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January 2021 Longshore/Maritime Update (No. 260)

Notes from your Updater:

On December 7, 2020, the Office of Workers' Compensation Programs announced that it is amending its regulations for the LHWCA and its extensions to require parties to file documents electronically, unless otherwise provided by statute or the OWCP, to streamline the settlement process, to address civil money penalties prescribed by the LHWCA, and to set forth the procedures for contesting the OWCP's penalty determinations. The regulations will become effective on March 15, 2021, unless OWCP receives written significant adverse comments by February 12, 2021. Directions to provide written comments are provided. The proposed regulations can be found at this link:

Proposed LHWCA Regulations

On December 22, 2020, the Internal Revenue Service announced its standard mileage rates for 2021. Beginning on January 1, 2021, the standard mileage rate for the use of a car (also vans, pickups, or panel trucks) will be 56 cents per mile driven for business use. The mileage rate will be 16 cents per mile driven for medical purposes.

On the LHWCA Front . . .

From the federal appellate courts:

Eleventh Circuit affirmed the dismissal of a longshore worker's claims (related to the denial of his seniority request) against the union for breach of its duty of fair representation and against the stevedore for breach of the collective bargaining agreement; *Oltmanns v. International Longshoremen's Association*, No. 19-13178 (11th Cir. Dec. 1, 2020) (Martin).

Opinion

Justin Oltmanns works for Georgia Stevedore Association and is a member of Local 1475 of the International Longshoremen's Union and Clerks and Checkers Union. He claimed that the Local and Georgia Stevedore denied him seniority as a clerk and checker based on his work as a "deck and dockman." He brought this hybrid action against the union for breach of its duty of fair representation and against the stevedore for breach of the collective bargaining agreement. The district court dismissed his suit, and the Eleventh Circuit agreed. Judge Martin reasoned that the dismissal against the stevedore was proper because Oltmanns did not state what was breached in the collective bargaining agreement and that the dismissal against the union was proper because Oltmanns failed to allege that the union acted with improper motive or purpose.

Shipbreaker was not entitled to limit liability because the barge on which it was working was a dead ship and was no longer a vessel; *In re Southern Recycling, L.L.C.*, No. 20-40274 (5th Cir. Dec. 7, 2020) (Clement).

Opinion

Southern Recycling purchased a tug/barge unit for shipbreaking and recycling, and the barge was allegedly cleaned of petroleum products and other chemicals and was transported to a shipyard in Brownsville for the shipbreaking. An affiliate of Southern Recycling, International Shipbreaking, was cutting and removing pipes, but the pipes still contained some gasoline and there was an explosion that killed one worker and injured another. After suits were filed in Texas state court by the injured worker and beneficiaries of the worker who was killed, Southern Recycling filed a limitation action, claiming that the barge still retained the essential features of a vessel and was still floating. The claimants filed a motion to dismiss, arguing that the barge was not a vessel and that the court lacked admiralty jurisdiction for the limitation action. The barge had a gaping hole open to the sea that was the basis for Judge Olvera finding that it was not a vessel and that the limitation action should be dismissed. However, on appeal Southern Recycling argued that the cuts in the vessel were preparatory only and that the barge had been moved on navigable waters after the accident. As there were factual disputes that had to be resolved with respect to whether the barge was a vessel, the first issue that was presented was whether the district court was allowed to resolve disputed jurisdictional facts on a motion to dismiss. The general rule is that the courts may resolve disputed facts on a motion to dismiss unless the issue of jurisdiction is intertwined with the merits of the case. Judge Clement reasoned that the limitation action is about consolidating multiple actions into a single forum to determine whether the owner is liable and whether it can limit its liability. It is not about whether a structure is a vessel. The status of the structure is a jurisdictional question that is antecedent to the merits. As such, the district court was permitted to resolve factual disputes about the status of the barge in deciding the motion to dismiss. Turning to the finding that the barge was not a vessel, Judge Clement noted that the subjective intent of Southern Recycling to dismantle the barge for scrap was insufficient to render it a dead ship. The issue was whether it had been withdrawn from navigation and maritime commerce. In this case, the fact that the barge still floated and could be moved in the shipyard did not establish its capability for transportation as the gaping hole in the bow put the barge at a substantially increased risk of taking on water. Judge Clement quoted the Supreme Court in *Lozman* that a structure is not a vessel merely because it is "capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two." Its structure must give a reasonable observer evidence that it is designed to a practical degree for transportation on water. With the cuts in the pipes the barge was not capable of carrying cargo, and with the pipes containing chemicals that could ignite with a spark, the barge had no capability of transporting people. Therefore, the Fifth Circuit could "readily conclude" that the barge was no longer a vessel and that there was no admiralty jurisdiction for the limitation action.

Claim of intentional infliction of emotional distress under state law was not available to longshore worker for sexual harassment by ILA board member as the worker had statutory remedies; *Stelly v. Duriso*, No. 19-20160 (5th Cir. Dec. 11, 2020) (Haynes).

Opinion

Rhonda Stelly began working as a longshore worker in Houston in 2014. She asserted that Paul Duriso, a board member of International Longshoremen's Association Local 1316 and Local 21, started sexually harassing her shortly after she started coming to the unions' hiring halls. She brought this action against the two Locals and West Gulf Maritime Association for employment discrimination and retaliation and against Duriso for intentional infliction of emotional distress under Texas law. She ultimately obtained a judgment against Local 21, and Local 1316 and West Gulf Maritime were dismissed. Duriso evaded service and a default judgment was ultimately entered against him. Duriso appealed the default judgment, and Judge Haynes initially held that his failure to move to set aside the default judgment in the district court did not prevent him from bringing the appeal. Turning to the merits of the appeal, Judge Haynes noted that the intentional infliction action is a "gap-

filler" tort that is available when the victim has no other recognized theory of redress. Here, the victim had statutory claims available to her, and she actually recovered against Local 21. Reasoning that the availability of the statutory remedies on the same facts foreclosed Stelly's intentional infliction claim, Judge Haynes held that the district court abused its discretion in entering the default against Duriso. Judge Ho would have certified the question to the Texas Supreme Court whether an intentional infliction action was available to Stelly in this case.

Vessel owner did not breach its turnover duty for a condition that was open and obvious; *Washington v. The National Shipping Co. of Saudi Arabia*, No. 19-12578 (11th Cir. Dec. 17, 2020) (Martin).

Opinion

The owner of the M/V BAHRI HOFUF engaged SSA Stevedores to discharge large steel coils from the vessel in the Port of Savannah. SSA determined that it would offload the coils by loading them onto a flatbed trailer owned by the vessel owner that was pulled by a tractor (a Terberg), owned by the vessel owner. The Terberg attached to the trailer using a gooseneck connector (owned by the vessel owner). The tractor and trailer did not have any safety chains to act as a back-up connection if the tractor-trailer connection uncoupled. SSA also removed coils using a TICO truck that had a fixed attachment to the trailer. The Terberg uncoupled from its trailer at the top of a ramp, causing the trailer to roll down toward Washington, who was working as a flagman. Washington was injured trying to get out of the way of the uncoupled trailer. Washington and his wife brought this action against the vessel owner seeking to recover for negligence under Section 905(b) of the LHWCA. The testimony indicated that use of chains as a back-up for the gooseneck connection would have prevented Washington's injury. The vessel owner moved for summary judgment that it had not breached any of the *Scindia* duties, and Judge Baker granted the motion and dismissed the case. On appeal, the only duty implicated was the turnover duty--that the owner must turn over the ship and its equipment in safe condition or warn the stevedore of hidden dangers. Noting that the Eleventh Circuit has allowed an open-and-obvious defense for negligence claims under the turnover duty, Judge Martin added that the defense is not absolute. In this case, the operator of the tractor knew that there were no safety chains and raised concerns about the condition with his supervisor. However, SSA approved the use of the equipment without the chains. Judge Martin reasoned that SSA had the discretion to use the owner's equipment and could have avoided the hazard by using other equipment. In fact, SSA alternated loads between the Terberg tractor and the TICO truck. As exclusive use of the TICO truck would have avoided the hazard, there was no exception to the open and obvious condition being a defense to liability under the turnover duty.

Harbor pilot had to be employed by someone to be covered by the LHWCA; Fifth Circuit affirmed his recovery for unseaworthiness as a *Sieracki* seaman; *Rivera v. Kirby Offshore Marine, L.L.C.*, No. 19-40799 (5th Cir. Dec. 22, 2020) (Stewart).

Opinion

Jay Rivera was a harbor pilot in Corpus Christi when he suffered an injury to his left foot on the TARPON, a seagoing tugboat owned by Kirby Offshore Marine that Rivera piloted to its berth in Corpus Christi Harbor. Rivera was on his way to the wheelhouse of the tug when he stepped over a two-foot high bulkhead for a watertight door. On the other side of the bulkhead was a hatch cover that was not flush with the deck. Rivera's foot landed on the edge of the hatch cover, causing his ankle to roll and fracture the fifth metatarsal bone in his left foot. Rivera brought suit against Kirby seeking to recover for unseaworthiness as a *Sieracki* seaman and, alternatively, for negligence under Section 905(b) of the LHWCA. The case was tried to the bench for seven days, and Judge Hanks held that Kirby was liable for both unseaworthiness and negligence under Section 905(b), rendering judgment in the amount of $11,695,136 (*see* October 2019 Update). To hold that Rivera was entitled to bring a claim for unseaworthiness as a *Sieracki* seaman, Judge Hanks held that Rivera was not covered by the LHWCA (with its exclusive remedy of negligence against the vessel owner/operator) because it was not clear that he was an employee of anyone. Writing for the Fifth Circuit, Judge Stewart held that Rivera had to be the employee of someone to be covered by the LHWCA. As there was no evidence that he was an employee of anyone while serving as a pilot on the vessel, he was not covered by the LHWCA. Judge Stewart considered the pilot, a member of the Aransas-Corpus Christi Pilots Association, to be an independent contractor. The Fifth Circuit had previously held that pilots do not have the requisite connection to the vessel to be covered under the Jones Act. Therefore, Rivera's cause of action against Kirby was for unseaworthiness in one of the pockets of *Sieracki* seamen who are not Jones Act seaman and who are not covered by the LHWCA (and subject to its exclusive-remedy provision). Finding sufficient evidence to support Judge Hanks' findings that the vessel was unseaworthy and that Rivera was not comparatively negligent, Judge Stewart affirmed those findings. He then addressed the argument that Judge Hanks should not have admitted evidence of the subsequent remedial measure (a photograph of reflective tape near the area where Rivera was injured) and held

that Judge Hanks did not abuse his discretion in admitting the evidence as there was sufficient evidence of Kirby's negligence without the photograph. Finally, Judge Stewart affirmed the award of damages that was based on the K-1 tax forms from Rivera's S-corporation.

From the federal district courts:

Suit by longshore worker for his de-registration as a longshore worker while he was in prison for defrauding his welfare plan was barred by limitations; *Gomez v. International Longshore & Warehouse Union*, No. 2:19-cv-9837, 2020 U.S. Dist. LEXIS 224827 (c.d. Cal. Nov. 30, 2020) (Phillips).

Opinion

David Gomez was deregistered as a Los Angeles-Long Beach longshore worker for failing to provide an excused absence from the industry while he was incarcerated for defrauding his welfare plan. He brought this suit in state court against the International Longshore and Warehouse Union, its Local 13, and the Pacific Maritime Association, alleging breach of the collective bargaining agreement and various torts based on the alleged breach of the agreement. The defendants removed the case based on preemption from the Labor Management Relations Act and asserted defenses that the suit was barred by the six-month statute of limitations in the LMRA, that Gomez was estopped from brining his claims because he failed to disclose them when he filed for bankruptcy, and that he was properly de-registered for failing to work at least one shift in a 30-day period without an exception (incarceration not being an exception). As Gomez was aware that he was de-registered while he was in prison, which was more than six months before he brought this suit, Judge Phillips held that his breach of contract claim was time barred. As his tort claims depended on the success of his contract claim, Judge Phillips dismissed them as well.

Surveyor who fell on vessel could not satisfy the *Scindia* duties for his Section 905(b) claim; *Patil v. Amber Lagoon Shipping GmbH & Co.,* No. 18-6167, 2020 U.S. Dist. LEXIS 231103 (E.D. La. Dec. 9, 2020) (Feldman).

Opinion

Pradeep Patil was contracted to assess the watertightness of the hatch covers on the M/V AMBER LAGOON. He tested several hatch covers on several holds, but when he came to the Number 4 hold, the port access ladder was blocked by cargo containers. He crossed to the starboard side of the hold, which required Patil to scale a three-foot gap from one ledge to another. His foot slipped during the process and he fell six feet to the deck of the vessel. Patil was paid compensation under the LHWCA by his employer's insurer and brought this action against the vessel owner under Section 905(b) of the LHWCA. He alleged that a slippery foreign substance on the hold caused his foot to slip. He did not see the slippery spot on the vessel, but he observed a spot of lubricant on his steel-toed boots in the days following the accident. His inspection companion during the work likewise did not observe any hazardous foreign substance, even though it was daylight at the time of Patil's fall. The vessel owner moved for summary judgment, and Judge Feldman addressed each of the *Scindia* duties. Patil argued that the vessel owner violated the active control duty by obstructing the access to the ladder that Patil would have ideally used to get to the hatch cover. However, Judge Feldman held that making Patil's job more difficult was not the same as inserting the vessel owner into Patil's activities. With respect to the duty to intervene, there was no evidence that the vessel owner had actual knowledge that it could not rely on the contractor to protect Patil. Finally, noting that neither Patil nor his assistant saw any foreign substance, Judge Feldman held that there was no evidence that the owner failed to exercise ordinary care to present a ship on which an experienced worker like Patil could safely perform his tests. Accordingly, Judge Feldman granted the vessel owner's motion for summary judgment.

Family member's asbestos claim against shipyard was removable under the Federal Officer Removal Statute based on a government contractor immunity defense; *Roussell v. Huntington Ingalls, Inc.*, No. 20-2857, 2020 U.S. Dist. LEXIS 237277 (E.D. La. Dec. 17, 2020) (Ashe).

Opinion

Marsha Roussell was diagnosed with mesothelioma that she attributed to exposure to asbestos from her father, who worked at Avondale Shipyard in 1957 and 1958, and from her uncle, who worked for Avondale until he transferred to a subcontractor of Avondale that sold and installed asbestos-containing wallboard in vessels that were under construction and repair at Avondale. Avondale removed the case based on the Federal Officer Removal Statute, asserting a government contractor immunity defense. Although Roussell attempted to create fact issues whether her father and uncle worked on MARAD vessels, Judge Ashe held that Avondale had

provided sufficient evidence of exposure to asbestos while working on MARAD vessels and held that the removal was proper.

And on the maritime front . . .

From the federal appellate courts:

Reality TV meets admiralty: Preliminary discussion for a cruise-ship reality TV show were not sufficient to create an implied contract; *Richter v. Carnival Corp.*, No. 20-10480 (5th Cir. Dec. 1, 2020) (per curiam).

Opinion

Sue Richter devised a reality television concept, *SeaGals*, which she pitched to Carnival. Richter would be the Creative Director and Host of the reality show, and Carnival would provide cabins on its ships, contestants, and use of shore excursions associated with its cruises. Carnival expressed in an email in July 2014 that it was "onboard with the reality show," and more than a year later the parties exchanged a letter of intent to secure a "preliminary understanding." The letter stated that it did not constitute a binding contract. Richter claimed that Carnival then appropriated her ideas and created its own reality show, *Vacation Creation*. Richter brought this action asserting claims for breach of contract (based on the oral agreement from July 2014) together with claims of quantum meruit, fraud, and breach of confidence or misappropriation of confidential information. The district court dismissed the suit, concluding that Richter did not state a plausible claim of breach of contract and that her other claims were preempted by the Texas Uniform Trade Secret Act (and that she had not sufficiently pleaded a case under that statute). The Fifth Circuit affirmed the dismissal, noting that the parties did not act as though a binding contract had been agreed in July 2014 when the documents exchanged more than a year later reflected that there was not a binding contract. With respect to the non-contractual claims, the district court noted that there was little in common between the shows other than that they both took place on cruise ships.

Lake formed by dams on the Missouri River was not navigable for admiralty jurisdiction (even though listed as navigable by the Coast Guard), and a limitation action based on an accident on the lake was dismissed for want of admiralty jurisdiction; *In re Garrett*, No. 20-35127, 2020 U.S. App. LEXIS 37600 (9th Cir. Dec. 2, 2020) (Tashima).

Opinion

Caleb Garett, owner of a 16-foot recreational fishing boat that capsized on Holter Lake (formed by the damming of the Missouri River in Montana) brought this limitation action, and the claimants in the limitation action moved to dismiss the action for lack of admiralty jurisdiction. Judge Haddon dismissed the action, and the Ninth Circuit agreed. Although the Coast Guard has designated the Lake as a navigable waterway (for purposes of its regulatory jurisdiction), Judge Tashima did not consider that to have any effect on whether the Lake was a navigable waterway for purposes of admiralty jurisdiction. As the stretch of the Missouri River where the Lake is located is wholly within Montana and is obstructed from interstate or international navigation by Holter Dam at one end and Hauser Dam at the other end, Judge Tashima held that the locality test was not satisfied. Garrett urged the Ninth Circuit to reject this "outdated view of the locality test," but Judge Tashima was not willing to change the Ninth Circuit's interpretation of the locality test, distinguishing cases cited by Garrett where the waterway had access to interstate or international waters.

Rail carrier was insulated from liability by the multimodal bill of lading issued for the shipment of generators from Germany to Kentucky; *Progressive Rail Inc. v. CSX Transportation, Inc.*, No. 20-5378, 2020 U.S. App. LEXIS 37639 (6th Cir. Dec. 2, 2020) (Sutton).

Opinion

Siemens AG, a German company, sells industrial manufacturing equipment. Its American subsidiary, Siemens Energy, sold two transformers to Gallatin Steel in Ghent, Kentucky. Siemens AG arranged with a freight forwarder to ship the goods, and the freight forwarder engaged Blue Anchor Line, which issued a bill of lading for the carriage from Germany to Kentucky. Siemens Energy agreed in the bill of lading not to sue subcontractors of Blue Anchor Line for any problems arising out of the transportation from Germany to Kentucky. The freight forwarder arranged for K-Line to complete the ocean leg of the carriage, and a different entity of the freight forwarder contracted with CSX to perform the land leg of the shipment from Baltimore to Kentucky. One of the transformers was damaged during the rail shipment, and Siemens Energy brought this

action against CSX. Judge Tatenhove granted summary judgment for CSX on the ground that the rail carrier qualified as a subcontractor under the Blue Anchor bill of lading and was insulated from liability (*see* April 2020 Update). The Sixth Circuit agreed. Following the decision of the Supreme Court in *Kirby* (which was not applied by Judge Kobayashi in the *Lieblong* decision discussed below), Judge Sutton held that the Blue Anchor bill of lading was a maritime contract and that maritime law applied even to the non-maritime rail carriage. The fact that CSX issued its own contract for the rail portion of the trip did not alter this conclusion, nor did the fact that Siemens AG paid for the ocean leg and Siemens Energy paid for the land leg. The Blue Anchor bill was still a multimodal bill of lading that applied throughout the shipment, regardless of whether the shipper or ocean carrier retained or paid for the rail carrier. Finally, Judge Sutton did not have to address the argument that the covenant not to sue was unenforceable under the Carriage of Goods Act as it was not raised in the district court, but Judge Sutton noted that Siemens' contention had been rejected by the Second Circuit and Ninth Circuit.

Fifth Circuit affirmed application of maritime law to uphold a seaman's settlement after the seaman tried to back out of the agreement; *Perrin v. Hayward Baker, Inc.*, No. 20-30241 (5th Cir. Dec. 10, 2020) (per curiam).

Opinion

Jarred Brent Perrin, a commercial diver, was injured while working on the Columbia Lock and Dam Project on the Ouachita River. He was employed by Specialty Divers and brought suit against Hayward Baker, Inc., a subcontractor of Massman Construction Co. As the trial approached, Perrin's counsel negotiated a settlement with counsel for Hayward Baker for $145,000. Perrin declined to execute the settlement documentation, obtained new counsel, and argued that the settlement between the parties was not binding under Louisiana law and that he would not release Massman or Perrin's employer, Specialty Divers. Hayward Baker's counsel responded with correspondence and an affidavit from Perrin's former counsel confirming that Perrin agreed to release all three companies for the sum of $145,000. Judge Barbier set the matter for oral argument, and the night before the hearing, Perrin filed a sur-reply and affidavit in which he contended that his counsel lacked authority to enter into the settlement. Judge Barbier agreed to hear the competing evidence at the hearing (but Perrin did not attend). Judge Barbier then held that maritime law, not Louisiana law, applied to the enforceability of the settlement, and he held that the evidence established that Perrin knowingly agreed to settle his claim and to release the parties. Perrin continued to refuse to execute the agreement, and Judge Barbier dismissed the suit with prejudice and adopted the settlement agreement. The Fifth Circuit agreed that maritime law governed the enforcement and that the district court had the authority to enforce the agreement. The appellate court noted that oral agreements are enforceable under the maritime law, even when a party refuses to sign the memorializing documents. The Fifth Circuit added that courts will not set aside the agreement of a seaman, acting on independent advice and based on a reasonable investigation, when there is no question of competence. As the evidence was sufficient to support Judge Barbier's enforcement of the settlement, the Fifth Circuit affirmed the judgment of the district court.

Fifth Circuit clarified when seamen may be found comparatively at fault when they are injured following orders; Fifth Circuit declined to overturn damage award that seaman considered inadequate; *Knight v. Kirby Offshore Marine Pacific, L.L.C.*, No. 19-39756 (5th Cir. Dec. 17, 2020) (Barksdale).

Opinion

Andrew Lee Knight was injured while serving as a crew member on Kirby's tugboat M/V SEA HAWK. The vessel had a stern line that was used to secure the tug to a barge when entering and exiting port, and the line was replaced when the vessel left port. The captain ordered Knight and another crew member to change out the line when the vessel was at sea in four-foot seas with winds of 20 miles per hour (causing the vessel to roll). After the line was removed and placed on the deck next to the workers, Knight stepped on the line while he was installing the new line. He testified that the rocking of the tug caused him to lose his balance. Judge Milazzo held a non-jury trial and found Knight and Kirby were 50% negligent. Her basis for finding Knight at fault was that he failed to watch his footing while replacing the line and failed to move the line to a location on the boat where he would not have stepped on it. She found total damages of $344,000, of which $60,000 was for past and future pain and suffering. Knight challenged the award of comparative fault on the ground that he could not be found to be comparatively at fault as he was following an order at the time of his injury. The three members of the panel of the Fifth Circuit disagreed on the issue whether the statement in a prior case that a seaman may not be found comparatively at fault when injured while carrying out an order was dictum or applicable law (Judge Elrod dissented and would have held that Knight could not be found at fault for the injury he incurred while following orders). The majority held that a seaman cannot be found negligent for carrying out a specific order

from his supervisor but may be found at fault for carrying out a general order. The majority defined a specific order as "one that must be accomplished using a specific manner and method and leaving the seaman with no reasonable alternative to complete the assigned task." As the order to change out the line was a general order, Judge Barksdale held that the district court was not precluded from finding Knight to be negligent. He then addressed each of the findings of negligence and concluded that Knight was an experienced tankerman who was familiar with rolling vessels and who knew that the line was on the deck while he was preparing the new line. As such, it was appropriate to find that Knight was negligent for failing to watch his footing. However, Judge Barksdale held that the finding of fault for placement of the line on the deck was clearly erroneous (the captain of the vessel watched the procedure and found no irregularities in the work). Consequently, the Fifth Circuit remanded the case to Judge Milazzo to find the percentages of fault for Kirby and Knight based on the single finding of comparative fault. Knight also urged the Fifth Circuit to reverse the award of $60,000 for his past and future pain and suffering. Knight injured his ankle and underwent three reconstructive surgeries and attended 100 sessions of physical therapy. He was assessed a 14% foot-and-ankle impairment and could not return to work as an offshore tankerman (although he could work as a shore tankerman). Judge Barksdale noted that the court looks to relevant federal and state cases in the district court's jurisdiction to determine whether the damages are excessive, and he applied that analysis to determine if an award was inadequate. Although the award was on the lower side of the scale, it was not outside the bounds of plausibility, and the majority consequently affirmed the amount of damages (Judge Elrod dissented on this point also and would have reversed the damage award as insufficient).

Misrepresentation voided insurance coverage for vessel based on uberrimae fidei; *Quintero v. Geico Marine Insurance Co.*, No. 19-12734, 2020 U.S. App. LEXIS 40091 (11th Cir. Dec. 22, 2020) (Hull).

Opinion

Alfred Quintero insured his 32-foot powerboat in Broward County, Florida, with Geico Marine's policy covering the period from May 5, 2017, to May 5, 2018. On May 4, 2018, a Geico representative called Quintero to advise him that his policy was up for renewal and the automatic withdrawal from his credit card on file to pay for the next installment had been declined. Quintero told Geico that it should lower the amount owed or it would lose him as a customer, and he did not pay the installment that was due on May 5 for the renewal. On May 10, 2018, Geico sent Quintero a Notice of Policy Expiration effective as of May 5, 2018. On May 25, 2018 at approximately 7:28 a.m., Quintero called Geico "to pay his boat policy." In order to reinstate the policy, Geico asked about the status of the boat and Quintero responded that the boat was sound and seaworthy, that the last time he physically saw the boat was "every day," and that the location of the boat was: "It's in my house." Geico then reinstated the policy retroactive to May 5, 2018. Seven hours later, at 2:43 p.m., Quintero called the police to report the theft of his boat and trailer. At approximately 6:30 p.m. that day he called Geico to make a claim for the stolen vessel with a date of loss of May 25, 2018. The police report noted that video surveillance from a neighbor's home showed that the vessel had been hauled away at 4:58 a.m. on May 25, 2018, three hours before Quintero called Geico to reinstate the policy. Geico responded by rescinding the policy ab initio because of his material misrepresentation when he called to reinstate the policy. Judge Ungaro held that the policy was void ab initio (*see* June 2019 Update), and Quintero appealed. Writing for the Eleventh Circuit, Judge Hull first held that the initial policy had expired and did not cover the loss that occurred after the expiration. Thus, the question was whether the renewal after the vessel had been stolen, which was retroactive to the date of the expiration of the prior policy, was in force. Geico relied on the doctrine of uberrimae fidei to void the policy from its inception. This was based on the representation when he called to reinstate the policy that the vessel was in his house. Although Quintero asserted that he did not know the boat had been stolen when he called to reinstate coverage shortly after the theft, Judge Hull did not consider Quintero's actual knowledge to be relevant as uberrimae fidei imposes the duty to disclose material facts that ought to be within the knowledge of the insured. The Eleventh Circuit agreed with Judge Ungaro that the renewal policy was void ab initio.

From the federal district courts:

Towing a grounded vessel off a jetty was salvage, but the salvage was not worth 20% of the value of the vessel; *Offshore Marine Towing, Inc. v. Gismondi*, No. 20-cv-60657, 2020 U.S. Dist. LEXIS 222215 (S.D. Fla. Nov. 27, 2020) (Ruiz).

Opinion

Arturo Gismondi, with his wife and guests, were on the 53-foot SEA U L8TER when it ran aground on the north jetty while entering the Hillsboro Inlet in Pompano Beach, Florida. Captain William Sisler of Offshore Marine Towing, received a report that the vessel was grounded and quickly proceeded to the site so that he could salvage the vessel while the tide was still high. Captain Sisler anchored his vessel and walked along the jetty to the SEA U L8TER, which was resting on its keel. After verifying that the bilges were dry, Captain Sisler presented Gismondi with a salvage agreement by which Offshore Marine would salvage the vessel and the fee would be determined after the work was performed. Gismondi signed the agreement, and the SEA U L8TER was successfully towed off the jetty. Captain Sisler then put on a diving suit and inspected the damage. He

recommended that Offshore Marine retain possession of the vessel and haul it out for a more thorough inspection. Gismondi declined to allow Offshore Marine to maintain possession and navigated the vessel back to his home marina on its own power. Offshore Marine then demanded compensation of $200,000 and arrested the vessel when Gismondi would not pay that amount. The vessel was originally released from the arrest for $330,000, and Gismondi moved to vacate the arrest or reduce the security. Gismondi initially contested whether salvage was proper, but Judge Ruiz ruled that a hard grounding such as occurred in this case is usually considered to be a per se marine peril so that the successful voluntary effort by Offshore Marine would support a salvage award. Considering whether the security should be reduced, Judge Ruiz evaluated the six factors enunciated by the Supreme Court in *The Blackwell* to determine the amount of the award. Noting the minimal risk to the SEA U L8TER, the minimal risk to the personnel and equipment of Offshore Marine, and the effort that was energetic, but completed in less than 15 minutes, Judge Ruiz considered that a low-order salvage award of 1% of the value of the vessel after it was pulled off the jetty ($950,000) was appropriate. Therefore, he reduced the security to $9,500.

Court held that an ambiguity in the contract precluded summary judgment on a claim for damage to the vessel from contaminated bunkers; *Trans-Tec International, S.R.L. v. TKK Shipping (PTE) Ltd.*, No. 18-cv-23199, 2020 U.S. Dist. LEXIS 223489 (S.D. Fla. Nov. 27, 2020) (Williams).

Opinion

TKK, time charterer of the M/V THORCO LINEAGE, ordered 680 metric tons of bunkers from Trans-Tec, which contracted with Bomin to supply the bunkers to the vessel. The fuel was delivered to the vessel at the port of Cristobal, Panama, and the vessel suffered severe main engine failure a few days after it began using the fuel supplied by Bomin for Trans-Tec. Trans-Tec brought this action to recover for the price of the fuel, and TKK counterclaimed for the damage to the ship. The supplier moved for summary judgment on the charterer's counterclaim, citing the contractual provision that the charterer's remedy (when the fuel was off specification and could not be consumed) was capped at replacement of the nonconforming goods. The charterer responded that it was entitled to recover based on the provision that the supplier would pay the charterer full compensation if the fuel was found to be outside the applicable quality specifications. Before considering the liability provisions, Judge Williams addressed the choice of law and forum provisions of the agreement. Upholding the validity of the choice of United States general maritime law and the venue in the courts of Miami-Dade County, Florida, she applied the general maritime law and held that there was an ambiguity in the two clauses addressing the supply of fuel that was off specification and held that there was a fact question of the intent of the parties that would have to be resolved.

Court declined to strike expert report in connection with summary judgment based on deficiencies in the declaration; court declined to address privity or knowledge before determining fault; *Willis v. Barry Graham Oil Service LLC*, No. 2:19-cv-165, 2020 U.S. Dist. LEXIS 223908 (W.D. La. Nov. 30, 2020) (Cain).

Opinion

Jon Willis, a platform operator, was injured while assisting in the offloading of a grocery box from Barry Graham Oil Service's work vessel, MS. TAMI. He brought suit against Barry Graham, and Barry Graham asserted limitation of liability as a defense. Willis responded with a motion for summary judgment on the limitation defense. Willis submitted the report of his expert, Robert Borison, setting forth his opinion on the negligence of the defendant, and argued that if the fact finder found the defendant was negligent in that manner, then the defendant would have privity or knowledge. Barry Graham answered the motion by seeking to strike Borison's expert report on the ground that it was not a sworn declaration itself but was attached to a declaration that was sworn as to the statements in the declaration. Judge Cain declined to strike the report, however, reasoning that it is improper to strike an expert report on summary judgment solely because it is unsworn (and also because the motion for summary judgment was premature). Judge Cain reasoned that the argument that there would be no privity if Willis established negligence as he alleged would shift the burden to Barry Graham to show that it lacked privity before there was a finding of fault.

Judge applied mixed contract doctrine to a lease-to-purchase agreement for a vessel and held that the charterer did not have a maritime lien for maintenance costs and legal expenses; *Lieblong v. Abella*, No. 19-425, 2020 U.S. Dist. LEXIS 222616 (D. Haw. Nov. 30, 2020) (Kobayashi).

Opinion

Matthew Lieblong and Ursula Abella entered into a lease-to-purchase agreement for the S/V TALISKER.

Lieblong agreed to maintain the vessel during the lease and to pay legal expenses to clear the vessel's liens. Before the end of the lease, Lieblong could exercise an option to purchase the vessel for $195,000. More than a year later, Abella claimed that there was a scrivener's error in the agreement and sought to reform the contract purchase price to be $295,000. Lieblong then exercised the purchase option for the original amount of $195,000. Abella terminated the lease, and Lieblong brought this action asserting a number of contract and tort theories, claiming a maritime lien for necessaries and also seeking a declaratory judgment. Abella then sought judgment on the pleadings on the lien counts and a declaratory judgment that Lieblong did not have a maritime lien. After beginning her discussion as to the applicable law for the contract by citing the 2004 decision of the Supreme Court in *Kirby* that rejected the treatment given to "mixed" contracts (with maritime and non-maritime aspects), Judge Kobayashi applied pre-*Kirby* mixed contract decisions and held that the contract had both maritime aspects (charter of the vessel) and non-maritime aspects (option to purchase). Finding that the exceptions to the discredited rule that a contract must be wholly maritime to be cognizable in admiralty were not applicable, Judge Kobayashi held that admiralty jurisdiction was not available on the basis of a maritime contract alone. Judge Kobayashi then addressed whether Lieblong had a maritime lien for the maintenance costs and legal expenses incurred in accordance with the agreement. She rejected a lien for the maintenance costs as the expenses were not furnished on the order of Abella, and she rejected a lien for the legal expenses to clear the title, reasoning that the legal expenses were not necessaries. Although Judge Kobayashi granted judgment on the counts asserting maritime liens, she did not grant a declaratory judgment for Abella as Abella did not counterclaim to seek declaratory relief.

District court declined to issue an injunction pending appeal after lifting the stay in a limitation action that the court held was untimely brought; *In re Martz*, No. 3:20-cv-152, 2020 U.S. Dist. LEXIS 226402 (D. Alaska Nov. 30, 2020) (Gleason).

Opinion

Jennifer Horazdovsky was killed on Flat Lake, Alaska, when the raft in which she was riding in tow of a vessel operated by her husband, Andrew, was involved in a collision with a 21-foot recreational vessel being operated by Reagan Martz, son of the boat's owners, William and Jane Martz. The Martzes filed an action seeking to limit their liability, but Judge Gleason held that the action was untimely because the letter sent by the attorney for Horazdovsky's husband to the counsel for the vessel owners that he would like to avoid naming the vessel owner in a law suit was sufficient to trigger the running of the six-month period to file the limitation action (December 2020 Update). The Martzes moved for an injunction pending appeal, arguing that they had complied with the statutory requirements of the Limitation Act and the injunction should remain in place as long as the appeal was pending. Although Judge Gleason assumed that there was sufficient chance of success on the merits of the appeal, she did not find that the Martzes would suffer irreparable harm absent an injunction pending appeal or that the balance of hardships was in their favor. Consequently, she exercised her discretion to deny the request for an injunction pending appeal.

Summary judgment was awarded to cruise line for passenger's fall attributed to improper lighting because of a lack of evidence of notice to the cruise line; *Rios v. MSC Cruises S.A.*, No. 1:19-24871, 2020 U.S. Dist. LEXIS 225064 (S.D. Fla. Nov. 30, 2020) (Ungaro).

Opinion

Aida Rios tripped and fell on a step up onto an apron stage at the Haven Lounge on the MSC SEASIDE. The brought this action against the cruise line asserting that it was negligent for the poor lighting in the lounge. The cruise line moved for summary judgment on several grounds, including that it did not have actual or constructive notice of the dangerous condition. In opposition, Rios submitted the affidavit of former MSC passenger Joseph DiJoseph, who described a similar incident. She also submitted evidence of "Watch Your Step" warning signs as evidence of MSC's notice of the dangerous condition. Judge Ungaro rejected Rios's arguments. First, Judge Ungaro declined to consider the affidavit because it was inadmissible hearsay. The statements made in the affidavit were from passenger Kathleen DiJoseph to passenger Joseph DiJoseph. Even if the affiant had testified in court, his relating of the statements of Kathleen DiJoseph were inadmissible. Moreover, the affidavit only described the condition and did not provide any evidence that the condition was reported to MSC. Thus, it did nothing to indicate that MSC was on notice of the condition. With respect to the warning sign, Judge Ungaro noted that such signs can be evidence of notice of a dangerous condition, but there must be a connection between the warning and the danger. As the complaint was for improper lighting and the sign did not reflect that there was any danger related to lighting, Judge Ungaro held that Rios failed to establish that MSC had notice of a danger from the lighting and granted summary judgment to MSC.

Vessel owner's request was granted for its Rule 30(b)(6) video deposition with court-imposed

protocols due to COVID-19 safety measures; *Antares Maritime Pte Ltd. v. Board of Commissioners of the Port of New Orleans*, No. 18-12145, 2020 U.S. Dist. LEXIS 222691 (E.D. La. Nov. 30, 2020) (Roby).

Opinion

Plaintiff, Antares Maritime, brought suit against the Board of Commissioners of the Port of New Orleans (Dock Board) for damage sustained by its vessel at the assigned berthing position, asserting that the vessel struck a protruding piece of steal plating, causing damage to the ship's hull. Antares Maritime, a Singaporean corporation, filed a motion seeking to quash or limit the 30(b)(6) deposition noticed by the Dock Board, requesting that the deposition of its corporate witnesses be conducted via videoconference rather than in person due to the overly burdensome risk posed by COVID-19. The Dock Board argued that Antares Maritime was responsible for the damage to the vessel under general maritime law, because a vessel owner is generally responsible for damaged sustained as a result of an allision. In response to Antares Maritime's motion, the Dock Board requested that (1) the court order Antares Maritime sit for its deposition in New Orleans; (2) the court allow the parties to push the discovery deadline to await for the loosening of travel restrictions; or (3) if the court order the deposition by videoconference, that the court set parameters for the deposition in the interests of fairness to the parties. Chief Magistrate Judge Roby noted that "[c]ourts across the country have recognized that the COVID-19 pandemic is requiring attorneys and litigants all to adapt 'to a new way of practicing law, including conducting depositions and deposition preparation remotely,'" and that a video deposition is safer than an in-person deposition in light of the COVID-19 pandemic. Chief Magistrate Judge Roby further noted that, because the future of the pandemic is unknown, allowing postponement for in-person depositions is pure speculation, therefore denying both in-person deposition and postponement. She recognized the potential problems associated with remote depositions, but the inevitable technical problems can be addressed through the resources and training available to the legal community. The difficulties in examining and preparing a witness are not enough alone to supersede the health concerns from the global pandemic and to require in-person deposition. Consequently, the general rule that the deposition should occur in plaintiff's chosen forum had to "give way in light of the health and safety risks posed to all involved." However, Chief Magistrate Judge Roby did agree to implement a protocol in the interest of fairness, requiring that the Rules of Civil Procedure be followed at all times, the deponent be sworn in remotely, no other parties to the lawsuit may participate in the call, no communication shall occur via the chat function or text, all phones shall be silenced, all witnesses and counsel shall be on screen the entire time, and all documents except those for impeachment shall be shared no later than ten days prior to the deposition. Finally, the court held that Antares Maritime may elect to have its in-house counsel in attendance, but the counsel must be present on a separate video screen.

Treating physician's opinions were not admissible without submitting a report in accordance with the Federal Rules, and summary judgment was granted on causation without an expert opinion; if passenger sought to introduce the totality of her medical bills, the cruise line would be allowed to introduce evidence of write downs; *Easterwood v. Carnival Corp.*, No. 19-22932, 2020 U.S. Dist. LEXIS 226569, 224252 (S.D. Fla. Dec. 1, 2020) (Bloom).

Order on motion in limine

Order on summary judgment

Mindy Easterwood was injured on June 7, 2019, while walking on the pool deck of Carnival's PARADISE. An hour before Easterwood's fall, Christy Baker fell in the same spot on the pool deck. Ms. Baker went to the ship's medical center, but it was closed. The nurse on call noted no swelling or obvious deformity, applied an ACE bandage to Baker's wrist, and told her to return to be seen by the doctor. Baker never returned, and no official incident report was created for the accident. In our December 2020 Update, we discussed Judge Bloom's decision declining to award a spoliation sanction against the cruise line for recording over the video footage of the earlier accident involving Ms. Baker. We also discussed Judge Bloom's decision excluding the opinions of Easterwood's expert Randall Jaques but allowing the opinions of the cruise line's expert, Dr. Zdenek Hejzlar. Judge Bloom then addressed the cruise line's motion in limine that included a request to prevent the passenger's treating physicians from testifying about causation if they did not prepare Rule 26 expert reports. Noting that when a treating physician testifies to opinions that are outside of his/her personal observations, the opinions are inadmissible unless the physician proves a written report in compliance with Rule 26, Judge Bloom held that testimony about causation would not be allowed from the treating physicians who did not comply with the Rule. Judge Bloom also addressed the paid-versus-incurred issue with respect to medical bills and held that if the passenger attempted to introduce the totality of her medical bills, the cruise line would be permitted to introduce evidence of write downs. Introduction of the write downs does not violate the collateral source rule as the guiding principle is that the injured party is entitled to recover the reasonable value of the treatment that was provided. Easterwood and the cruise line both moved for summary judgment on the issues of notice and whether the condition on the deck was open and obvious. Finding fact questions on these issues, Judge Bloom denied both motions. Finally, Judge Bloom addressed the causation for the gastric bypass surgery that Easterwood underwent a year after her fall on account of her diabetes, morbid obesity, and worsening acid reflux. Easterwood argued that her medical issues were aggravated by her post-injury stress, and she cited the opinions of her treating physicians that the purpose of the surgery was to relieve the stress of her medical conditions and her injury and treatment. As Easterwood did not disclose a medical expert to opine on causation,

Judge Bloom granted partial summary judgment with respect to causation between her fall and her bariatric surgery.

Federal court lacked admiralty jurisdiction over claim for hearing loss by employee of government contractor against the manufacturer of earplugs; *Sultan v. 3M Co.*, No. 20-1747, 2020 U.S. Dist. LEXIS 225863 (D. Minn. Dec. 2, 2020) (Tunheim).

Opinion

More than 500 employees of civilian contractors for the United States brought suit against the manufacturers of earplugs, claiming that the instructions on usage for the earplugs were insufficient and caused them to suffer hearing loss and tinnitus. The workers included a number of workers serving in Iraq, but one employee, Gary Martin, was a contractor for the Army Corps of Engineers working on barges in the Hudson River. The suits were brought in state court and were removed and consolidated before Chief Judge Tunheim in the District of Minnesota. He rejected removal based on the government contractor defense, the combatant activities exception, and the federal enclave doctrine. However, manufacturer 3M asserted that the claim of Gary Martin, which arose from work on barges on the Hudson River, gave the court admiralty jurisdiction. Chief Judge Tunheim agreed that the locality test for admiralty jurisdiction was satisfied, but he held that the tortious activity of supplying earplugs without adequate warnings or instructions did not have a substantial relationship to traditional maritime activity. As there was no admiralty jurisdiction and the other bases for removal had been rejected, Chief Judge Tunheim remanded the cases to state court.

Court rejected electronic service of process for maritime attachment and garnishment; *Nueva Seas AS v. USD 179,092*, No. 20-cv-3495 (D.D.C. Dec. 3, 2020) (Lamberth).

Opinion

Nueva Seas entered into a sales contract with persons holding themselves out to be representatives of JSB Seara to buy frozen chicken parts to be shipped from Brazil to China. Nueva Seas was presented with bills of lading and was informed that the cargo was shipped on the M/V MAERSK LEON. Nueva Seas then transferred the purchase price to an account at Truist Bank. The transaction was fraudulent, and Nueva Seas brought this action and sought to garnish/attach the bank account. To expedite the service of the process for the garnishment/attachment, Nueva Seas moved for service on the garnishee bank by facsimile or other verifiable electronic means, including email. Judge Lamberth did authorize the issuance of the process for maritime attachment and garnishment. However, he found no support in the Rules for electronic service, and instead appointed one of Nueva Seas' proposed process servers to serve the garnishee.

Limitation claimant could proceed against the vessel captain outside the limitation action, but his stipulation had to protect the insurance proceeds of the vessel owner from the direct action against the vessel owner's insurer in the state suit in order to have the stay lifted against the vessel owner; *In re Daigle Towing Service, LLC*, No. 19-13521, 2020 U.S. Dist. LEXIS 226428 (E.D. La. Dec. 3, 2020) (Lemmon).

Opinion

Daigle Towing brought this limitation action in connection with an injury suffered by Lance Lacrosse on Daigle Towing's M/V BRAYDEN RAY. Lacrosse, brought an action in state court against the captain of the vessel, Morgan Gaudet, and a direct action against the vessel's insurer, Allianz, under Louisiana law. In accordance with the precedent in the Fifth Circuit, the limitation stay did not apply to the state court proceeding against the captain, but the Fifth Circuit requires the limitation action to proceed before a direct action against the liability insurers in order to avoid depleting the limitation fund (the ship owner has a priority claim on the insurance proceeds). Consequently, Judge Lemmon ruled that Lacrosse had to submit a stipulation that Daigle Towing had a priority claim on any insurance proceeds that Lacrosse might win in a direct action against Allianz before she would lift the stay in the limitation action.

Stipulation was sufficient to allow lifting of the stay in a single-claimant limitation action; *In re Roen Salvage Co.*, No. 20-C-915, 2020 U.S. Dist. LEXIS 227813 (E.D. Wis. Dec. 4, 2020) (Griesbach).

Opinion

Roen Salvage's crew boat MONARK #2 was being used to inspect a pipeline as part of a dredging project near Duluth Harbor, Minnesota, in Lake Superior. The vessel capsized after being struck by two waves, and Donald

Sarter, Project Superintendent, drowned. Roen Salvage filed a limitation action, and Sarter's widow filed a motion to lift the stay, based on the single-claimant exception, so that she could file a Jones Act claim in state court. Roen Salvage objected on three grounds: that the motion did not specify the state court where the suit was to be brought, that Sarter was not a seaman and did not have a valid Jones Act claim, and that the stipulation did not reserve to the limitation court the right to decide Roen's right to exoneration from liability. Judge Griesbach rejected Roen Salvage's arguments and lifted the stay. First, Judge Griesbach held that it was not necessary for Sarter's widow to identify the specific court in which she intended to assert her common-law remedies. Second, whether Sarter was a seaman was a fact issue to be decided by the state court. Third, it was not necessary that Sarter's widow stipulate to the jurisdiction of the limitation court over Roen's claim for exoneration, only that she stipulate to the jurisdiction of the limitation court over issues related to limitation.

Cruise line's and shore excursion operator's motions to dismiss action brought by passenger who slipped on a nature path were rejected by the magistrate judge; *Thayer v. NCL (Bahamas) Ltd.*, No. 20-23174, 2020 U.S. Dist. LEXIS 229367 (Dec. 4, 2020) (Torres).

Opinion

Jill Thayer, a passenger on the ESCAPE, was injured while participating in a shore excursion that included a scenic walk around Cadillac Mountain in the Acadia National Park in Bar Harbor, Maine. She stepped onto looser gravel that moved from underneath her, causing her to lose her balance and slip on a moss-covered boulder. She brought multiple claims against the cruise line and excursion operator asserting that the excursion was advertised as an easy activity level but it was dangerous due to the conditions of the path and lack of an adequate railing. The cruise line and excursion company filed motions to dismiss, and Magistrate Judge Torres recommended that the motions be denied except for the claim that Thayer was a third-party beneficiary of the contract between the cruise line and excursion operator (as the contract rejected that status). As the procedural context was a motion to dismiss, it was sufficient that Thayer assert (in her amended complaint) that the excursion company had notice of complaints regarding this excursion from previous passengers. It was plausible that the condition of the nature path was not open and obvious because Thayer had been walking on hard tack gravel until she stepped on the loose gravel. Magistrate Judge Torres also rejected the argument that the naturally occurring geographic condition should be treated different from a manmade walkway as the amended complaint did not indicate whether the path was manmade or not. For similar reasons, Magistrate Judge Torres declined to dismiss the claims against the cruise line for failure to warn. Thayer sought to apply Florida's statute forbidding misleading advertising, and the cruise line objected that Thayer was not in Florida when she read the advertising and that her injury was not in Florida. However, Magistrate Judge Torres held that the statute was applicable as the cruise line disseminated advertising, alleged to be misleading, to Florida residents. As Thayer was able to allege facts that the cruise line had notice that the excursion was not easy, Magistrate Judge Torres recommended against dismissal of the claims against the cruise line based on negligent selection and retention of the excursion operator. Although Magistrate Judge Torres dismissed the claim against the excursion company that Thayer was a third-party beneficiary of the contract between the excursion company and the cruise line (based on the express terms of the contract), he did not recommend that the claims be dismissed alleging that the defendants were vicariously liable for each other's actions based on agency or apparent agency or as joint venturers.

Court ordered intra-district transfer of limitation action from Lafayette to Lake Charles, cognizant of the damage to the courthouse in Lake Charles from Hurricane Laura; *In re Mike Hooks, LLC*, No. 6:20-691, 2020 U.S. Dist. LEXIS 229842 (W.D. La. Dec. 7, 2020) (Whitehurst).

Opinion

David Tyrone Lavan was injured in an explosion on Mike Hooks' dredge while it was operating on the Calcasieu River in Calcasieu Parish, Louisiana. Mike Hooks filed this limitation action in the Lafayette Division of the Western District of Louisiana, and Lavan moved to transfer the matter to the Lake Charles Division where most of the witnesses and evidence were located. Although Magistrate Judge Whitehurst was cognizant of the damage sustained by the federal courthouse in Lake Charles from Hurricane Laura, she held that the convenience factors weighed in favor of transfer of the case to the Lake Charles Division.

Injury suit by crewmember was transferred to the court where another crewmember previously filed suit based on the same incident; *Bernard v. Omega Protein Inc.*, No. 6:20-CV-1301, 2020 U.S. Dist. LEXIS 230660 (W.D. La. Dec. 8, 2020) (Hanna).

Opinion

Timmy Minor and Roland Bernard, Jr., crewmembers on the F/V TERREBONNE BAY, were injured when an unsecured net fell overboard from the vessel. Minor filed a lawsuit in the Western District of Louisiana, and the next day Bernard filed suit in the Eastern District of Louisiana. The suits were brought against the same defendant and were similar in their assertions. Applying the Fifth Circuit's first-to-file rule, Judge Hanna transferred the second suit to the Western District of Louisiana.

Clean-up workers' BELO suits were dismissed when one's expert was unable to establish causation and the other failed to produce any expert evidence; *Collins v. BP Exploration & Production, Inc.*, No. H-19-2198, 2020 U.S. Dist. LEXIS 229794 (S.D. Tex. Dec. 8, 2020) (Atlas); *Hernandez v. BP Exploration & Production, Inc.*, No. 19-11517, 2020 U.S. Dist. LEXIS 239496 (E.D. La. Dec. 21, 2020) (Brown).

Opinion Collins

Opinion Hernandez

Tiera Collins brought a Back-End Litigation Option suit against BP pursuant to the Medical Benefits Class Action Settlement Agreement, alleging that she was exposed to chemicals and other substances while working as a clean-up worker following the DEEPWATER HORIZON/Macondo blowout. She designated Mark D'Andrea, M.D., as her expert, but Dr. D'Andrea was unable to offer testimony on causation for Collins' conditions. Without expert evidence of causation, Judge Atlas granted BP's motion for summary judgment and dismissed the suit. Clarence Hernandez, III, brought his BELO action asserting that his medical conditions resulted from exposure to oil and other substances while performing response activities. He did not produce an expert report or other expert evidence to support causation, and Chief Judge Brown dismissed his case.

Passengers who were injured in a vessel collision could not maintain an unseaworthiness claim in the limitation action brought by the owner of the other vessel; *In re Motes Lease Service, L.L.C.*, No. 19-12018, 2020 U.S. Dist. LEXIS 232155 (E.D. La. Dec. 10, 2020) (Morgan).

Opinion

After a collision involving its vessel M/V A-WILL, Motes Lease Service brought this limitation action, and claims were filed by three passengers on the vessel that collided with the A-WILL. The claimants brought claims for negligence of Motes Lease Service as well as unseaworthiness of the A-WILL. Motes Lease Service sought summary judgment on the unseaworthiness claims, and Judge Morgan held that the vessel owner did not owe a non-delegable duty to provide a seaworthy vessel to the claimants. Therefore, she dismissed the unseaworthiness claims, but held that the negligence claims should remain.

"Quintessential disputes of material facts" prevented summary judgment on Jones Acts claims; court granted summary judgment on the issue of punitive damages; *Wynn v. Harley Marine Services Inc.*, No. 19-cv-596, 2020 U.S. Dist. LEXIS 234642 (N.D. Cal. Dec. 11, 2020) (Donato).

Opinion

Bryan Wynn was injured while serving as Chief Engineer on the defendants' tugboat M/V AHBRA FRANCO when the vessel was involved in a collision while Wynn was putting on his pants in his stateroom. Wynn brought suit under the Jones Act and general maritime law, and the defendants moved for summary judgment in their favor on all the claims and on the availability of punitive damages. Summary judgment was denied on the Jones Acts negligence and general maritime law unseaworthiness claims, but was granted for defendants on the prayer for punitive damages. Judge Donato noted that summary judgments are disfavored in Jones Act cases and listed the elements of a Jones Act negligence claim as duty, breach, notice, and causation. Defendants argued that they did not breach their duty to provide Wynn with a reasonably safe place to work and that Wynn's injuries were caused by his failure to brace himself while putting on his pants. Judge Donato reasoned that, upon examining the conflicting evidence about whether the tugboat was operated by an inexperienced trainee or whether the tugboat was travelling at an unreasonably high speed, a reasonable juror could find that defendants breached their duty to provide a reasonably safe working environment. As to the element of causation, Judge Donato noted that the Jones Act applies a "featherweight" causation standard to negligence claims and that summary judgment is inappropriate if the conclusion may be drawn that negligence of the employer played any part in the injury. Judge Donato determined that this threshold was easily cleared by the undisputed fact that Wynn was injured after the M/V AHBRA FRANCO collided with another vessel (he also noted Wynn's assertion that, after "forty years of experience in the maritime industry," he knows how to put on his pants at sea). As for the unseaworthiness claim, Judge Donato determined that Wynn is only required to prove that his injuries were caused by a physical or other defect that prevented the tugboat from being reasonably fit for its intended use. Wynn proffered expert testimony that the tugboat, which had "Shibata"

fenders, would have been more effective at reducing impacts with other vessels if it had tire fenders. Judge Donato considered this evidence sufficient for a reasonable jury to find that the tugboat was not suited to safely perform its intended task. Judge Donato did grant summary judgment on the claims for punitive damages for the Jones Act and unseaworthiness counts, citing the decision of the Supreme Court in *Batterton* with respect to unseaworthiness and the decision of the Ninth Circuit in *Kopczynski* with respect to the Jones Act.

Court applied majority rule to remand case that was removed based on original admiralty jurisdiction; *Silagyi v. Towriss*, No. 20-61850, 2020 U.S. Dist. LEXIS 234013 (S.D. Fla. Dec. 11, 2020) (Dimitrouleas).

Opinion

Jarret and Lauren Silagyi brought this suit in state court in Broward County, Florida, seeing to recover for injuries they sustained as passengers on the BLUE STEEL, operated by Daniel Towriss, when the vessel struck the south jetty at Port Everglades. Towriss removed the case to federal court, and Judge Dimitrouleas concluded that there was no diversity jurisdiction as Towriss and the Silagyis were citizens of Indiana. Following the decisions of a majority of courts, Judge Dimitrouleas declined to hold that the case could be removed based on the original admiralty jurisdiction over the accident. He then referred the Silagyis' motion for attorney's fees to Magistrate Judge Snow for her recommendation.

Claims of negligent misrepresentation and apparent agency for passenger's death on snuba excursion in the Bahamas were sufficient to survive a motion to dismiss; claims for punitive damages for wrongful death were dismissed based on DOHSA; claims for punitive damages for infliction of emotional distress were dismissed for insufficiency; *Case v. Celebrity Cruises Inc.*, No. 20-21826, 2020 U.S. Dist. LEXIS 234506 (S.D. Fla. Dec. 11, 2020) (Torres).

Opinion

Jeffrey Lane Case, a passenger on the CELEBRITY EQUINOX, drowned while participating in a snuba excursion in Nassau, Bahamas. His widow brought this action against the cruise line and excursion operator for her husband's wrongful death and for infliction of emotional distress on her. The cruise line moved to dismiss the counts of negligent misrepresentation that the excursion was safe and easy and for vicarious liability for the negligence of the excursion operator based on apparent agency, but Magistrate Judge Torres recommended that the motion be denied. He held that allegations about the safety of the excursion were sufficient to satisfy the heightened pleading standard for misrepresentation claims and that Case's widow had pleaded sufficient facts suggesting that the snuba excursion was in fact a cruise line excursion. Magistrate Judge Torres did recommend that the claims for punitive damages that were asserted under Florida law, the law of the Bahamas, and general maritime law for wrongful death were preempted by DOHSA's limitation to pecuniary losses and should be dismissed. Finally, although Ms. Case asserted a claim for infliction of emotional distress, she did not allege intentional conduct sufficient to permit an award of punitive damages. Therefore, Magistrate Judge Torres recommended that her demand for punitive damages on this claim also be dismissed.

Court allowed late claims after the time expired to file claims in a limitation action; *Nana's Landing, LLC v. Murray American River Towing, Inc.*, No. 5:20-cv-4, 2020 U.S. Dist. LEXIS 235021 (N.D. W. Va. Dec. 14, 2020) (Bailey).

Opinion

On January 13, 2018, barges broke free from a fleeting facility and one crashed into the plaintiff's dock on the Ohio River. Limitation actions were filed by the owners/operators of the barges, and the court ordered claims to be filed before October 15, 2018. Nana's Landing did not file this suit until January 9, 2020, long after the time to file complaints. As the limitation actions were still in their infancy and discovery had not yet begun, Judge Bailey found that the vessel interests would not be prejudiced by the late claim, declined to dismiss the suit, and ordered that it be consolidated with the limitation actions.

Court declined to exercise supplemental jurisdiction over case brought in state court and removed under the court's admiralty jurisdiction by consolidating the removed case with a case brought in federal court; *Allied Shipyard, Inc. v. Moore*, No. 20-2744, 2020 U.S. Dist. LEXIS 235197 (E.D. La. Dec. 15, 2020) (Milazzo).

Opinion

Logan Moore agreed to guarantee the debts of Marlin Oilfield Divers to Allied Shipyard with respect to its vessel, the M/V IRON MAIDEN. Marlin brought an action in federal court seeking a declaratory judgment that it did not owe any amount to Allied Shipyard because Allied's work resulted in a fire that damaged the IRON MAIDEN. That action was brought under the court's admiralty jurisdiction. Thereafter, Allied brought an action in Louisiana state court against Moore as guarantor of Marlin's debts. Moore removed the action to federal court based on its original admiralty jurisdiction and moved to consolidate the case with the pending federal action involving the same issues. Following the majority rule, Judge Milazzo held that the federal court did not have removal jurisdiction based on the court's original admiralty jurisdiction, and she declined to hold that the court had supplemental jurisdiction over the removed action as it was a separate suit. She declined to apply supplemental jurisdiction to claims in separate actions even if they were consolidated. Therefore, Judge Milazzo remanded the suit brought by Allied, but she declined to award attorneys' fees as it could not be said that Moore "had no objectively reasonable basis for removal."

Court granted summary judgment to seaman on his Jones Act claim based on his employer's admission of negligence and granted summary judgment to the employer on the seaman's claim of punitive damages for failure to pay maintenance and cure based on a lack of evidence of willful misconduct; *Beam v. Watco Transloading, LLC*, No. 18-cv-2018, 2020 U.S. Dist. LEXIS 236224 (S.D. Ill. Dec. 16, 2020) (Yandle).

Opinion

Kevin Beam was working on a floating dock aiding in the loading of coal onto barges at Watco's Cora Terminal on the Mississippi River. He was employed as a deckhand and assigned to the tow boat M/V IDA L. During the work a metal cable came loose and struck Beam on the neck and back, requiring extensive medical treatment. Watco initially paid benefits to and on behalf of Beam as a longshore worker, but then changed to paying maintenance and cure. Watco paid maintenance at the rate of $35 per day ($245 per week) although Beam contended that his living expenses were $1230.14 per month. Beam stated that he had incurred over $940,000 in medical bills and that Watco had paid only $252,629.68 of those bills. Beam and Watco filed cross motions for partial summary judgment. Beam argued that he was entitled to summary judgment of liability for negligence under the Jones Act, and Watco admitted that it was negligent. Consequently, Judge Yandle granted that motion. Watco moved for summary judgment on the unseaworthiness claim and on the claim for punitive damages for willful and wanton failure to pay maintenance and cure. As Beam did not oppose the granting of the motion on the unseaworthiness count, Judge Yandle dismissed the unseaworthiness count. There were disputes as to the amount of maintenance (as the amount paid was not sufficient to cover Beam's living expenses) and over the medical expenses; however, the disputes over what was owed were not evidence of bad faith. Beam argued that summary judgment should be denied because he needed to obtain the testimony of the corporate representative for Watco on the issue of bad faith. However Beam sought to depose the corporate representative, and limitations on the deposition were the subject of a motion for protective order. The deadline for taking the deposition elapsed, and Beam did not supplement his response to the motion for summary judgment. As there was no evidence to support the claim of punitive damages, Judge Randle granted Watco's motion.

Passing vessel was allowed to maintain a claim against its pilot under state law for gross negligence or willful misconduct when the passing vessel's wake caused damage to boats and docks at a marina; *Port of Kalama v. M/V SM MUMBAI*, No. 3:20-cv-621, 2020 U.S. Dist. LEXIS 236549 (D. Ore. Dec. 16, 2020) (Immergut).

Opinion

Christopher Boyce was the lead pilot (accompanied by two trainee pilots) on the M/V SM MUMBAI, an ocean-going vessel that was navigating up the Columbia River. Boyce directed the vessel to increase its speed from half ahead to full ahead (approximately 15 to 16 knots) before it passed the Kalama Export grain terminal. A few minutes later, it passed the Port of Kalama's marina at the same speed, creating a three- to four-foot wake that caused damage to the boats moored at the marina and the marina's docks. Boyce reported to the Oregon Board of Maritime Pilots that is his standard practice is to reduce the vessel's speed to 10 knots when passing the marina. The Port of Kalama brought his suit against the owner of the SM MUMBAI, which brought a third-party action against Boyce. As Oregon law limits the liability of pilots unless they are guilty of willful misconduct or gross negligence, the vessel owner alleged that Boyce was liable on those grounds. Boyce moved to dismiss the complaint, but Judge Immergut denied the motion, holding that the complaint asserted a facially plausible claim of the pilot's conscious indifference or reckless disregard to the rights of the vessels/docks by disregarding his standard practice and maintaining a speed of 15 to 16 knots when passing the marina.

Court did not lift the stay in a limitation action when a second claimant announced her intent to bring a late claim in the limitation action; *In re Amble*, No. 20-3713, 2020 U.S. Dist. LEXIS 236811 (N.D. Cal. Dec. 16, 2020) (Alsup).

Opinion

Jessica Plante purchased a vessel from Brian Christopher Amble. A month later a fire broke out on the vessel while it was docked in Redwood City, California. Plante and Aaron Horton were injured. In response to letters from Plante, Amble filed this action seeking limitation of liability and attempted to serve Plante and Horton. Horton was served and filed a claim, but Amble was not able to locate Plante. A default was entered against Plante in the limitation action, and Horton moved to lift the stay to pursue Amble in state court. Meanwhile, Amble brought a third-party action against Plante in the limitation action and continued to try to serve Plante. Amble was finally successful in serving Plante, who advised that she was going to hire an attorney and file a claim. As it was still possible that there would be multiple claims and that the court might set aside the default, Judge Alsup declined to lift the stay at this time.

Cooking for passengers being transported by the vessel was work as a seaman and was exempt from overtime under the Fair Labor Standards Act; *Hanna v. American Cruise Lines, Inc.*, No. 3:19-cv-74, 2020 U.S. Dist. LEXIS 236847 (D. Conn. Dec. 17, 2020) (Haight).

Opinion

Rimon Hanna was employed by American Cruise Lines as an Executive Chef on its passenger ship AMERICAN SPIRIT. In that capacity, he prepared meals for crew members of the vessels and passengers while the vessel operated in waters off the United States West Coast. After he was fired, Hanna brought this suit in federal court seeking to recover overtime under the Fair Labor Standards Act and for wrongful termination. The FLSA contains an exemption for "seamen," and Judge Haight noted the decisions that held that workers who cook for seamen on vessels have been held to be seamen within the exemption in the FLSA, but that held that onboard cooks who prepared food for non-crew members employed by other companies were not. In this case, Judge Haight held that cooking for passengers who are being transported by the vessel falls within the FLSA exemption for seamen, and he therefore dismissed the FLSA claim. As that claim was the only basis for federal jurisdiction, Judge Haight dismissed Hanna's remaining claims without prejudice.

After settling with the sole claimant in a limitation action, the vessel owner was entitled to exoneration from liability; *In re Fun Zone Boat Co.*, No. 19-865, 2020 U.S. Dist. LEXIS 239932 (C.D. Cal. Dec. 17, 2020) (Carter).

Opinion

Fun Zone Boat Co. brought this limitation action on behalf of its vessel SHOWBOAT after Alex Aguilar was injured on the vessel. Aguilar was the sole person to file a claim, and Fun Zone entered into a settlement with him. Fun Zone then moved for exoneration of liability, and as the time had passed to file claims and there were no claimants to oppose the motion, Judge Carter exonerated Fun Zone from liability.

Lack of pleading of constructive notice required dismissal of vicarious liability claim against cruise line; *Navarro v. Carnival Corp.*, No. 19-21072, 2020 U.S. Dist. LEXIS 237951 (S.D. Fla. Dec. 18, 2020) (Moreno).

Opinion

Margarita Navarro was injured after being tripped by a cruise line photographer who unexpectedly stuck out her leg while taking a picture. Navarro brought this suit alleging that Carnival breached a duty of care to her by creating a hazardous condition, failing to properly rope off the area, failing to train its personnel to prevent such accidents, and failing to warn passengers of a dangerous condition. Judge Moreno dismissed the complaint (November 2019 Update) because Navarro failed to explain how the cruise line had actual or constructive notice of the risk-creating condition (the unexpected leg movement). Additionally, the complaint failed to allege facts to support the negligence theories; for example, how did the leg movement fall below the requisite standard of care, or how did the failure to warn fall below the standard of care. After Navarro filed an amended complaint, Judge Moreno again held that the complaint was insufficient. Navarro's allegation that she tripped after unexpectedly encountering a photographer moving into her path in a high traffic area did not overcome an open and obvious defense. Judge Moreno reasoned that "common sense says that busy areas always raise a risk of

unexpected physical contact with other persons or with objects." Judge Moreno also found the allegations with respect to Carnival's notice of the dangerous condition were insufficient. Aside from the conclusory allegation that Carnival should have been aware of the risk of tripping caused by the photographer sticking out her leg in the high traffic area when she kneeled to take a photograph, the complaint did not allege how Carnival was aware of the risk so that it could have corrected it. Without evidence of prior incidents, close calls, or complaints about photographers tripping passengers, the complaint would be based on a "general foreseeability" theory of liability that would convert carriers into insurers of passenger safety. Although the amended complaint did not correct the deficiencies in the first complaint, Judge Moreno did give Navarro leave to file another complaint; however, he warned that the failure to state a claim a third time would result in dismissal with prejudice (*see* April 2020 Update). In support of her final amendment, Navarro argued that notice was unnecessary because she pleaded her negligence claim based on vicarious liability—that Carnival was responsible for the conduct of its employee regardless of whether it had notice of the danger of the employee's conduct. Judge Moreno agreed that vicarious liability does not require the employer to be at fault separate from its employee, but it does not excuse the requirements of duty and notice. Judge Moreno recognized that it could be difficult to classify a negligent employee as a dangerous condition, but he stated that the plaintiff could show that the employee had acted negligently before or that there had been similar incidents with photographers in high-traffic areas. As there was no exception to the notice requirement and as Navarro's allegations of notice were conclusory, Judge Moreno dismissed her complaint.

Passenger was not a third-party beneficiary of the contract between the cruise line and the excursion company so as to provide specific jurisdiction over an injury suffered by a passenger on an excursion in Grand Cayman, and the excursion company lacked sufficient contacts with the United States for general jurisdiction; *Storm v. Carnival Corp.*, No. 20-22227, 2020 U.S. Dist. LEXIS 239896 (S.D. Fla. Dec. 18, 2020) (Torres).

Opinion

James Storm, a passenger on the CARNIVAL MIRACLE, was injured during a shore excursion in Grand Cayman that was operated by Caymanian Land & Sea Cooperative Society. Storm brought this action in federal court in Miami against the cruise line and excursion operator, asserting that the court had personal jurisdiction over the Caymanian excursion operator based on the forum selection clause (Southern District of Florida) in the shore excursion agreement between the cruise line and excursion operator. Finding insufficient intent within the agreement that passengers would be third-party beneficiaries of the agreement, Magistrate Judge Torres ruled that Storm's claims did not arise under the agreement but in tort from his injury in the Cayman Islands. Therefore, there was no specific jurisdiction over the excursion operator in Florida. Turning to general jurisdiction, Magistrate Judge Torres did not consider the marketing of the shore excursion by Carnival in Florida to be sufficient to establish that the Caymanian company should be subject to general jurisdiction in Florida. Consequently, he recommended that the case against the excursion operator be dismissed for want of personal jurisdiction.

Fact questions about the nature of the seaman's treatment after a prior trial on her maintenance and cure claim resulted in denial of the employer's motion to dismiss the seaman's second suit seeking maintenance and cure; *Jackson v. NCL America, LLC*, No. 19-25115, 2020 U.S. Dist. LEXIS 241972 (S.D. Fla. Dec. 18, 2020) (Torres).

Opinion

Dorothy Jackson was injured on November 16, 2012, when she slipped on an onion peel while working as a crew member on the M/V PRIDE OF AMERICA. She brought suit against her employer, and after a bench trial the court entered judgment in her favor on her cure claim, but limited the recovery to the rate that the defendant would have paid for a physician in its network of providers. Although Jackson's physician declared that she had reached maximum cure in 2016, she filed an amended complaint in 2020, seeking to recover for surgeries on her back that were performed in 2017 and 2019. Jackson's employer moved to dismiss the amended complaint on the ground that the complaint did not allege that there was an available treatment that could cure her condition. Although the complaint was unclear whether there was an advancement in medical knowledge or if the treatment was unavailable at the time of the previous trial, Magistrate Judge Torres held that the allegations were sufficient to withstand a motion to dismiss ("Plaintiff has done just enough to survive a motion to dismiss").

Federal court had admiralty jurisdiction over dispute from a divorce involving ownership in a vessel, but the court gave collateral estoppel effect to the divorce court's decree on the sale of the vessel; *Steele v. Sailing Vessel "Polaris,"* No. GJH-19-3314, 2020 U.S. Dist. LEXIS 239212 (D. Md. Dec. 21, 2020) (Hazel).

Opinion

Jessica and Mark Steele bought the sailing vessel POLARIS in 2016 as joint tenants. Two years later they were divorced, and the court ordered that the vessel be sold with the proceeds used to repay the purchase loan for the vessel and then be divided equally between the parties. Mark Steele then unilaterally sold the vessel for $14,000 to Alyssa Tantallon, LLC and signed the bill of sale "on behalf of sellers." Jessica Steele sought a hearing in the divorce court to question the legitimacy of the sale, arguing that the vessel was not sold in an arms-length transaction and was sold below its market value. She also brought this action in federal court, arresting the vessel and asserting a right to possession of the vessel as a 50% owner. The suit included in personam claims against Mark Steele and Alyssa Tantallon, LLC. The defendants in the federal action filed an emergency motion for release of the arrest of the POLARIS in which they argued that the court did not have jurisdiction as the action involved a contract for sale and a divorce decree that did not support admiralty jurisdiction. Judge Hazel

disagreed, reasoning that Jessica Steele's action asserted an ownership interest in the vessel that asked the court to quiet title to the vessel. The defendants next argued that the divorce court had issued an order upholding the sale of the vessel and that the federal court should give that order collateral estoppel effect. Judge Hazel agreed and held that Jessica Steele was barred from challenging the validity of the sale. Having lost in the divorce court, she could not raise the same issues in the federal proceeding, and Judge Hazel ordered the vessel released. Judge Hazel also ordered that Jessica Steele bear the costs of the arrest, but he declined to find that she had acted in bad faith and did not assess attorneys' fees against her for a wrongful seizure.

Suit against the United States for injuries sustained on a radar vessel had to be brought without a jury in the district where the vessel was located; *Gimutao v. United States*, No. 3:20-cv-1868, 2020 U.S. Dist. LEXIS 240851 (S.D. Cal. Dec. 22, 2020) (Benitez).

Opinion

Julius Gimutao brought this suit against the United States under the Public Vessels Act and the Suits in Admiralty Act seeking to recover for injuries he sustained while working on the SBX-1, a sea-based radar vessel. The United States moved to strike Gimutao's jury demand and to transfer the case to the District of Hawaii, and Judge Benitez granted the motion. First, jury trials are not allowed in suits under the Public Vessels Act or the Suits in Admiralty Act. Second, venue is proper in a suit under the Public Vessels Act in the district in which the vessel is found when the complaint is filed. In this case, the United States attached the log book for the SBX-1 reflecting that the vessel was moored in Pearl Harbor when the complaint was filed, which Judge Benitez considered sufficient to satisfy the venue provision.

Court allowed late claims of ownership to an arrested vessel and declined to require those claiming ownership to share in the custodial expenses; *Ramirez-Alonso v. M/Y THE COMMISSIONER*, No. 20-1451, 2020 U.S. Dist. LEXIS 241184 (D.P.R. Dec. 22, 2020) (McGiverin).

Opinion

Jose G. Ramirez-Alonso arrested the yacht THE COMMISSIONER, asserting a maritime line for unpaid seaman's wages ($48,461.70) plus penalty wages ($149,345.04). The court appointed a substitute custodian. Although the claim of owner was due within 14 days, statements of interest in the vessel were not filed until after 14 days from the arrest. The seaman moved to strike the statements of interest, but Magistrate Judge McGiverin exercised his discretion and did not require strict compliance with the 14-day filing period, particularly in light of the health crisis from the COVID-19 pandemic. He also held that the claims were sufficiently colorable to have standing, including a party who sold the yacht but was still the record owner and mortgagor. Ramirez-Alonso then argued that the parties claiming ownership in the vessel should be required to share in the custodial costs. The parties claiming ownership argued that it was inappropriate for them to have to share in the costs as the claims of Ramirez-Alonso were exaggerated or lacking in legal basis (pointing out that penalty wages are not applicable to wages earned on a yacht). In the interest of fairness, Magistrate Judge McGiverin declined to require those claiming ownership in the vessel to share in the custodial costs at this time, advising Ramirez-Alonso that he could renew his motion only if he addressed the contention that the claims were exaggerated or lacking in legal basis.

Court held that it lacked jurisdiction over an in personam suit for breach of a loan agreement on a vessel and maritime attachment of a vessel that was not encumbered by the ship mortgages; *Nassau Maritime Holdings Designated Activity Co. v. Riverside Navigation, Ltd.*, No. 20-614, 2020 U.S. Dist. LEXIS 241843 (M.D. La. Dec. 22, 2020) (Jackson).

Opinion

This case arises from the alleged breach of a loan agreement and ship mortgages. Nassau Maritime is the mortgagee by assignment of the ship mortgages and brought this in personam action based on the court's admiralty jurisdiction against parties who were liable for the loan. Nassau Maritime sought to attach a vessel that was not encumbered by the mortgages, and the owner argued that the Ship Mortgage Act (the Commercial Instruments and Maritime Liens Act) did not provide jurisdiction for the attachment. Noting that the statute provides that the mortgagee may enforce a claim for the debt secured by the mortgaged vessel in a civil action in personam in admiralty, Judge Jackson reasoned that the debt at issue was not secured by the vessel that was attached. Holding that the statute did not provide the court with jurisdiction and that it would be improper to exercise jurisdiction against the in personam defendants pursuant to the Ship Mortgage Act when the mortgagee did not have a preferred mortgage on the attached vessel, Judge Jackson vacated the attachment and dismissed the complaint.

Court applied state law in piercing the corporate veil with respect to a vessel storage contract and applied the state statute of frauds in connection with a contract involving sale of a vessel; *Seward Property, LLC v. Arctic Wolf Marine, Inc.*, No. 3:18-cv-78, 2020 U.S. Dist. LEXIS 241431 (D. Alaska Dec. 23, 2020) (Holland).

Opinion

Seward Property owns property in Seward, Alaska, that it uses to drydock vessels. Seward brought this action under the court's admiralty jurisdiction against Arctic Wolf Marine, Henry Tomingas, and Del Schultz seeking to recover storage charges for the BERING EXPLORER. Arctic Wolf underwent more than one round of involuntary dissolution proceedings, and there was a dispute over ownership of the vessel and responsibility for the storage charges. The litigation was further complicated by the failure of Arctic Wolf or Schultz to answer the suit. Seward sought to hold Schultz and Tomingas personally liable for breach of the storage agreement, and Judge Holland applied Alaska law on piercing the corporate veil to find Schultz liable based on his failure to answer admissions. This allowed Judge Holland to hold Schultz personally liable for Arctic Wolf's breach of the covenant of good faith and fair dealing. Tomingas did participate in the litigation and counterclaimed for intentional interference with his contract with Schultz for the sale of the BERING EXPLORER by which Tomingas agreed to transfer title to the vessel to Schultz, and Schultz agreed to convey real estate in Arizona to Tomingas. However, the parties did not complete a written contract to that effect. Noting that both Arizona and Alaska have statutes of fraud that require a written contract for sale of real property, Judge Holland granted summary judgment to Seward on Tomingas' claim of intentional interference with contract.

Shipper's cargo insurer had standing to bring a subrogation claim against a freight forwarder for loss during shipment even though the cargo was shipped on FOB terms; *Interested Lloyds Underwriters v. Danzas Corp.*, No. 20-22065, 2020 U.S. Dist. LEXIS 241180 (S.D. Fla. Dec. 23, 2020) (Altonaga).

Opinion

International Brand Development purchased some Duke's Mayonnaise (in Charleston, South Carolina) and sold it to Hipermercados Tottus in Chile. The goods were sold on FOB terms (title and risk of loss passed to Tottus in Charleston). Lloyds Underwriters issued a cargo insurance policy to Pegasus Parts Distribution and associated or affiliated companies covering the shipment, and Pegasus argued that International Brand was an associated or affiliated company. Tottus made the arrangements for the ocean carriage through freight forwarder Danzas Corp. The mayonnaise was supposed to be shipped at 18.3 degrees Celsius, but the bill of lading showed an incorrect temperature of minus 18.3 degrees Celsius. Although a corrected bill of lading was issued, the mayonnaise was shipped at the wrong temperature and was a total loss. Lloyds Underwriters paid for the loss and brought this subrogation claim against the freight forwarder, which challenged the standing of Lloyds Underwriters to bring the claim. There was a fact question whether International Brand was covered under the policy that precluded summary judgment, which left a legal question whether the shipper had a right to bring the action when the shipment was on FOB terms. Noting that the claim was based on negligence that was not dependent on the terms of the sales contract between International Brand and Tottus, Judge Altonaga rejected the argument that International Brand (and Lloyds Underwriters by subrogation) did not have standing to pursue the freight forwarder. The liability of the freight forwarder was not as a carrier pursuant to the Carriage of Goods by Sea Act but was based on negligence in supervising the transportation of the mayonnaise. That liability was subject to the limitations in the freight forwarder's terms and conditions, which were disputed at the summary judgment stage.

Alleging that the deck was dangerous from water or other slippery substance that caused numerous accidents was sufficient to state a negligence claim; *Haynes v. Carnival Corp.*, No. 20-21921, 2020 U.S. Dist. LEXIS 243251 (S.D. Fla. Dec. 29, 2020) (Scola).

Opinion

Thomas Haynes slipped and fell on the CARNIVAL GLORY on a wet or slippery substance on the deck while entering the interior of the ship from an exterior doorway. The cruise line moved to dismiss the complaint, arguing that the passenger had no basis to assert that the deck was slippery just because it was wet and that the incident itself was insufficient to state a claim for negligent maintenance. Judge Scola disagreed. The complaint described a chronic issue on that vessel and other vessels in which a slippery substance accumulated in this area, causing injuries to passengers and crew. In fact, the cruise line had installed doorway air cushions that had failed to remedy the accumulation of moisture on the doorway surface. Judge Scola considered those allegations to be sufficient to state a negligence claim against the cruise line.

From the state courts:

Court applied state law to determine that there was sufficient evidence of causation from asbestos exposure for a seaman's death from lung cancer; *Bartel v. Farrell Lines, Inc.*, No. 109139, 2020 Ohio App. LEXIS 4371 (Ohio App 8th Dist. Dec. 3, 2020) (Mays).

Opinion

Robert F. Stewart worked in the deck department for Ford Motor Company on ships that had asbestos-insulated steam lines. Stewart, who had a 60 pack-year smoking history, was frequently exposed to asbestos from his repair of the steam lines. He died from lung cancer in 2013 and his beneficiaries maintained this suit against Ford under the Jones Act and general maritime law. Ford moved to dismiss the case for the failure to satisfy the requirements of Ohio law that the plaintiffs provide prima facie evidence that Stewart's exposure to asbestos was a substantial contributing factor to his development of lung cancer. The trial court and the court of appeals agreed that the report of Stewart's treating oncologist that Stewart's lung cancer was substantially attributed to by his asbestos exposure (although it did not use the magic words in the Ohio statute) was sufficient to establish a prima facie case of causation under Ohio law.

Seamen's work on vessels in California waters was held to be subject to California employment law; *Gulf Offshore Logistics, LLC v. Superior County of Ventura County*, No. B298318, 2020 Cal. App. LEXIS 1154 (Cal App. 2d Dist. Dec. 7, 2020) (Yegan).

Opinion

This case involves a Louisiana business that owns and operates an offshore support vessel that provided services to oil platforms located off the California coast. The crewmembers of the vessel were citizens of Texas, Ohio, and Mississippi who traveled to Louisiana to be hired in Louisiana. The vessel worked in the Gulf of Mexico, but then transferred to California to work off the California coast. The vessel was docked at Port Hueneme in California and traveled through the Santa Barbara Channel to deliver supplies and pick up refuse from four platforms in federal waters off the California coast. The vessel sailed both inside and outside of California's state boundaries during this work. The issue was whether the employer had to comply with California's wage and hour laws for minimum wage, overtime, meal/rest periods, and wage statements for the employment of nonresidents of California working on a vessel off the California coast. The appellate court initially held that Louisiana law applied to the workers as their employment was based in Louisiana, but after being reversed by the California Supreme Court, the appellate court held that California employment law applied to the seamen. Justice Yegan noted that federal law defines California's territorial boundaries more narrowly than California state law does, defining the center portion of the Santa Barbara Channel as not within the state of California. However, Justice Yegan noted that the boundaries of California labor laws implicitly extended to employment within California state boundaries, including all of the Channel (unless federal law conflicted with state law). As the principal part of the work performed was within California (under the state law definition of the California boundary), the crewmembers were entitled to the protection of California law. The fact that the vessel also sailed through federal waters and outside of California's boundaries into what the court described as international waters (the outer Continental Shelf) did not alter the court's conclusion as the court considered most of the work to have occurred in California. Finally, Justice Yegan held that the Fair Labor Standards Act does not preempt state employment laws and that the exemption for seamen in the FLSA likewise did not preempt application of California law to seamen working in California.

Seaman's claim for disgorgement of legal fees from an unconscionable attorney employment agreement was not raised in a claim for affirmative relief and was time barred; *Izen v. Laine*, No. 14-18-216-CV, 2020 Tex. App. LEXIS 10255 (Tex. App.—Houston [14th Dist.] Dec. 29, 2020) (Jewell).

Opinion

Brian Laine was injured while working for his employer Big Inch Marine Systems in a Louisiana marine fabrication yard. Laine liked working for Big Inch, and Big Inch took care of him after his injury. Laine and Big Inch negotiated a settlement consisting of two lump sum payments ($60,000 and $75,000) plus an annuity of $1,100 a month, with cost of living adjustments and payments continuing for a minimum of 30 years. Big Inch recommended that Laine consult with an attorney regarding the proposed settlement document, and Laine engaged an attorney in Houston, Texas, who made a few comments, but the agreement was signed without change. When the attorney and Laine met, they discussed an action against a potentially liable third party in

Louisiana. Laine and the attorney then signed an agreement by which Laine gave a 35% interest in all settlement payments, including the settlement with Big Inch, as the attorney explained that the payments from the Big Inch settlement would be used to finance the litigation in Louisiana against the other parties. The attorney drafted a pro-se petition against the third parties so that it would be filed within the Louisiana one-year statute of limitations while the attorney found counsel in Louisiana to handle the suit. The attorney engaged the services of a Louisiana lawyer to handle the suit with an agreement to pay him 60% of the 35% contingent fee. Laine paid the Houston attorney 35% of the lump sum payments made by Big Inch and 35% of the annuity payments until the Louisiana suit was voluntarily dismissed without any recovery. Laine stopped making the payments on the ground that there was no longer any litigation that needed to be financed. The attorney then sued Laine in state court in Houston, seeking to recover his percentage of the continuing annuity payments, and Laine counterclaimed against the attorney, asking for a refund of the fees paid to the attorney on the ground that the contract was unconscionable. The case went to trial, but the district court granted Laine's motion for a directed verdict that the agreement was unconscionable and ordered disgorgement of the amounts that had been paid ($70,126.13). On appeal, the attorney argued that it was not unconscionable to combine the pursuit of different defendants under a single fee agreement and divide the cost of that combined litigation among all of the recoveries. The court of appeals initially agreed (*see* July 2020 Update) that it might be acceptable to combine the recoveries when none of the defendants had settled before the lawyer was retained. However, it was not acceptable to take a contingent fee on a settlement that was already reached before the attorney began his representation. As there was no risk in the work on the Big Inch settlement, the court held that it was unconscionable and a violation of public policy for the attorney to collect a 35% contingent fee on the Big Inch settlement "disguised as the payment of the expenses incurred in separate litigation against the Louisiana third-party defendants." On rehearing, the court of appeals substituted an opinion that reversed the portion of the judgment ordering disgorgement from the attorney of the $70,126.13 in attorneys' fees as the request for disgorgement was not correctly raised in a claim for affirmative relief in the counterclaim and was time-barred if it had been. The court affirmed the judgment in all other respects, including the portion of the judgment ordering that the attorney forfeit all fees not paid by Laine.

Cayman Islands company with its principal place of business in London was held to be subject to general jurisdiction in Texas because of its subsidiary's office in Houston that was akin to a general business office in Texas, in connection with an injury on a drillship off the coast of Trinidad and Tobago, even though the drillship was not an American vessel, the drillship had never operated from any port in Texas, the worker was not a Texas resident, and he did not seek medical treatment in Texas; *PetroSaudi Oil Services Ltd. v. Hartley*, No. 01-19-607-CV, 2020 Tex. App. LEXIS 10278 (Tex. App.—Houston [1st Dist.] Dec. 29, 2020) (Keyes).

Opinion

William Hartley brought this action in state court in Houston, Texas, against PetroSaudi Oil Services under the Jones Act and general maritime law for injuries he received while working on the M/V PETROSAUDI SATURN, a drillship that was anchored off the coast of Trinidad and Tobago. PetroSaudi, a Cayman Islands company with its principal place of business in London, filed a special appearance to challenge personal jurisdiction in Texas. There was a dispute whether the office of PetroSaudi's subsidiary in Houston was also an office for PetroSaudi, but the district court resolved the issue against PetroSaudi, and the district court held that the office was akin to a general business office. As such, the district court held that PetroSaudi was subject to general jurisdiction in Texas over an accident in foreign waters to a non-resident on a foreign-flagged vessel that had never operated from any port in Texas, and where the injured worker did not seek any medical treatment in Texas. Finding sufficient facts to support the district court, the court of appeals affirmed the finding that PetroSaudi had sufficient minimum contacts with Texas to support personal jurisdiction.

Thanks to Katherine E. Kaplan and Fitzgerald Eze for their help in preparing this Update.

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Quote:

In reaching this decision, we have kept in mind that "sailors lead a rough life and are more apt to use their fists than office employees." When a seaman is injured in a fight, we should not be too quick to conclude that he has been guilty of gross misconduct.

Gulledge v. United States, 337 F. Supp. 1108, 1113 (E.D. Pa. 1972) (Lord), *aff'd*, 474 F.2d 1340 (3d Cir. 1973) (quoting *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815, 817 (2d Cir. 1953) (Learned Hand)).

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