

NOT DESIGNATED FOR PUBLICATION

CAROLYN GORDON, * NO. 2004-CA-0683
GWENDOLYN T. DUNN, *
JEANETTE T. COHEN, * COURT OF APPEAL
SHIRLEY T. SHAMBUGER, *
WILLE JOHNSON, JR., DAVID * FOURTH CIRCUIT
P. JOHNSON, CHRISTOPHER * STATE OF LOUISIANA
D. JOHNSON AND JOSEPH J. *
JOHNSON, O/B/O LAWRENCE *
PAUL JOHNSON *

VERSUS *

*** * * * ***

BUCK KREIHS COMPANY,
INC.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-8383, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge

*** * * * ***

Judge Edwin A. Lombard

*** * * * ***

(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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AFFIRMED

On June 2, 2003, the plaintiffs-appellants filed suit under La. C.C. art. 2315 and 2315.1 against defendant-appellee, Buck Kreighs Company, Inc., for the wrongful death of their brother, Lawrence Paul Johnson (decedent). Appellants alleged that decedent, a longshoreman, died in a fall while working as a ship repairman on a ship owned by appellee moored at the Hines Lane Wharf in New Orleans. Decedent left no parent, spouse, or children; and appellants alleged that they were not dependent on decedent. Appellants stated in their petition that this case sounded in tort only because it involved no federal claim and, as non-dependent siblings of decedent, was not subject to any workers' compensation law.

On July 28, 2003, appellee filed an exception of no cause of action, alleging that La. R.S. 23:1032, et seq., the Louisiana Workers' Compensation Act (LWCA), was the proper remedy in this case and that appellee was immune from tort liability as decedent's employer. Appellants opposed the exception arguing that this case was not barred under the

LWCA because decedent was an employee entitled to benefits under 33 U.S.C. 903, et seq., The Longshore and Harbor Workers Compensation Act (LHWCA).

On September 11, 2003, appellee filed a supplemental memorandum in support of its exception of no cause of action, arguing that appellee properly paid benefits due under the LHWCA after decedent's death and that appellee had no underlying tort liability due to 33 U.S.C. sec. 905(a), the exclusivity provision in the LHWCA. That is, appellee argued, appellants were not entitled to sue appellee simply because they were not provided a large enough monetary remedy under the LHWCA.

Appellants argued in a reply opposition that they were compelled to sue in tort because neither the LHWCA nor the LWCA provided appellants with a remedy in this case. Appellants reasoned that had decedent survived or had decedent been survived by any class of beneficiary entitled to compensation under the LHWCA, the right to compensation would be governed by that federal statute. Appellants then cited a portion of the LWCA, La. R.S. 23:1035.2, which provides that "no compensation shall be payable in respect to the disability or death to any employee covered by the Federal Employee Liability Act, Longshore and Harbor Worker's Compensation Act, or any of its extension, or the Jones Act." That is,

because decedent fell under the definition of “employee” under the LHWCA, 33 U.S.C. section 903, the LWCA did not apply.

On December 30, 2003, the trial court maintained the exception and dismissed the suit with prejudice. This timely appeal followed.

LAW AND DISCUSSION

It is clear that the LHWCA does not provide benefits. 33 U.S.C. sections 905, 909. In Louisiana, remedies for damages to an employee, injured at work, against his employer are governed by the LWCA. La. R.S. 23:1032 is the exclusivity provision:

(1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies, and damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.

It has long ago been determined that La. C.C. art. 2315 does not provide a right of action against the employer outside of the above exclusivity provision. *Atchison v. May*, 201 La. 1003, 10 So.2d 785

(La. 1942.) In *Atchison*, the brother and sister of the deceased attempted to sue the employer in tort for negligence. The Louisiana Supreme Court, interpreting the Employer's Liability Act, predecessor to the Louisiana Workers' Compensation Act, stated:

The intention of the Legislature is demonstrated by the clear language employed by it ... and this court has experienced but little difficulty in resolving that a contract of employment to do hazardous work is governed exclusively by the provisions of the compensation law, not only with respect to the right and remedy of the employee himself, but as to all persons designated as beneficiaries by Article 2315 of the Civil Code, as amended, having a right or cause of action to recover for death by wrongful act. *See Philips v. Guy Drilling Co.*, 143 La. 951, 79 So. 549; *Colorado v. Johnson Iron Works*, 146 La. 68, 83 So. 381; *Williams v. Blodgett Const. Co.*, 146 La. 841, 84 So. 115, and *Labourdette v. Doullut & Williams Shipbuilding Co.*, 156 La. 412, 100 So. 547.

201 La 1008-1009, 10 So.2d at 787.

In *Beverly v. Action Marine Services*, 433 So.2d 139 (La. 1983), the court considered the availability of workers compensation benefits under the LWCA to the parents for the death of their son. The parents were precluded from receiving benefits under the LHWCA, as it required a showing of dependency in order to receive benefits, which the Beverlys could not demonstrate. Their deceased son, Robert Beverly, was a land-

based employee for Action Marine Services, a company engaged in the business of repairing and cleaning vessels. He died while assisting in cleaning out bromide tanks after inhaling toxic fumes.

In finding that workers' compensation benefits were available, the court noted language from *Director, etc. v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 643 (1983), that state remedies are available to injured workers when "an employee was deemed for whatever reason not to be eligible for LHWCA relief." The court further noted that Beverly was not a longshoreman and ruled that because there was no relief available under the LWHCA, state compensation law could apply.

The appellants are not entitled to damages under La. C.C. art. 2315. The trial court correctly maintained the appellee's exception and properly dismissed the petition with prejudice.

AFFIRMED