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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001662-MR

ESTATE OF KEVIN MEYERS;
ANGELA FARRIS, as Special Administrator
of the Estate of Kevin Meyers, Deceased;
and ASHLEY AND ASHTON MEYERS, Individually
through HOLLY MEYERS as Guardian — APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE JAMES T. JAMESON, JUDGE
ACTION NO. 14-CI-00415

WEPFER MARINE OF CALVERT CITY, LLC;
CALVERT CITY TERMINAL, LLC d/b/a
SOUTHERN COAL HANDLING SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, TAYLOR, AND L. THOMPSON JUDGES.

COMBS, JUDGE: This case arises from the death of Kevin Meyers, who drowned in the Tennessee River while working for the Appellee, Calvert City Terminal,

LLC, d/b/a Southern Coal Handling Services (CCT). Appellants, the Estate of Kevin Meyers; Angela Farris, as Special Administrator of the Estate of Kevin Meyers, Deceased; and Ashley and Ashton Meyers, Individually, through Holly Meyers as Guardian, appeal from orders of the Marshall Circuit Court entering summary judgment in favor of the Appellees, CCT and Wepfer Marine of Calvert City, LLC (Wepfer), on the ground that CCT's dock barge was not a vessel in navigation and that, therefore, Meyers did not qualify as a **seaman** under the Jones Act.[1] After our review, we affirm.

We shall refer to the record as necessary to resolve the issues properly before us. The trial court's September 11, 2017, order provides a concise but thorough summary of the underlying facts:

> 1) On February 26, 2012, Kevin Meyers was working as an employee of CCT when he drowned in the Tennessee River near the CCT loading dock in Calvert City, Kentucky.
> 2) As a part of CCT's business, CCT receives coal by train, stores the coal in its riverside yard, sells the coal, and loads the coal onto its different customers' barges using a conveyor system at the CCT terminal.
> 3) [The Appellee] Wepfer operates a tugboat that moves the customers' barges to and from the CCT terminal for loading. CCT does not own or operate any tug boat that brings a barge to CCT's dock.

[1] "The Jones Act provides a cause of action in negligence for 'any seaman' injured 'in the course of his employment.' 46 U.S.C.App. § 688(a)." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S. Ct. 2172, 2183, 132 L. Ed. 2d 314 (1995).

4) At the time of the accident, Meyers… was loading coal onto a customer's barge, which was tied at the CCT dock.

…

16) CCT used a dock constructed of three (3) retired barges (hereinafter "dock barge") to load and unload customer barges. The purpose of the dock barge was to facilitate the loading and unloading process because the dock barge floated and would remain at the same level as the customer barges no matter the water level of the river.

17) The three (3) barges making up the dock barge were attached to each other using cables, ratchets, and a hinge system that could be removed with a cutting torch and a construction crew.

18) The dock barges have deck fittings on the side facing the river so customer barges may be tied to the dock barge, and the upstream bar has a raked bow.

19) The dock barge is affixed between three framed iron towers know as "dolphins", and the center barge is secured to a "spud pole." The dolphins, which have not been moved since they were installed, are permanently secured to the riverbed by being "driven down into the river bed, filled with dense grade, and then capped with concrete."

20) The dock barge is permanently affixed to the dolphins with guides that allow the dock barge to travel up and down, and the guides could be removed from the barges with a welding torch and a construction crew.

21) The guides allow the dock barge to move a few inches up and down the river. However, the dock cannot move out toward the center of the river or closer to the bank.

22) The dock barge is connected to land-based utilities, which includes [*sic*] electricity, internet, telephone, and the conveyor system. The conveyor system, which starts on land is welded to the dock barge.

23) Since the accident, the downstream barge has been replaced because it was taking on water and developed a crack. Prior to replacing the barge, water

had to be pumped from it. Once, the downstream barge sank, it was raised by a salvage crew, and then it took the same salvage crew two (2) continuous days to remove the guides from the barge.

24) There is conflicting testimony regarding whether the dock barge could float on their own [*sic*]. Plaintiff's expert testified the barges are capable of floating on their own. However, CCT's Chief Operating Officer testified the upstream barge is foam-filled because it cannot stay afloat on its own. Plaintiff's expert acknowledged the foam was being used to keep the barge afloat.

25) In one (1) of the barges, which make up the dock barge, there is vegetative growth.

26) A water pump was inside one (1) of the barges, which make up the dock barge so that water could be pumped form the dock barge. There were also "a lot of fractures" in the hull of the dock barge.

(Footnotes omitted).

Wepfer and CCT both filed motions for summary judgment. Wepfer explained that the representative of Meyers's estate had filed an action against CCT under the Longshore and Harbor Workers' Compensation Act (LHWCA)[2] and then brought the instant action against CCT and Wepfer alleging negligence under the Jones Act[3] and unseaworthiness under the general maritime law. Wepfer argued that: "[t]o recover under either theory, Plaintiffs must show that Meyers was a seaman at the time of the accident which they cannot do. Because Meyers was a longshoreman, Plaintiff's [*sic*] claims for negligence under general maritime

[2] Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*
[3] The Jones Act, 46 U.S.C. § 30104, *et seq.*

law and state law are precluded as well." Wepfer asserted that the plaintiffs' available remedies were limited to those under the LHWCA, citing *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 89, 112 S. Ct. 486, 492, 116 L. Ed. 2d 405 (1991) ("A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act."); *Miller v. American President Lines, Ltd*., 989 F.2d 1450, 1457 (6th Cir. 1993) ("Longshore and Harbor Worker's Compensation Act … creates a worker's compensation scheme for certain maritime workers which is exclusive of other remedies…."); and *Ballard v. American Commercial Lines, Inc*., 2012 WL 6861490 (Ill. App. 1st Dist., December 28, 2012) (Exclusive remedy provision of LHWCA applied to crew and owner of tugboat so as to preclude judicial action by injured longshoreman stemming from injuries suffered while repairing a nearby barge).

In their brief in opposition to Wepfer's motion for summary judgment, the plaintiffs asserted that Meyers was a seaman, that his estate has a cause of action under the Jones Act and General Maritime Law against CCT[4] and "under the General Maritime Law against Wepfer … a local harbor tug service that shifts barges" for CCT. Plaintiffs argued that Wepfer did not have standing to

[4] The court's April 11, 2017, calendar order reflects that the case was held in abeyance "until parties brief matter further[.]" On August 8, 2017, the Court conducted the hearing on CCT's motion for summary judgment.

raise seaman or vessel status because those defenses belonged solely to Meyers's employer, CCT.

In its reply brief in support of its motion for summary judgment, Wepfer explained as follows:

> Plaintiff asserts that Wepfer Marine's harbor tug crew were negligent in using a donut [a loop of rope] to tie off the tow; in failing to warn Meyers of the movement of the tow; and in failing to find him quickly enough after he fell overboard. Thus, Plaintiff alleges negligence of Wepfer's vessel. If Meyers was a longshoreman, then such a claim can only be brought under Section 905(b) of the LHWCA,[5] which expressly excludes other remedies.

Wepfer argued that plaintiffs had never pleaded an action against it under §905(b) -- despite having amended the complaint twice, that the deadline for amending pleadings had passed, and that fact discovery was closed.

In its motion for summary judgment, CCT also argued that Meyers was not a seaman and that, therefore, LHWCA provided the exclusive remedy.

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[5] 33 U.S.C. 905(b) provides in relevant part:

> 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. … 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.

The trial court granted summary judgment in favor of CCT and Wepfer. Its September 11, 2017, order provides in relevant part as follows:

> This matter having come before the Court upon [Wepfer's] motion for summary judgment on all claims against it, … [and CCT's] motion for summary judgment on all claims against it ….
> …
> By stipulation of the parties, the Court's ruling is limited to the issue of whether Plaintiff, Kevin Meyers, is a "seaman" who works on a "vessel" because this issue will control whether Plaintiff is granted protection by the Jones Act.

The court explained that the Jones Act provides that if a seaman dies from injury sustained in the course of employment, "the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C.A. § 30104. Although the Jones Act does not define the term "seaman," *Charis, Inc. v. Latsis,* 515 U.S. 347, 368, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314 (1995), established a two-part test as follows:

> [T]he essential requirements for seaman status are twofold. First, … an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission. ….
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

(quotation marks and citation omitted).

The trial court concluded that CCT's dock barge was not a "vessel" in navigation and explained as follows:

> The definition of "vessel" has been codified to include, "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C.§3. Over the years, this broad definition of vessel has created problems for courts, which led the United States Supreme Court to attempt to more narrowly construe what constitutes a vessel:
>
> > Not every floating structure is a "vessel." … Rather, the statute applies to an "artificial contrivance ... capable of being used ... as a means of transportation on water." 1 U.S.C. § 3 "[T]ransportation" involves the "conveyance (of things or persons) from one place to another." 18 Oxford English Dictionary 424 (2d ed. 1989) (OED). Accord, N. Webster, An American Dictionary of the English Language 1406 (C. Goodrich & N. Porter eds. 1873) ("[t]he act of transporting, carrying, or conveying from one place to another"). And **we must apply this definition in a "practical," not a "theoretical," way.** *Stewart, supra*, at 496. Consequently, in our view **a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the [structure's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.**
>
> *Lozman v. City of Riviera Beach, Fla*., 568 U.S. 115, 121 (2013) (Emphasis added). Plaintiff argues because the barges, which comprise the dock were

> designed for carrying people and/or things over water, then the dock itself would continue to qualify as a vessel. However, Plaintiff's argument ignores subsequent portions of the *Lozman* opinion. The *Lozman* Court continues by saying:
>
> > Satisfaction of a design-based or purpose-related criterion, for example, is not always sufficient for application of the statutory word "vessel." **A craft whose physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations.** For example, an owner might take a structure that is otherwise a vessel (even the Queen Mary) and **connect it permanently to the land** for use, say, as a hotel. See Stewart, supra, at 493–494, 125 S.Ct. 1118. Further, changes over time may produce a new form, i.e., a newly designed structure—in which case it may be the new design that is relevant.
>
> *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 128-29 (2013) (Emphasis added).

(Emphasis original). The trial court based its conclusion that the dock barge was not a vessel upon the following reasoning:

> (1) the dock was connected to land based utilities, such as electricity, internet, and telephone, (2) the conveyor system welded to the dock was also attached to the land, (3) the barges that comprised the dock were attached to one another with cables, ratchets, and a hinge system that could only be removed with a cutting torch and construction crew, (4) there is vegetative grow[th] in one of the barges, (5) foam in the hull is being used to help keep one of the barges afloat, (6) one of the barge's [*sic*]

> sustained a crack in the hull that required water to be pumped from the hull to keep the barge afloat, and most importantly (7) the dock is permanently moored to the dolphins which are permanently secured to the riverbed so the barge can move a few inches up or down stream but can neither move to the center of the river nor towards the river bank. The Court believes this final factor is most important in its analysis due to language from *Stewart v. Duttra Constr. Co.* 548 U.S. 481 (2005):
>
> > Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.
> >
> > *Stewart, supra* at 494.

The court explained that the CCT dock barge is permanently moored and "is precisely the type of floating platform referenced by the *Lozman Court* that would not qualify as a vessel." The court determined that "[w]hen the facts are applied to the law, the only reasonable conclusion that may be reached is the dock barge **was not a vessel in navigation**." (Emphasis added). The court granted CCT's motion for summary judgment "on the sole issue of [Meyers] not qualifying as a 'seaman' and cannot maintain a cause of action under the Jones Act."

Wepfer filed a motion to alter or amend to clarify the finality of the order, stating: that it had moved for summary judgment on all claims against it;

that its motion for summary judgment had been heard orally in April 2017;[6] that the issue was fully briefed and deemed submitted by an agreed order entered on June 23, 2017; but that the court's order only expressly granted CCT's motion for summary judgment.

On October 18, 2017, the trial court entered an order granting Wepfer's motion. The court amended its September 11, 2017, order to reflect that Wepfer's motion for summary judgment is granted and that "all claims against Wepfer are hereby DISMISSED with prejudice. All claims against all parties having now been dismissed, this is a final and appealable order and there is no just cause for delay." (Emphasis original).

Appellants raise the following issues on appeal:

> I. The Trial Court Erred in Entering Summary Judgment for Wepfer Because Wepfer's Liability Does Not Hinge on Whether or Not The Barges are "Vessels" Within the Meaning of the Jones Act [and]
>
> II. The Trial Court Erred In Entering Summary Judgment for CCT Because There Were Genuine Issues of Material Fact As To Whether the Dock Barges Were "Vessels" As Defined by the Jones Act[.]

[6] The court's April 11, 2017, calendar order reflects that the case was held in abeyance "until parties brief matter further[.]" On August 8, 2017, the Court conducted the hearing on CCT's motion for summary judgment.

This Court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.… [We] review the issue *de novo.*" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (internal quotation marks and footnotes omitted).

We address the second issue first since it is dispositive of the first issue. Appellants correctly state that seaman status is a mixed question of law and fact. They cite *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997), for the proposition that the question will often be inappropriate for summary judgment. However, appellants omit that *Harbor Tug* goes on to state that "[n]evertheless 'summary judgment or a directed verdict **is mandated** where the facts and the law will reasonably support only one conclusion.'" 520 U.S. at 554 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S. Ct. 807, 818, 112 L. Ed. 2d 866 (1991) (emphasis added)). We conclude that this is such a case.

We agree with the trial court's well reasoned analysis set forth above and adopt it as our own. We also note the recent decision in *Thomas v. Riverfront Limestone, LLC*, 2018 WL 1413342 at *4 (W.D. Ky. Mar. 21, 2018) (Barge converted to dock for unloading coal, lime, and clay held not a vessel for purposes of § 905(b) of LHWCA. "Although … originally designed for transportation in the

1960's, its design was modified and it is no longer used for that function. Therefore, the structure does not fall under the definition of 'vessel[.]'").

We are not persuaded by appellants' argument – unsupported by any legal authority -- that the court impermissibly relied upon personal experience in reaching its decision. Appellants refer to a discussion at the August 8, 2017, hearing on CCT's motion for summary judgment where the judge mentioned that he was familiar with these types of docks and their purposes. However, as the court also stated, "it's clearly in all the facts that were in the depositions, that … what they use this thing for was essentially a dock." There is no question that the court properly and objectively examined the evidence as was demonstrated by its numerous references to the record in its September 11, 2017, order in concluding that the dock barge was not a vessel in navigation.

Appellants argue that the trial court erred in granting summary judgment for Wepfer because its liability did not hinge on whether the barges were vessels within the meaning of the Jones Act. However, that issue was not preserved for our review. As this Court explained in *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004):

> CR[7]76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal,

[7] Kentucky Rules of Civil Procedure.

> including jurisdictional challenges[.]" CR 76.03(8) specifically provides that a "party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion."

In the case before us, appellants' prehearing statement filed on January 3, 2018, sets out a sole issue on appeal:

> The issue on appeal is whether decedent is a seaman within the meaning of Jones Act 42 U.S.C. 30104 because the dock barges at the Appellee's terminal are vessels in transportation within the meaning of federal maritime law and the Jones Act.

The other issue raised in appellants' brief -- that the trial court erred in entering summary judgment for Wepfer because Wepfer's liability ***did not*** hinge on whether the barges are vessels within the Jones Act -- was not raised by a timely motion for "good cause shown" according to *Sallee, supra*. Therefore, under the binding precedent of *Sallee*, that issue is not properly before this Court for our review.

We affirm the order of the Marshall Circuit Court granting summary judgment to the appellees.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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