IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30303

ROBERT CRAIG KELLY, GARY C. PORTER and SHARON PORTER,

Plaintiffs-Appellants,

versus

STAR ENTERPRISE and BARRY J. WEBER,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-93-3876-M-4)

(February 14, 1995)

Before VAN GRAAFEILAND[*], JOLLY, and WIENER, Circuit Judges.

PER CURIAM:[**]

In this personal injury case, Robert Kelly and Sharon and Gary Porter appeal the district court's (1) denial of their motion to remand to state court and (2) grant of summary judgment in favor of Star Enterprises ("Star") and Barry Weber, the head operator of Star's Convent, Louisiana refinery. Having reviewed the record and

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[*] Circuit Judge of the Second Circuit, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

considered the positions of the parties advanced in their briefs and at oral argument, we are convinced for the reasons that follow that the judgment of the district court is correct. Accordingly, its judgment is affirmed.

I

First, the plaintiffs' motion to remand requires us to examine our subject matter jurisdiction. Although both Kelly and Weber are citizens of Louisiana, this case clearly falls within our diversity jurisdiction. The plaintiffs do not dispute that if there is no possibility of recovery against Weber, then we may disregard Weber's citizenship for jurisdictional purposes. The plaintiffs also do not dispute that recovery against Weber is possible only if their injuries stem from an "intentional act" on Weber's part. Finally, the plaintiffs do not dispute that an act is intentional, for present purposes, if the actor "knows [the] result is substantially certain to follow from his conduct." Bazely v. Tortorich, 397 S.2d 475, 482 (La. 1981). The plaintiffs argue, however, that their allegations need have only a "modicum of sturdiness" that they can recover against Weber in order to defeat our diversity jurisdiction, and assert that they have met this test.

We disagree. As the district court found, to be substantially certain, and thus intentional, the result of Weber's actions must have been "inevitable" or "incapable of failing." See Armstead v. Schwegmann Giant Super Markets, Inc., 618 So.2d 1140, 1142 (La.

App.), writ denied, 629 So.2d 347 (1993). At most, the allegations of the plaintiffs amount to a charge of recklessness on Weber's part, not a charge that he acted knowing that the consequences were the inevitable result of his actions. Similarly, the evidence falls short of the "substantial certainty" threshold required to maintain an action against Weber. Accordingly, we are convinced that the plaintiffs have no possibility of recovery against him. We therefore disregard Weber's citizenship, and hold that we have jurisdiction. As a consequence, the district court's refusal to remand the case was proper.

II

Passing to the merits, this suit is barred, and summary judgment is proper, unless it falls within an exception to the general bar against tort suits contained in the Louisiana workers compensation statute, La. Rev. Stat. 23:1032. The plaintiffs argue that the workers compensation statute does not bar claims sounding in strict liability for injuries that result from the ultrahazardous activity of the employer, and urge us to reconsider our decision in Duhon v. Texaco, Inc., 490 F.2d 91 (5th Cir. 1974), in which we squarely rejected this argument.

We decline to do so. As a court sitting in diversity, we are Erie-bound to apply the Louisiana law. We think that Louisiana courts would find that workers compensation is the exclusive remedy for injuries that result from ultrahazardous activities. The broad wording of the statute does not admit the distinction advanced by

the plaintiffs, see La. Rev. Stat. 23:1032. Moreover, permitting suits against employers to go forward whenever an injured employees claim stems from an ultrahazardous activity would ill-serve the policy underlying Louisiana's workers compensation scheme. We do not think Louisiana courts would take such a course. We therefore adhere to Duhon and find that the plaintiffs' claims are barred by the workers compensation act. As a consequence, the district court's grant of summary judgment was proper, and is hereby affirmed.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

A F F I R M E D.