

ALFIE LUDAHL ET AL., Plaintiffs

v.

SEAVIEW BOAT YARD, ET AL., Defendants

United States District Court, Western District of Washington, November 14, 1994

No. C94-75D

1995 DAMAGES — 1212. Future — 129. Non-Pecuniary Loss.

The estate of a seaman who died when his fishing vessel sank cannot recover for non-pecuniary loss even in a suit against a repair yard rather than his employer, nor for loss of inheritance or accumulation of estate, since that would be equivalent to recovery for lost future earnings and barred by *Miles v. Apex*, which has overruled Ninth Circuit cases allowing such recovery.

James M. Beard (Law Office of James M. Beard) for Plaintiffs

William L. Rivers Black (Lane Powell Spears Lubersky) for Defendants

Carolyn R. Dimmick, Ch.J.:

This matter comes before the Court on defendants' motion for a partial judgment on the pleadings. Specifically, defendants ask for an order granting a judgment on the pleadings on plaintiffs' claims for (1) lost earnings (encompassing loss of earning capacity, loss of inheritance, and loss of accumulation of estate), and (2) loss of society/consortium (which was pled under general damages). The Court, having considered the motion, memoranda, and affidavits submitted by the parties, hereby grants the motion.

I

Richard Ludahl, who was a seaman aboard the F/V *Freya*, died when she sank on the high seas northwest of LaPush, Washington. Ludahl's daughters, Alfie Ludahl and Crystal Ludahl (collectively the "Ludahls"), as the personal representative of the estate, brought this action pursuant to the Death on the High Seas Act, 46 U.S.C. app. §§761

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-67, (hereinafter "DOHSA"), and general maritime law against Seaview Boat Yard and Backetun & Thomas Boat Company (collectively the "defendants"). In their first amended complaint, the Ludahls allege that the defendants improperly repaired the *Freya*, which resulted in her sinking.

The defendants have brought this motion, seeking a judgment on the pleadings. According to the defendants, the claims for lost earnings (including loss of earning capacity, loss of inheritance, and loss of accumulation of estate), and for loss of society/consortium are not recoverable under the law. The Ludahls have challenged a portion of this motion.

II

This motion is brought pursuant to Federal Rule of Civil Procedure 12(c) for a judgment on the pleadings. The standard that the Court must apply is the same standard applicable to a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See William W. Schwarzer, et al., *Federal Civil Procedure Before Trial*, 9-58.6 (The Rutter Group 1993). A judgment on the pleadings should be granted when there are no issues of material fact, and the moving party is entitled to a judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9 Cir. 1989). The Court must assume that the material facts as pleaded are true, and the

inferences drawn from these facts are construed in favor of the party opposing the motion. *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9 Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990).

III

A

The Ludahls have conceded that defendants are entitled to a judgment on the pleadings on at least one portion of defendants' motion. The Ludahls recognize that, pursuant to DOHSA, they can make no claim for the loss of consortium. Accordingly, defendants are entitled to a judgment as a matter of law.

B

In addition the Ludahls concede that the Ninth Circuit case of *Davis v. Bender Shipbuilding & Repair Co.*, 1994 AMC 2587, 2592, 27 F.3d

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426, 430 (9 Cir. 1994), is directly on point and would preclude their claim for loss of accumulation of estate. The Ludahls argue, however, that *Davis* conflicts with a contemporaneous opinion, *Sutton v. Earles*, 1994 AMC 2007, 26 F.3d 903 (9 Cir. 1994), which allows such a claim. In addition, the Ludahls argue that a petition for certiorari to the Supreme Court has been filed in the *Davis* case. The Ludahls conclude that the Court should follow *Sutton*.

The instant case is indistinguishable from *Davis*, and, contrary to the Ludahls' assertions, *Sutton* is distinguishable. In *Davis*, the Ninth Circuit, citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990), distinguished *Sutton* as follows:

We have recently held that survival claims for lost future earnings may be pursued in a case involving the death of a nonseaman in state territorial waters. *Sutton v. Earles* 1994 AMC 2007, 26 F.3d 903 (9 Cir. 1994). We said this was appropriate "where there is no applicable federal wrongful death statute imposing a damage limitation." 1994 AMC at 2031, 26 F.2d at 920. Our decision in this case, however, is controlled by *Miles*. The estates' decedents were seamen, and they perished on the high seas. The Jones Act does not permit the damages sought by the estates. DOHSA does not permit such damages either. We are therefore precluded from awarding them to the estates under general maritime law.

The plaintiffs attempt to distinguish this case from *Miles* by stressing that the defendant in this case is a shipbuilder, not a "Jones Act defendant." Yet there is nothing in *Miles*' reasoning to suggest that the decision turned upon the identity of the defendant. Indeed, not all of the defendants in *Miles* were Jones Act employers. *Miles*, 498 U.S. at 21, 1991 AMC at 2. Moreover, the principle underlying the Supreme Court's decision in both *Miles* and *Moragne* is that general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them. *Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations.

Davis, 1994 AMC at 2592, 27 F.3d at 430. While prior cases would have allowed these claims, *Davis* is the law of the Ninth Circuit; accordingly,

defendants are entitled to a judgment as a matter of law on the claim of loss of accumulation of estate.

IV

The defendants also seek a judgment on the pleadings on the Ludahls' loss of inheritance claim. The defendants characterize this claim as a claim for lost future earnings, which is not recoverable under either *Miles* or *Davis*. The defendants cite one district court decision, *Hopper v. Waterman Steamship Corp.*, 1992 AMC 1087 (E.D. La. 1991), to support this proposition. Not surprisingly, the Ludahls oppose the motion, arguing that Ninth Circuit law allows for the recovery of loss of inheritance.

The cases cited by the Ludahls to support their claim for loss of inheritance, *Nygaard v. Peter Pan Seafoods, Inc.*, 1985 AMC 2085, 2088, 701 F.2d 77, 80 (9 Cir. 1983); *Bergen v. F/V St. Patrick*, 1987 AMC 2024, 816 F.2d 1345 (9 Cir. 1987), *cert. denied*, 493 U.S. 871, 1990 AMC 2700 (1989); and *In re Arctic Fisheries, Inc.*, 741 F.Supp. 850 (W.D. Wash. 1990), all predate the Supreme Court's ruling in *Miles* and the Ninth Circuit's ruling in *Davis*. As the Ninth Circuit recognized in *Davis*, "*Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages." *Davis*, 1994 AMC at 2592, 27 F.3d at 430. Common sense dictates that if lost future earnings are not recoverable under DOHSA, then loss of inheritance would also not be recoverable. *See Hopper*, 1992 AMC at 1087 ("The Supreme Court has also disallowed claims for a decedent's lost future earnings. In essence, plaintiff's claim for loss of prospective inheritance asserts such a claim..."); *see also* Charles M. Davis, *Maritime Law Deskbook* 153 (1994) ("Whether maritime law permits recovery for loss of inheritance was put into doubt by *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990).").

In accordance with the foregoing, the defendants' motion for a partial judgment on the pleadings is hereby granted.