdiction is irrelevant here, and there is no reason for this court to accept jurisdiction to decide that issue.

B. <u>In addition, Federal Marine's Request for Leave to Amend Moots This Appeal.</u>

The first time Talik claimed that Federal Marine's Answer had waived the defense of federal preemption was in its brief opposing Federal Marine's motion for summary judgment (where he also thoroughly addressed the merits of the defense). Federal Marine's Reply Brief, filed *after* Talik had notice of the defense and had fully addressed

its merits, requested that the court grant it leave to amend its Answer if it deemed the Answer defective as Talik claimed:

> Even if, for some reason, the statement in FMT's Answer is deemed to be insufficient and ought to changed from "lack of subject matter jurisdiction" to "lack of subject matter jurisdiction—to wit, exclusivity of the LHWCA," leave to so amend is hereby requested and should be granted. * * *
>
> Such an amendment in this instance would be, however, academic and would place form over substance given the principles of notice pleading. Plaintiff does not claim any surprise or prejudice with respect to the defense, nor could he since, among other instances, his attorney examined FMT's representative regarding the exclusivity of the LHWCA at deposition on May 12, 2005.

Federal Marine Reply Brief, filed July 22, 2005, at 10-11 (citations omitted).

Clearly, Federal Marine was entitled to amend its Answer had any amendment been necessary. See Civ.R. 15(A) (leave to amend "shall be freely given when justice so requires"); *Hoover v. Sumlin* (1984), 12 Ohio State 3d 1.

In *Hoover*, a defendant was granted leave to amend its Answer, after a trial date had been scheduled and continued, to assert the statute of limitations as an affirmative defense. Affirming, this Court first noted that the amendment was consistent with the U.S. Supreme Court's interpretation of Fed. R. Civ. P. 15:

> We note that the rules applicable herein bear a strong resemblance to their federal counterparts in all substantive ways and in the policies underlying the rules. Federal R.Civ.P. 15 reflects two of the most important policies of the federal rules. * * * First, a liberal amendment policy provides the maximum opportunity for each claim to be decided on the merits rather than on procedural deficiencies. * * * Second, the rule reflects the fact that pleadings are assigned the

> limited role of providing the parties to a lawsuit with *notice* of the nature of the pleader's claim or defense.

Id. at 4, citing 6 Wright & Miller, Federal Practice and Procedure (1971) 359-360, § 471; *Foman v. Davis* (1962), 371 U.S. 178. This Court then approves a similarly "pragmatic" reading of Civ.R. 8(C) and 15(A):

> "In the real world * * * failure to plead an affirmative defense will rarely result in waiver. Affirmative defenses—like complaints—are protected by the direction of Rule 15(a) that courts are to grant leave to amend pleadings freely * * * when justice so requires. Accordingly, failure to advance a defense initially should prevent its later assertion only if that will seriously prejudice the opposing party."

Id. (citation omitted). Finally, this Court confirmed that its pragmatic interpretation of Civ.R. 8(C) was consistent with other civil rules of procedure:

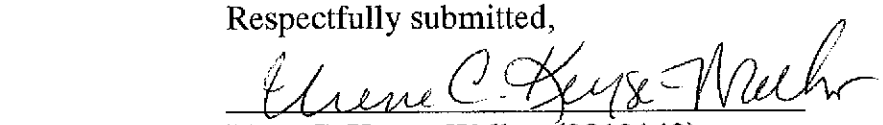
> Civ.R. 1(B) states that "[t]hese rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." One of the purposes of the Civil Rules is to effect the resolution of cases upon their merits, not on pleading deficiencies. * * * Pleadings are simply a means to that end.
>
> * * *
>
> Appellants were not prejudiced by the addition of the statute of limitations defense as they faced no obstacles by the amendment which they would not have faced had the original pleading raised the defense.

Id. at 5-6 (footnotes and citations omitted). Under the principles set forth in *Hoover*, even if the assertion in Federal Marine's Answer of "federal preemption" as "lack of subject matter jurisdiction" were insufficient, Federal Marine was entitled to amend its Answer as it requested. Consequently, the issue raised by Talik's appeal is moot.

IV. CONCLUSION

The Court of Appeals did not make the ruling that Talik seeks to have this Court accept jurisdiction to review. It simply applied fundamental principles of notice pleading to reject Talik's hyper-technical argument that Federal Marine waived the defense of federal preemption in this case. Talik's request that the Court accept jurisdiction should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 31st day of July, 2008, by U.S. Mail, postage prepaid, upon the following:

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