May 2021 Longshore/Maritime Update (No. 264)

Notes from your Updater:

On April 19, 2021, the United States Supreme Court declined to issue a writ of certiorari in No. 20-963, *Walton v. Virginial International Terminals, LLC,* in which the petition presented this question:

Since the founding of our country, the individual States have provided and regulated tort remedies for land-based personal injuries of their citizens. Since 1916 Congress has regulated the cargo-related activities of marine terminal operators, through the Shipping Act. Pursuant to 46 U.S.C. § 40501(f) of the Shipping Act of 1984, 46 U.S.C. § 40101, et seq., a marine terminal operator may issue a schedule of rates pertaining to receiving, delivering, handling or storing property at its terminal, and the schedule is enforceable as an implied contract. In the case below, the respondent marine terminal operator successfully argued that the personal injury action of a longshoreman who was injured on terminal grounds through the respondent's negligence, which was timely filed under Virginia law, was nevertheless time-barred by time limitation provisions in the respondent's schedule of rates, pursuant to the Shipping Act of 1984. The question presented for review is: Pursuant to the Shipping Act of 1984, is a marine terminal operator's schedule of rates, which is authorized by the Act to pertain to the receiving, delivering, handling or storing of property at its terminal, enforceable to time-bar a land-based personal injury action which is timely under State law?

On April 19, 2021, the United States Supreme Court declined to issue a writ of certiorari in No. 20-1104, *Tesoriero v. Carnival Corp.*, in which the petition presented this question:

Whether federal courts may grant an adverse inference as a sanction for negligent spoliation of evidence, as the Second, Sixth, and D.C. Circuits have held, or whether "bad faith" is the standard, as held by the Eleventh Circuit below, as well as the Third, Fifth, Seventh, Eighth, and Tenth Circuits. (*See* August 2020 Update, Discard the evidence and get the case dismissed).

We have followed decisions of the appellate courts applying the 2018 ruling of the Supreme Court in *Lucia v. SEC,* addressing the constitutionality of the appointment of administrative law judges. On April 22, 2021, the Supreme Court overturned decisions holding that challenges to Social Security ALJs that were not raised at the administrative level were untimely. *Carr v. Saul*, No. 19-1442 (Sotomayor).

Opinion

On the LHWCA Front . . .

From the federal appellate courts:

Ninth Circuit overturned ALJ's reduction of the hourly rate for the claimant's attorney and paralegal, remanded the case to determine if interest should be awarded on costs because of the exceptionally protracted litigation, and sua sponte reassigned the case from the ALJ even though she had retired; *Seachris v. Brady-Hamilton Stevedore Co.*, No. 18-71807 (9th Cir. Apr. 19, 2021) (Tashima).

Opinion

After succeeding in obtaining an award of death benefits under the LHWCA for the widow of Cloyd E. Seachris after a prior appeal to the Ninth Circuit, attorney Charles Robinowitz filed an application for fees and costs for work performed between 2007 and 2016. He requested an hourly rate of $450 for his services based on his more than 45 years of experience. In a 63-page opinion, Administrative Law Judge Gee rejected the evidence submitted by Robinowitz and held that he had failed to satisfy the burden of producing evidence of a prevailing market rate for his services. Judge Gee then determined the hourly rate independent of the evidence offered by Robinowitz and awarded him fees at the hourly rate of $341.92 after accounting for inflation. The Benefits Review Board affirmed at the hourly rate of $349.85 (after a correction in the calculation for inflation). The Ninth Circuit reversed the BRB, holding that Judge Gee erred in rejecting the evidence submitted by Robinowitz. The Ninth Circuit then vacated Judge Gee's decision to place Robinowitz in the 75th percentile of attorneys in civil litigation and general practice under the 2012 Oregon State Bar Survey, concluding that the "decision appears to have been influenced by an improper factor, namely, the ALJ's unwarranted irritation with a brief that Robinowitz filed on remand" from the Ninth Circuit after the ALJ's decision denying benefits was reversed by the Ninth Circuit. In this second reversal, the Ninth Circuit remanded for further proceedings on Robinowitz's hourly rate, but, in rejecting the ALJ's reduction of the paralegal rate from $165 to $150, the court ordered the ALJ to award paralegal fees at the requested rate of $165. The Ninth Circuit also held that the BRB erred in holding that the LHWCA does not permit an award of interest on

the costs that were awarded to the claimant, and remanded to the BRB to determine whether an award of interest was appropriate because of the "exceptionally protracted" period that the case has been pending. Finally, having concluded that Judge Gee appeared to have improperly reduced Robinowitz's fees as a sanction for the supplemental brief he filed, the Ninth Circuit, sua sponte, ordered that the BRB reassign the case to a different ALJ on remand. Robinowitz had not asked for that relief as Judge Gee retired more than a year ago. After the reversal in favor of Robinowitz in the *Seachris* case, another panel of the Ninth Circuit vacated a decision on Robinowitz's fees and remanded it for reconsideration in *Lesh v. Advantage Federal Resourcing*, No. 19-71780 (9th Cir. Apr. 23, 2021) (per curiam).

From the federal district courts:

LHWCA worker was not entitled to recover from a third-party vessel owner for his injury sustained as a result of conditions not in existence at the time the vessel was turned over, but the worker was allowed to continue discovery in search of evidence which might create a fact issue as to the existence of a dangerous condition. *Edwards v. Kirby Inland Marine, LP*, No. 19-11742, 2021 U.S. Dist. LEXIS 59290 (E.D. La. Mar. 29, 2021) (Barbier)**.**

Opinion

Ronnie Edwards, a machinist employed by James Marine, Inc. (JMI), suffered an injury aboard a tugboat owned by Kirby Inland Marine after he fell into an open hole in the vessel engine room caused by the removal of floor plating which Edwards missed due to his claim of inadequate lighting. Edwards sought recovery against Kirby as the third-party vessel owner under Section 905(b) of the LHWCA on the basis that his injuries resulted from the negligence of the vessel. Kirby filed a motion for summary judgment claiming no vessel liability because Kirby had no knowledge of nor responsibility for the conditions which resulted in Edwards' injury. Kirby argued neither the removal of the floor plating nor the inadequate lighting occurred prior to the time Kirby turned the engine room of the vessel over to JMI for maintenance. Edwards did not dispute the issue of Kirby's liability as it pertains to the inadequate lighting. As such Judge Barbier granted Kirby's motion on this issue. However, Judge Barbier denied the motion with respect to the removal of the floor plating. Under the *Scindia* turnover duty, a vessel owner must turn over the vessel and its equipment in such a way that an expert worker can perform operations with reasonable safety, and the owner must warn the worker of any hidden or latent dangers that are known or should be known to the vessel owner. However, once the vessel is turned over to the worker, the vessel owner owes no general duty to supervise and inspect. The question remained whether or not Kirby removed the floor plating in the engine room of the tugboat or whether it was removed by JMI employees. Judge Barbier did not believe it was appropriate to grant the motion on this issue while the discovery deadline had not passed, allowing Edwards the opportunity to continue to investigate the removal of the engine room floor plates.

Courts denied remand of suits alleging exposure to asbestos during shipyard work; *Clark v. Huntington Ingalls, Inc.*, No. 19-cv-1709, 2021 U.S. Dist. LEXIS 60586

(E.D. La. Mar. 30, 2021) (Guidry); *Legendre v. Lamorak Insurance Co.*, No. 19-14336, 2021 U.S. Dist. LEXIS 61553 (E.D. La. Mar. 31, 2021) (Guidry); *Danos v. Huntington Ingalls, Inc.*, No. 20-847, 2021, U.S. Dist. LEXIS 62108 (E.D. La. Mar. 31, 2021) (Guidry).

Opinion Clark

Opinion Legendre

Opinion Danos

Willie Clark brought an action in Louisiana state court against Avondale asserting that he was exposed to asbestos while employed as a laborer and mechanic at Avondale. His wife and children substituted as plaintiffs after Mr. Clark's death. Stephen R. Legendre brought an action in Louisiana state court against Avondale asserting that he was exposed to asbestos from several sources, including asbestos brought home on the clothes of his father who worked at Avondale. His wife and children substituted as plaintiffs after Mr. Legendre's death. The beneficiaries of James Joseph Danos brought an action in Louisiana state court against Avondale asserting that Danos was exposed to asbestos while working at Avondale and by secondary bystander to asbestos at his home. After the *Latiolais* decision from the en banc Fifth Circuit (March 2020 Update), Avondale removed the cases based on the Federal Officer Removal Statute, and the plaintiffs moved for a remand, asserting that Avondale had not established a colorable federal defense that is required for removal under the statute or that the removal was untimely. As in *Latiolais*, Judge Guidry found that the governmental contractor immunity defense from *Boyle* was plausibly alleged and that the decision in *Latiolais*, even though issued in another case, was a sufficient "order" or "other paper" so as to commence the time for removal.

Shipyard must prove more than having a contract with the United States and the government's acceptance of the work to obtain immunity from suit; *Pizarro v. National Steel & Shipbuilding Co.*, No. 19-8425, 2021 U.S. Dist. LEXIS 61149 (N.D. Cal. Mar. 30, 2021) (Alsup).

Opinion

National Steel & Shipbuilding asserted *Boyle* government-contractor and *Yearsley* derivative-immunity defenses to asbestos injury claims of its employees arising from the overhaul of the USS BRISTOL COUNTY. The shipyard established the work under the contract with the United States and the acceptance of the work by the United States at the end of the contract, but there were still fact questions whether the shipyard strictly followed the Navy's guidelines or relied on its own discretion in the overhaul. Therefore, Judge Alsup declined to grant summary judgment to the shipyard.

Animosity of ILA business agent was not evidence of discrimination against Hispanic casual laborer on the basis of race or national origin; *Atencio v. International Longshoremen's Association, Local 20*, No. 3:19-cv-11, 2021 U.S. Dist. LEXIS 62212 (S.D. Tex. Mar. 31, 2021) (Brown).

Opinion

Norberto Atencio sought longshore work in Galveston and membership in Local 20 of the International Longshoremen's Association in 2017. When a job became available that required a RORO certification, the assistant business agent for the Local, Henry Torres, looked at the certifications notebook and turned down Atencio for the job because Torres' certification had not been added to the notebook (although he had completed the certification). Claiming that Torres (and the Local) denied him work and discriminated against him for his race (Hispanic) and national origin (Venezuela), Atencio filed a complaint with the EEOC and brought this suit against Torres and the Local. After Torres was dismissed from the suit, the Local filed a motion for summary judgment, which was granted by Judge Brown. Although Atencio was able to make out most of the elements of a prima facie case, he could not identify a non-Hispanic, non-Venezuelan longshore worker of a similarly situated background who received more work assignments than Attencio.

Suit alleging torture of private security contractor in Afghanistan contained numerous frivolous counts, including his claim under the Defense Base Act; *Hebert v. United States*, No. 6: 21-cv-545, 2021 U.S. Dist. LEXIS 74104 (W.D. La. Apr. 16, 2021) (Hanna).

Opinion

John Keith Hebert and his company, International Defense Corp., brought this suit pro se alleging a number of claims related to his torture in Afghanistan because he was a whistleblower concerning criminal activity. Magistrate Judge Hanna ruled that a number of his claims were frivolous and ordered International Defense to retain counsel. One of the counts involved Hebert's claim under the Defense Base Act. Hebert alleged that the administrative law judge had remanded his case. Magistrate Judge Hanna noted the rule in the Fifth Circuit that judicial proceedings from a decision of the Benefits Review Board are directed to the United States district court of the judicial district for the office of the district director whose compensation order is involved. To the extent that the action could be interpreted as an appeal of a decision of the BRB, it would have to be filed in San Francisco.

Judge in a Section 905(b) suit struck the plaintiff's supplemental witness and exhibit lists (adding evidence of a neck injury) that were submitted after the deadline in the scheduling order; *Smith v. Transocean Offshore USA, Inc.*, No. 19-14738, 2021 U.S. Dist. LEXIS 74576 (E.D. La. Apr. 19, 2021) (Vitter).

Opinion

Orlando Smith, an employee of Halliburton, was injured on the DISCOVERER INSPIRATION, and brought this action against the vessel's owner and operator under Section 905(b) of the LHWCA. The court's scheduling order contained a deadline for the parties to file their witness and exhibit lists for June 12, 2020, and for trial on September

28, 2020, but the vessel owner moved for a continuance, which was opposed by Smith. Judge Vitter denied the motion on July 1, 2020, noting in part that the general order of the Chief Judge had continued the dates for the trial and final pre-trial conference. Judge Vitter then issued an amended scheduling order retaining all of the previous deadlines except those changed in the order and another amended scheduling order that reset only the trial and final pretrial conference dates. On February 18, 2021, Smith filed a supplemental witness and exhibit list without leave of court. It included evidence of a herniated disc in his neck that was not addressed in the previous evidence with respect to the injury to his shoulder and elbow. Smith argued that the late filings resulted from the fact that he did not suffer from neck problems until January 2021, long after the 2020 deadline to file the witness and exhibit lists. The vessel owner moved to strike the new witnesses and exhibits, and Smith moved for leave to file them. Judge Vitter evaluated the good-cause factors and noted that Smith had filed the supplemental lists without seeking leave, without explaining earlier why there was good cause for the late filing, and without seeking a continuance of the deadlines. Judge Vitter also found that the vessel owner would be severely prejudiced by the late filing as the discovery deadline ended seven months before the late filing. It was not lost on Judge Vitter that Smith previously opposed the owner's request for a continuance, citing the prejudice that would result from a continuance. Judge Vitter struck the supplemental witness and exhibit lists and denied leave for Smith to file them.

From the state courts:

Eighteen hours spent by lawyer in opposing summary judgment in malpractice action brought against the claimant's LHWCA attorney was not egregious, but seventy hours to review five boxes of documents containing many unrelated matters was unreasonable; *Lewis v. Jenkins*, No. 2020-CA-0333, 2021 La. App. LEXIS 482 (La. App. 4 Cir. Apr. 7, 2021) (Dysart).

Opinion

Nathan Lewis claimed that he was injured on or around April 1, 2011, while employed as a longshore worker by Archer-Daniels-Midland Co. (ADM). ADM determined that Lewis' injuries were not work-related, and Lewis retained attorney Timothy Young to pursue a claim under the LHWCA. Lewis terminated Young's services on July 2, 2012, and ADM advised Lewis on August 2, 2012, that no timely LHWCA claim had been filed. Lewis retained another attorney who filed an LHWCA claim on August 8, 2012, and Lewis brought a malpractice action against Young for failing to file a timely claim under the LHWCA. While the malpractice suit was pending, the claims examiner for the Department of Labor concluded that the LHWCA claim was timely and that Lewis had established a prima facie case of compensability. The claim was referred for trial to an administrative law judge, but the parties settled on the eve of trial. Young then moved for summary judgment in the malpractice case on the ground that Lewis could not demonstrate any loss as a result of Young's conduct. Lewis submitted an affidavit in response that the settlement was for less than the value of the claim and he accepted that amount because he feared that the ALJ would dismiss his claim as untimely. Neither Lewis nor his attorney in the malpractice case, Robert C. Jenkins, appeared at the hearing

(Jenkins asserted that his failure to appear was because of a calendaring issue). The judge struck the affidavit and granted summary judgment to Young, and the Louisiana Court of Appeal affirmed the striking of the affidavit and the summary judgment. *Lewis v. Young*, 187 So. 3d 531 (La. App. 4 Cir. 2016). Lewis then filed this lawsuit against attorney Jenkins, seeking a return of amounts Lewis paid Jenkins during Jenkins' representation of Lewis. After a bench trial, the trial judge entered judgment in favor of Jenkins. The court of appeal affirmed in part, holding that the amount of time in preparing the opposition to the motion for summary judgment (18 hours at $450 an hour) could not be said to be egregious. However, the appellate court did consider that it was unreasonable for Jenkins to charge Lewis 70 hours to sort through five boxes of documents when some of them were admittedly related to other matters and did not require review. The appellate court held that half of that amount (35 hours) was the maximum reasonable amount of time to review the documents, and the court reduced the amount owed by Jenkins accordingly.

Claimant was not entitled to double recovery under state workers' compensation statute from his settlement under the LHWCA and Jones Act; *Peterson v. Department of Labor & Industries*, No. 53885-7-II, 2021 Wash. App. LEXIS 953 (Wash. App. Apr. 20, 2021) (Worswick).

Opinion

Joshua Peterson was injured on a barge and received an award of benefits under the Washington workers' compensation law. Peterson stipulated that he was also seeking benefits under the LHWCA and Jones Act, and he was paid provisional benefits pending the outcome of his maritime claims. In March 2016, Peterson advised the adjudicator of the Washington Department of Labor & Industries (DLI) that settlement of his maritime claims was imminent and that the portion of the settlement attributable to the Jones Act was $90,000. The adjudicator accepted $25,000 as DLI's share of the recovery and an order was issued for the reimbursement. DLI determined that the balance owed from the LHWCA claim was $72,450.89, but there was no order to that effect. In April 2016, Peterson settled his LHWCA and Jones Act claims for $900,000. The settlement was approved by the United States Department of Labor. DLI then issued an overpayment order for the $72,450.89, and Peterson objected. Peterson argued that the award had become final and he was entitled to double recovery. The court of appeals disagreed. The Washington statute does not apply to workers covered under the LHWCA, and workers who recover under the federal act must repay benefits recovered under the Washington law. As the statute provides that benefits "shall" be repaid, the order could not be a final judgment for purposes of res judicata. The court held that DLI was entitled to collect reimbursement, and the reimbursement was not limited to benefits paid before the settlement. Finally, even though the state statute is silent as to whether DLI could recover attorney fees from the claimant, the court held that DLI was entitled to attorney fees as the prevailing party.

State employee who was not covered by the LHWCA could not bring a claim as a *Sieracki* seaman; *Baum v. PCS Phosphate Co.*, No. 2:20-cv-35, 2021 U.S. Dist. LEXIS 79978 (E.D.N.C. Apr. 27, 2021) (Myers).

Opinion

Christopher C. Baum was employed by the North Carolina State Ports Authority and was injured while helping move a hatch lid on a barge to unload cargo. As Baum was an employee of the state, he was not covered under the LHWCA (Chief Judge Myers also did not consider Baum to be covered under the Jones Act). Baum did not assert any right to recover under state law. Therefore, his remedies against the vessel owner were limited to those provided by the general maritime law. Baum argued that he was entitled to recover as a *Sieracki* seaman as he fell within a gap in coverage under the LHWCA and was not prohibited from bringing the action by the exclusive remedy provision of the LHWCA. Noting that the Fourth Circuit has not recognized a *Sieracki* claim, Chief Judge Myers declined to extend *Sieracki* to workers like Baum. This did not mean that Baum was without a remedy. Chief Judge Myers held that Baum could seek recovery under a maritime negligence theory.

And on the maritime front . . .

From the federal district courts:

COGSA claim in amended complaint was timely as it related back to the original complaint involving the same cargo shipment; "Notify Party" on bills of lading (buyer of the cargo) could not invoke COGSA when goods were returned to the loading port by order of Customs, but there was a fact question whether the buyer could bring an action under COGSA under the "Merchant Clause of the bills; buyer did make out a prima facie case under COGSA for the failure to deliver the cargo; bags and not containers were the COGSA packages, but there was a fact question whether the failure to deliver was an unreasonable deviation that would preclude the carrier from invoking the package limitation; *Saray Dokum Ve Madeni Aksam Sanayi Turizm A.S. v. MTS Logistics, Inc.*, No. 17-cv-7495, 2021 U.S. Dist. LEXIS 61291 (S.D.N.Y. Mar. 30, 2021) (Cronan).

Opinion

Saray Dokum, a Turkish company, purchased Resin Formosa Formolon from Oxyde Chemicals, a Texas trading corporation, and Oxyde contracted with MTS Logistics, a New York non-vessel operating common carrier, to ship the resin from Texas to Turkey. MTS issued two bills of lading to Oxyde to govern the shipment, listing Oxyde as the shipper, "To Order" as the consignee, and Saray in the "Notify" box. The MTS bills specified the number of "bags" of the resin and number of containers into which the bags of resin were packed. MTS then contracted with Mediterranean Shipping Company to carry the goods, and Mediterranean issued two sea waybills. The sea waybills listed MTS as the shipper, consignee, and Notify Party. After the vessel departed with the cargo, it was ordered to return the cargo to Houston by United States Customs. Mediterranean then charged MTS for the cost of redelivery, and MSC paid Mediterranean and secured possession of the

cargo. MTS then informed Oxyde that it intended to foreclose its lien on the cargo, and Saray brought this suit against MTS in federal court in Texas. The suit was transferred to the federal court in New York in accordance with the forum-selection clause in the MTS bills of lading. Saray asserted claims for breach of contract, negligence, and conversion in the capacity as a third-party beneficiary ("creditor beneficiary") of the contract between Oxyde and MTS, and it also sought a declaratory judgment that MTS did not possess a lien on the cargo (along with a temporary restraining order preventing MTS from selling the cargo). The court ordered Saray to post a bond in order for the court to enjoin the sale of the goods, and, when Saray declined to post the bond, MTS sold the cargo, reimbursed itself for the sums it had paid for the redelivery charges, and paid Oxyde expenses that MTS owed to Oxyde. After arguing that the Carriage of Goods by Sea Act governed the case, Saray amended its complaint to assert a single claim against MTS under COGSA and dismissed its remaining claims with prejudice. MTS counterclaimed for unjust enrichment and legal fees. The parties then filed cross-motions for summary judgment. Saray argued that it had established a prima facie case of liability under COGSA and that MTS had raised no valid defenses. MTS argued that Saray was not a party to the MTS bills of lading and lacked standing to bring the suit, that COGSA did not apply because the cargo was not damaged or lost, that MTS properly sold the cargo, and that its liability under COGSA was limited to $500 per container. As a preliminary matter, Judge Cronan addressed the question whether Saray's COGSA pleading was timely as it was added more than a year after the incident. As all of the assertions involved the same transaction and the same bills of lading, Judge Cronan held that the COGSA claim was not barred by COGSA's statute of limitations. Judge Cronan next addressed the question whether Saray had standing to bring a COGSA claim. Sarah argued that its listing as a "Notify Party" on the MTS bills reflected an intent to benefit Saray, but Judge Cronan cited cases holding that "notify" status generally confers no rights upon a party. Saray also argued that the MTS bills contained a "Merchant Clause" that defined a "merchant" as the shipper, consignee, receiver, or holder of the bill and provided that the "merchant" was jointly and severally liable to the carrier for all charges and for performance of the obligations under the bill. Judge Cronan held that the broad Merchant Clause, would give the owner or person entitled to the goods a right to sue; however, there were fact questions whether Saray qualified as a merchant under the clause. Judge Cronan then considered whether COGSA was applicable to the non-delivery of the cargo on the ground that the goods were not damaged or lost, and he held that this was not a situation where cargo was merely delayed and was comparable to situations where cargo was delivered to the wrong party. Thus, he concluded that Saray had made a prima facie case under COGSA. Considering whether MTS was permitted to sell the cargo to pay for its additional costs, Judge Cronan noted that a rule that permits carriers to sell cargo when faced with any additional charges finds no support in COGSA. Finally, Judge Cronan ruled that the bags were the packages for the COGSA package limitation, but there were fact questions whether the failure to deliver the goods was an unreasonable deviation that would prevent MTS from limiting its liability under COGSA.

Owner, captain, and insurer of charter tourist boat were denied limitation of liability for claims of passengers arising from collision; *Amador v. Torres*, No. 17-2050, c/w 17-2168, 17-1502, 17-2145, 2021 U.S. Dist. LEXIS 65975 (D.P.R. Mar. 31, 2021) (Dominguez).

Opinion

This opinion arises from a collision between the charter tourist boat M/V LA NENA II and the recreational vessel M/V ANDREA GABRIELLA. The LA NENA was engaged in a voyage between La Parguera village in Puerto Rico and Bioluminescent Bay on the evening of July 25, 2017, with 28 passengers and a crew of two, its captain, Jose Hernandez-Zapata, and a swimmer, Juan Pablo Quinones Espinosa. Although the vessel's Coast Guard Certificate of Inspection required a captain and deckhand when carrying passengers, Espinosa had no licenses and functioned only to jump into the water and activate the water's bioluminescence. The vessel had also lacked a working compass light for a month before the voyage. The ANDREA GABRIELA was operated by Ricardo Velez-Amador, who had no licenses to operate a vessel, and the ANDREA GABRIELA's GPS and radar were not working. Velez-Amador designated the passengers on his boat as lookouts, but no one saw the LA NENA before the ANDREA GABRIELA struck the port after quarter of the LA NENA. The owner, master, and insurer of the LA NENA sought to limit liability, and that action was consolidated with actions brought by passengers on the LA NENA. The claimant passengers argued that the limitation action should be dismissed because the petitioners were not entitled to limit liability. Judge Dominguez rejected the petitioners' argument that the passengers were just trying to find a deep pocket because the overtaking vessel, ANDREA GABRIELA, was clearly at fault but had no financial means to respond to a judgment, and held that the owner, captain, and insurer of the LA NENA were not entitled to limitation for different reasons. First, the LA NENA had a proper deckhand, but he was unavailable for this voyage. The captain called the owner, who authorized having the swimmer, Espinosa, work on the voyage. The fact that the operator of the ANDREA GABRIELA designated all of the passengers on his vessels as lookouts did not substitute for a licensed deckhand in accordance with the Certificate of Inspection of the LA NENA. Thus, the owner knew that the LA NENA was being operated in violation of federal regulations. Additionally, the owner was aware that the LA NENA's compass light was not working. Finally, Judge Dominguez invoked the Home Port Doctrine in support of denial of limitation in instances in which the owner resides and the casualty occurs in local waters of the vessel's home port. Captain Hernandez-Zapata argued that the term "owner" should be given a broad interpretation so that he could be included in the parties seeking limitation. Judge Dominguez disagreed and held that Hernandez-Zapata owned no ownership interest in the vessel and did not operate the vessel at his own expense or procurement. Therefore, he did not have an ownership interest that would permit him to limit liability. Guardian Insurance Co., which issued a Commercial Yacht Policy, for the LA NENA, cited Judge Brown's decision for the en banc Fifth Circuit in the *Crown Zellerbach* case for the proposition that "when a specific provision in the policy fixes the maximum liability of the insurer to the owner's judicially declared limitation of liability amount, the insurance company can benefit from the limitation amount afforded to the owner of the vessel." However, Judge Dominguez did not find language in the Guardian policy, as in *Crown Zellerbach*, that would make the insurer eligible to benefit from a limitation afforded to the owner of the vessel. As such, Guardian's liability was not contractually limited to the liability of the owner, and its liability was capped by the policy limit of $1 million and not the value of the vessel.

Energy companies' arguments based on the relationship of the allegations in the suit to navigable waters and the OCSLA did not convince the federal judge to retain the suit brought under state law related to climate change allegedly related to fossil fuels; *Minnesota v. American Petroleum Institute*, No. 20-1636, 2021 U.S. Dist. LEXIS 62653 (D. Minn. Mar. 31, 2021) (Tunheim).

Opinion

The State of Minnesota brought suit against several energy companies and the American Petroleum Institute alleging that the defendants engaged in a campaign to deceive the public about the dangers of fossil fuels and to undermine the scientific consensus linking fossil fuel emissions to climate change. The defendants removed the action on several grounds, including that the claims arose under federal law and the Outer Continental Shelf Lands Act. Chief Judge Tunheim rejected all of the grounds for removal and remanded the case. Although the defendants argued that federal common law had to govern because the State sought remedies for injuries related to flooding and damage on navigable waters, Chief Judge Tunheim held that the federal common law had been developed to resolve issues between state governments and between the state and federal governments, so it was not applicable in this case. With respect to the federal jurisdiction under the OCSLA, Chief Judge Tunheim noted that the State's claims were based on a campaign of misinformation, not extractive operations on the OCS. Finally, Chief Judge Tunheim rejected the energy companies' argument that the billions of dollars and equitable relief sought could discourage production on the OCS and undermine the viability of the federal leasing of offshore lands, finding it to be too speculative to support jurisdiction.

Court upheld jurisdiction based on forum-selection clause in bunker supply agreement against a non-party to the agreement on an alter ego theory; *Liberty Highrise Pvt. Ltd. v. Praxis Energy Agents DMCC*, No. 20-cv-2427, 2021 U.S. Dist. Lexis 62445 (S.D.N.Y. Mar. 31, 2021) (Abrams).

Opinion

Liberty Highrise, an Indian company and operator of the M.V. MENALON and M.V. GOLD GEMINI, ordered bunkers from Praxis Energy Dubai, a United Arab Emirates company, to be delivered to the vessels in Singapore. Praxis Dubai sent an invoice to Liberty for the bunkers for the MENALON, and Liberty transferred payment to Praxis Dubai's bank account. With respect to the bunkers for the GOLD GEMINI, Liberty was directed to transfer the funds to the bank account of Praxis Singapore. There was confusion about the payments, and the bunkers were never delivered to the MENALON. Liberty then brought this suit against Praxis Dubai and Praxis Singapore for the retention of the payment/failure to deliver. The suit was brought in New York in accordance with the forum-selection clause in the Praxis General terms and Conditions for the Sale of Marine Bunker Fuels and Lubricants that was incorporated into the transaction between Praxis Dubai and Liberty. Praxis Singapore sought to dismiss the complaint for lack of personal jurisdiction and forum non conveniens, arguing that Praxis Singapore was not bound by the terms that were agreed between Praxis Dubai and Liberty and that the New

York venue was inconvenient because it had nothing to do with the transaction. Judge Abrams denied the motion, however, finding sufficient allegations that Praxis Singapore was an alter ego of Praxis Dubai to avoid the motion to dismiss. He did note that Liberty would have to submit evidence and not just allegations to establish liability on the part of Praxis Singapore. Judge Abrams also denied the defendant's argument that Liberty had not established any of the requirements of the federal venue statute as this is an admiralty case, and forum-selection clauses are enforced in admiralty unless shown to be unreasonable. Finally, Judge Abrams rejected the defendant's forum non conveniens argument as the defendant had not provided any reason why the parties choice of forum should not be given deference.

Court resolved the fact questions from the Hurricane Irma damage claims brought by a marina against vessels moored at the marina; *Crown Bay Marina, L.P. v. Reef Transportation, LLC*, No. 18-73, 2021 U.S. Dist. LEXIS 64084 (D.V.I. Apr. 1, 2021); *Crown Bay Marina, L.P. v. Subbase Drydock, Inc.*, No. 18-68, 2021 U.S. Dist. LEXIS 64085 (D.V.I. Apr. 1, 2021) (Miller).

Reef opinion

Subbase opinion

This case involves two trials of damage to a marina's docks during Hurricane Irma. Reef secured its vessels MORNING STAR and EVENING STAR at Crown Bay Marina docks in anticipation of the Hurricane making landfall on St. Thomas. Both vessels remained tied to the dock during the storm, but the dock sustained damage and the marina brought this action seeking to recover for the cost to repair and restore the facility. Reef moved for summary judgment on the claims, and the marina filed a cross-motion for summary judgment. Reef's motion was based on the fact that the vessels did not sustain significant damage and remained securely moored in their slips. The marina asserted that Reef was liable for the damage to the dock pursuant to the provision in the License Agreement for Dockage, which provided that Reef would be liable for all damages to facilities caused by the vessels. The parties presented substantially different versions of what caused the damage, resulting in Magistrate Judge Miller concluding that negligence and causation were disputed so that the case could not be decided on summary judgment. *See* November 2020 Update. Subbase Drydock, a marine repair and maintenance company, was agent and custodian of the vessels M/V CULEBRA II and M/V CARIBENA. When the Hurricane approached St. Thomas, Subbase secured the vessels at Crown Bay Marina and signed the marina's License Agreement for Dockage for the vessels. Both vessels broke free during the storm, and the marina brought this suit seeking to recover from Subbase for the damage sustained by the marina. Subbase moved for summary judgment that it was not the party that was responsible under the agreement and that the marina's negligence claim was precluded by the gist of the action doctrine. The marina argued in its cross motion for summary judgment that Subbase was liable under the contracts to the same extent as the vessels' owner. Concluding that the contract was ambiguous with respect to the responsibility of Subbase, Judge Miller declined to grant summary judgment to either party on the contract claim. With respect to the marina's tort claim, Subbase argued that the duties asserted by the marina flowed from the contract, which addressed the

responsibility for the breach of those duties. Thus, the tort claim could not stand apart from the contract claim (gist of the action doctrine). The marina argued that Subbase could be liable in tort regardless of whether there was a contract, and that it could certainly have sued Subbase for its alleged negligence if there had not been a contract. However, Magistrate Judge Miller held that the tort and contract claims would have to be resolved at trial. *See* November 2020 Update. Magistrate Judge Miller reached different results in trial of the two cases. With respect to the marina's claims against Reef, she concluded that the evidence did not establish that the vessels made contact with the docks and that the condition of the docks before the Hurricane was inconclusive so that causation for damages could not be established even if there were contact. Additionally, Magistrate Judge Miller did not find that Reef failed to exercise reasonable care in its tying off of the vessels. Consequently, she held that the marina failed to establish the elements of a maritime negligence claim. Finally, the absence of evidence that the Reef vessels caused damage to the dock was fatal to the claim for breach of contract. In contrast, Magistrate Judge Miller found that the Subbase vessels did cause some of the damage to the marina dock facilities. However, she concluded that Subbase did not act unreasonably and was not liable for maritime negligence. Nonetheless, the contract provided that Subbase, which signed as "Owner" of the vessels, was liable for damages caused by the vessels. Therefore, Magistrate Judge Miller entered judgment in favor of the marina for the damages she found to have been caused by the Subbase vessels, together with prejudgment interest and attorney fees (as provided by the contract).

Court struck jury demand in suit against hull insurer for failure to allege diversity and because the case was designated as an admiralty action; *Leopard 34 M, LLC v. National Union Fire Insurance Co.*, No. 20-22518, 2021 U.S. Dist. LEXIS 64728 (S.D. Fla. Apr. 2, 2021) (Moreno).

Opinion

Leopard 34 brought this action in federal court in Florida against the hull insurer of its vessel for failing to pay for damage to the insured vessel caused by an overheated engine. Leopard 34 invoked the court's diversity jurisdiction, but the complaint also listed the complaint as being brought "IN ADMIRLATY [sic]" and stated in paragraph 4 that the case was an admiralty and maritime cause within the meaning of Rule 9(h). Judge Moreno first held that Leopard 34 was not a corporation and that a limited liability company was a citizen of every state in which its partners or members are citizens. The complaint's failure to allege the citizenship of the partners was an insufficient pleading for diversity, and, as the deadline had passed for amendment, Judge Moreno held that Leopard 34 had not established good cause for an amendment. Moreover, even if diversity had been pleaded properly, Leopard 34 had designated Rule 9(h) and was not entitled to a jury. Therefore, Judge Moreno struck the plaintiff's request for a jury and declined to allow the plaintiff to amend its pleading.

Separate and independent federal claim allowed removal of suit with Jones Act claim; *Giron v. E&E Foods*, No. C21-273, 2021 U.S. Dist. LEXIS 65452 (W.D. Wash. Apr. 5, 2021) (Martinez).

Opinion

Gerber Giron brought this suit in the King County Superior Court in Washington under the Jones Act for injuries sustained on the defendant's fishing boat. In his second amended complaint he added a cause of action for violation of the Fair Labor Standards Act based on his employer's adoption of a "no fish, no pay" rule that processors were not paid when there were no fish to process even though the workers were on standby waiting for fish to process. The defendant removed the case based on federal question jurisdiction, and Giron moved to remand the case based on the bar to removal of FELA cases in 28 U.S.C. § 1445(a). Chief Judge Martinez agreed that Jones Act claims are not generally removable based on Section 1445(a), but he sided with the decisions in the Second, Fifth, and Ninth Circuits that have allowed Jones Act claims to be removed when there is a separate and independent claim within the federal question jurisdiction [now addressed in Section 1441 (c)]. As the FLSA case was a separate and independent claim that gave the court federal question jurisdiction, Chief Judge Martinez held that the suit could be removed even though it contained a Jones Act claim. Therefore, he denied Giron's motion to remand.

Lack of expert evidence caused dismissal of BELO suit; *Scott v. BP Exploration and Production, Inc.*, No. 19-254, 2021 U.S. Dist. LEXIS 65640 (S.D. Ala. Apr. 5, 2021) (DuBose).

Opinion

Carolyn Scott alleged that she suffered from chronic dry eye syndrome as a result of digging and picking up tar balls on shore and placing them in garbage bags and buckets during the clean-up of the spill from the DEEPWATER HORIZON/Macondo blowout. She brought this Back-End Litigation Option lawsuit in accordance with the Medical Benefits Class Action Settlement Agreement, which required that she establish causal connection between her exposure and her later-manifested physical condition. Scott designated an environmental scientist and a toxicologist as experts, but did not disclose her optometrist, Dr. Gene Terrezza, who examined her at the request of her attorney. BP moved for summary judgment that Scott could not establish the elements required to prove her case, and Chief Judge DuBose agreed. Scott testified that the optometrist told her that her work for BP was the cause of her eye problem, and the optometrist filled out a form that checked chronic dry eye syndrome due to chemical exposure. When the optometrist was deposed in the Florida BELO cases, he testified that drawing conclusions as to the toxicological basis of the symptoms was above his pay grade. There were two reasons for the granting of summary judgment. In the first place, the optometrist was not designated as an expert, and Scott offered no explanation for the lack of designation. Consequently, she gave the court no basis to excuse the failure and to allow the opinions of the optometrist. Additionally, Chief Judge DuBose noted that the optometrist did not have a treating relationship with Scott; he admitted that her symptoms could apply to other ocular conditions; and he admitted that he could not establish causal connection. Regardless of the failure to designate the optometrist, his opinion was insufficient to establish a diagnosis or an inference of causation.

Judge did not strike late expert report but extended the time for production of a rebuttal report; *Diaz v. Carnival Corp.*, No. 20-22755, 2021 U.S. Dist. LEXIS 65570 (S.D. Fla. Apr. 5, 2021) (Torres).

Opinion

Noel Diaz brought this action against the cruise line for an injury he sustained on the CARNIVAL VICTORY when he was struck by a motorized scooter whose operation was being assisted by an employee of the cruise line. The court entered a Scheduling Order with a deadline to disclose experts on February 4, 2021. On that date, the cruise line disclosed Dr. David Keyes as an expert witness and requested that Diaz submit to a medical examination with Dr. Keyes. Diaz was examined on February 22, 2021, and the cruise line submitted his report on March 8, 2021, the date for submission of rebuttal reports. Diaz moved to strike the report as untimely, and Magistrate Judge Torres agreed that the report was untimely. He noted that there was no explanation why the cruise line waited until February 4 to make a request for the examination, and the report was not that of a rebuttal expert because it contained opinions that were not contained in the reports of Diaz's experts. It appeared that the cruise line submitted Dr. Keyes' report as a rebuttal report solely because the cruise line missed the deadline to produce his report on February 4. Therefore, Magistrate Judge Torres considered the appropriate sanction. It was impossible for Diaz to submit a rebuttal report within the time for rebuttal reports as the report of Dr. Keyes was submitted on that date. However, the trial was more than three months away and the deadline to file pre-trial motions had not passed. Thus, there was ample time to cure any prejudice suffered by Diaz. Consequently, Magistrate Judge Torres declined to strike the report of Dr. Keyes, but he extended the time to serve a rebuttal expert report and to take any discovery in support of that effort.

Damages against shipyard for breach of warranty of workmanlike performance for faulty repair included all foreseeable losses incurred by the vessel owner, including loss of use of the vessel, property damage, and attorney fees; *Continental Insurance Co. v. Bollinger Quick Repair, LLC*, No. 18-2810, 2021 U.S. Dist. LEXIS 68025 (E.D. La. Apr. 7, 2021) (Barbier).

Opinion

The port and starboard propellers of Hydra Offshore's OCEAN PIONEER became entangled in and fouled by a loose mooring line. Divers did not find any underwater damage when they removed the line, and the vessel completed two jobs before being drydocked and inspected at Bollinger's shipyard. During the inspection, the Coast Guard observed an oil sheen and required repairs. Hydra contracted with Bollinger to repair the oil leak and to rebuild components of the vessel's controllable pitch propeller systems. During testing of the systems, the port propeller blades began to oscillate and failed to settle on the order of pitch (hunting). Eventually Hydra abandoned the vessel to its hull underwriter as a constructive total loss, and the insurer brought this action against the shipyard for faulty repair based on negligence and breach of the warranty of workmanlike performance. Hydra asserted that the vessel did not experience hunting issues prior to the repair work, and the shipyard argued that the controllable pitch systems were hunting

prior to the repairs. The shipyard moved for summary judgment that the insurer's damages were limited to the original repair costs paid to the shipyard, arguing that the measure of damages was to place the owner in the condition it would have occupied had the wrong not occurred. Judge Barbier noted that the insurer brought a claim for breach of the warranty of workmanlike performance and that damages were available under that theory for all foreseeable losses caused by the breach. Those included loss of use of the vessel, property damage, and reasonable attorney fees. Although the shipyard argued that there was no evidence that the shipyard caused additional damage, Judge Barbier responded that if the hunting did not begin until after the alleged defective work, as contended by the insurer, then it could be reasonable to infer that the shipyard's repairs caused the hunting issue, absent evidence to the contrary.

Products liability claim against a third-party defendant was properly and timely joined by claimants in a limitation action; *In re American River Transportation Co. LLC*, No. 18-2186, 2021 U.S. Dist. LEXIS 67080 (E.D. La Apr. 7, 2021) (Lemmon).

Opinion

On September 3, 2017, an electronic cigarette with a lithium battery exploded in a deck locker aboard the tug M/V LOUISIANA LADY, causing the main deck crew's quarters to catch fire. During the fire, two crew members suffered smoke inhalation and lost consciousness, Spencer Graves died as a result of the incident, and Ronald Neal sustained injuries. Vessel owner, American River Transportation (ARTCO), filed a complaint seeking limitation of liability for the incident. In September 2018, the representatives of the injured and deceased seamen filed third-party claims in the limitation action under the Louisiana Products Liability Act and general maritime law, asserting that the fire was caused by an exploded lithium battery manufactured and/or distributed by LG Electronics (they later amended their complaint to substitute LG Chem America for LG Electronics). In response, LG Chem filed a motion to dismiss under Federal Rule 12(b)(2) arguing that the court lacked personal jurisdiction over LG Chem, as well as a motion to dismiss under Federal Rule 12(b)(6) on the grounds that the claims were beyond the statute of limitations. Judge Lemmon determined that the parties provided insufficient evidence to decide whether the court could assert general or specific personal jurisdiction over LG Chem and found that further discovery was warranted and ordered that discovery be completed within 90 days. As for the motion to dismiss under Rule 12(b)(6), LG Chem argued that the plaintiffs did not file their claims against LG Chem within the three-year statute of limitations applicable to federal maritime law claims, but the claimants responded that the claims related back to the initial date of filing against LG Electronics in September 2018. Judge Lemmon found that because the claimants filed a claim against the LG entity they believed to be the manufacturer of the battery, the claim against the correct entity was not time barred. Additionally, the claims against LG Chem were not dismissed as an improper impleader of a third-party in a limitation action; rather, a permissive joinder of LG Cham as a direct defendant was permissible in an effort to promote judicial efficiency. Thus, Judge Lemmon denied LG Chem's motion to dismiss for failure to state a claim on which relief can be granted.

Lien on barges for unpaid services was invalid because the claimant named in the USCG filing did not provide any necessaries to the vessel to support the existence of a valid maritime lien. *Louisiana Marine Operators, LLC v. JRC Marine LLC*, No. 19-9302, 2021 U.S. Dist. LEXIS 67426 (E.D. La. Apr. 7, 2021) (Milazzo).

Opinion

Barges under the operation and control of bareboat subcharterer Louisiana Marine Operators (LMO), were damaged in a collision between the M/V MISS DIXIE and the M/V D&R BONEY. LMO filed suit against JRC Marine, the operator of the MISS DIXIE, and the vessel *in rem*. Later, LMO added as a defendant the owner of JRC, Ranny Fitch, alleging Fitch filed a fraudulent lien against numerous barges under LMO's control in the amount of four million dollars for unpaid services. LMO moved for summary judgment on its claim that Fitch's lien was not valid. Under the Commercial Instruments and Maritime Liens Act, a person providing necessaries to a vessel under the order of the owner (or person authorized by the owner) has a maritime lien and may bring an action *in rem* to enforce it. Fitch filed the maritime lien with the Coast Guard identifying himself as the claimant, thus implying that he had provided the necessaries to the vessels. However, because it was his company, JRC, which rendered the necessaries to the barges and not Fitch personally, Judge Milazzo found the Fitch lien was invalid. Additionally, Judge Milazzo found that the lien, as filed, was invalid (even if it had been filed by JRC) due to Fitch's own admission that the lien in the amount of four million dollars was "unenforceable in that amount." Judge Milazzo did not address whether JRC was entitled to a lien in some amount as JRC had not brought an action in rem seeking to enforce a lien. Judge Milazzo awarded LMO reasonable attorney's fees incurred in the defense of the lien because neither the position of Fitch nor JRC was justified in relation to the baseless lien.

Evidence was insufficient for the judge to find that a fire on the vessel was caused by a repair contractor that last worked on the vessel eleven months before the fire; *Roe Boat, LLC v. N&G Engineering, Inc.*, No. 19-cv-61503, 2021 U.S. Dist. LEXIS 69469 (S.D. Fla. Apr. 8, 2021) (Dimitrouleas).

Opinion

In January 2015, Roe Boat, LLC purchased a used 55-foot Sea Ray Sundancer vessel and renamed it the ROE BOAT. The owner engaged N&G Engineering to conduct an engine survey, and N&G found an exhaust leak coming from the starboard engine's turbo or exhaust manifold. N&G performed repairs and maintenance on the vessel for a year and a half until a new captain was hired who used a different company for maintenance and repair. That company worked on the boat six times over the next eleven months before a fire started in the starboard engine room that caused damage to the vessel. Roe Boat brought this suit against N&G for breach of contract, breach of the warranty of workmanlike performance, and negligence, and the case was tried before Judge Dimitrouleas. Although N&G's expert John Toth "was argumentative and seemed not to understand the role of an expert witness," Judge Dimitrouleas found that "the substance of his opinions made more sense" than those of the fire-cause-and-origin expert used by

Roe Boat's insurer, Michael Hill. Judge Dimitrouleas concluded that the owner failed to carry its burden to demonstrate that any improper repairs by N&G were the cause of the fire. Therefore, he denied recovery to Roe Boat on all of its causes of action.

Judge declined to strike opinions of cruise ship's expert, who inspected the stairs on the vessel after the carpet had been replaced; passenger provided sufficient evidence of a dangerous condition in the stair on which she fell and of notice of the dangerous condition to the cruise line; without disclosing her physicians as experts, the passenger could not establish causation as to her non-readily-observable injuries; *Johnson v. Carnival Corp.*, No. 19-cv-23167, 2021 U.S. Dist. LEXIS 68745 (S.D. Fla. Apr. 8, 2021), 2021 U.S. Dist. LEXIS 69150 (Apr. 9, 2021) (Bloom).

Order on motion for summary judgment

Order on motion to strike

Sherry Johnson, a passenger on the Carnival FREEDOM, was injured when her shoe caught in a gap between the carpet and metal nosing on a step, causing her to fall down a set of stairs while descending from Deck 4 to Deck 3 on the vessel. Johnson sought to strike the opinions of the cruise line's liability expert, Bryan Emond, because he inspected the stairs after the carpet had been replaced, including putting the nosing back. Johnson argued that Emond's testimony was not helpful as to the condition of the stairs at the time of Johnson's fall. However, Johnson's objection did not explain how Emond's methodology was unreliable. Emond examined photographs of the stairs after the accident and explained the methodology used in forming his opinions. Judge Bloom found his methodology to be useful and sufficiently reliable to permit his testimony, subject to cross-examination on the differences in conditions at the time of his examination. The cruise line then moved for summary judgment that, although Johnson complained of a gap between the carpet and nosing, she did not see the gap and did not know what was wrong with the nosing. However, Judge Bloom noted that the heel of Johnson's shoe did become caught between the carpet and nosing, and the photographs did not depict any close-up views of how the nosings were affixed to the stairs. As Johnson's theory was that the dangerous condition was a space large enough to catch the heel of her shoe, and as the heel of her shoe did become caught, Judge Bloom found sufficient evidence to require a trial on whether a dangerous condition existed that was not open or obvious. The cruise line also argued that Johnson did not establish actual or constructive notice of the condition; however, Judge Bloom found sufficient evidence from prior falls and an acknowledgement from the cruise line that there could be an issue with nosings not being flush with the carpet. Judge Bloom did grant partial summary judgment to the cruise line on causation for Johnson's injuries that were not readily observable (back pain, depression, anxiety, and vision problems), as opposed to her fractured right fibula requiring surgical repair, as she did not disclose her treating physicians as expert witnesses. The physicians could testify as lay witnesses, including giving testimony as to medical care, examination, and treatment, but they could not give opinions about the cause of her non-readily-observable injuries.

It was for the jury to decide whether the TVA was liable to boaters who struck a sagging power line over the Tennessee River; *Thacker v. Tennessee Valley Authority*, No. 5:15-cv-1232, 2021 U.S. Dist. LEXIS 69394 (N.D. Ala. Apr. 9, 2021) (Kallon).

Opinion

The Tennessee Valley Authority was upgrading an electric line spanning the Tennessee River at the TVA-owned Wheeler Reservoir when a pulling cable broke and the electric line sagged. The TVA had two boats in the river patrolling nearby during the installation, and, when the cable broke, the TVA undertook several steps to protect boaters from the danger of the sagging line. The two patrol boats shifted to intercepting approaching vessels. The Coast Guard broadcast a notice on the marine radio notifying boaters of the closing of the hazardous portion of the river and that there were low hanging cables in the river. The TVA asked the Corps of Engineers to shut down a nearby lock to prevent new traffic in the area coming from the west and asked a nearby bridge to drop its span to restrict large commercial vessels traveling from the east from entering the area. About three hours after the cable broke, a recreational bass fishing tournament began, and Gary Thacker and other boaters took off from an upstream harbor. Thacker's boat did not have a marine radio, and he did not hear the warning about the closure of the reservoir. He drove his boat with is fishing partner toward his planned fishing location at full speed of about 68 miles an hour and hit the downed line, resulting in serious injuries to Thacker and his fishing partner. Thacker brought suit in federal court against the TVA, and both Thacker and the TVA filed motions for summary judgment. In his complaint against the TVA, Thacker asserted that there was jurisdiction against the TVA for a "Congressional waiver of suit against TVA," and he sought a jury trial. Judge Kallon corrected Thacker's allegation to be based on federal question jurisdiction involving an action against a federally created corporation. The complaint did not allege admiralty jurisdiction, but Thacker did invoke admiralty jurisdiction in his motion for summary judgment, and Judge Kallon responded that Thacker could not amend his complaint in a motion for summary judgment. The TVA cited the several actions taken to warn of the sagging line and to keep boaters from the area, and Kallon argued that the actions taken were insufficient. Accepting arguments from both sides, Judge Kallon denied summary judgment to both the TVA and Thacker. That including finding sufficient evidence for a jury to find that the TVA acted with reckless or conscious disregard to the rights and safety of others.

Judge enforced United States choice-of-law provisions to limit liability to $500 per package in cargo shipment from Brazil to the United Arab Emirates; *Indemnity Insurance Co. of North America v. Expeditors International of Washington, Inc.*, No. 20-cv-1765, 2021 U.S. Dist. LEXIS 70377 (S.D.N.Y. Apr. 12, 2021) (Hellerstein).

Opinion

Expeditors contracted to carry a cargo of oilfield equipment on a third-party ship from Brazil to the United Arab Emirates. The shipment was damaged, and the consignee's

insurer brought this suit against Expeditors seeking damages of $604,713 in federal court in New York. Citing the $500 package limitation in the bill of lading and Master Service Contract, Expeditors sought to limit liability to $1,500 for three packages. The insurer argued that UAE law, which has a higher package limitation, was compulsorily applicable, but Judge Hellerstein disagreed. The bill of lading and Master Service Contract contained choice-of-law clauses for Washington state and federal law and New York state and federal law. As maritime law, applicable to the shipment, would uphold the choice-of-law clauses, and as the limitations were enforceable under federal, Washington, and New York law, Judge Hellerstein granted summary judgment that Expeditors' liability was limited to $500 per package for the three packages.

Suit to compel arbitration in New York was bound by decision from vessel arrest in Jamaica over failure to pay for bunkers; *F.T. Maritime Services Ltd. v. Lambda Shipholding, Ltd.*, No. 20-cv-2111, 2021 U.S. Dist. LEXIS 70380 (S.D.N.Y. Apr. 12, 2021) (Ramos).

Opinion

Lambda, owner of the M/V PLUTO, chartered the vessel to Nordia, which entered into an agreement with F.T. Maritime to supply bunkers to the vessel. The Confirmation was subject to F.T. Maritime's Standard Terms and Conditions; however, there were three versions of Standard Terms and Conditions. All of the versions provide for a maritime lien to be enforced in any court of competent jurisdiction, but the versions differed on arbitration and choice of law. F.T. Maritime cited one version that provided for arbitration in New York City. The Standard Terms and Conditions that F.T. Maritime attached to this suit in New York provided for London arbitration. A version that was hyperlinked to the Confirmation provided for New York arbitration with an enumerated procedure for selecting the arbitrators. After the bunkers were delivered to the vessel in Jamaica, Nordia failed to pay for the bunkers, and F.T. Maritime arrested the vessel in Jamaica. F.T. Maritime demanded arbitration in New York, but Lambda refused to arbitrate and filed a counterclaim in the Jamaican action, seeking damages for wrongful arrest of the vessel. F.T. Maritime moved for a stay of the Jamaican action pending arbitration based on the contract for supply of the bunkers, and Lambda moved to strike F.T. Maritime's claim and for summary judgment on its counterclaim for wrongful arrest. Applying English law, the Jamaican court struck F.T. Maritime's claim for lack of a maritime lien and declined to stay the suit against Lambda pending arbitration on the ground that F.T. Maritime had no contractual claim in personam against Lambda. F.T. Maritime brought this action in New York to compel arbitration, arguing that Lambda was bound by the New York arbitration clause in the Standard Terms and Conditions. Lambda responded that F.T. Maritime was collaterally estopped from arbitration based on the order from the Jamaican court. Although the order did not expressly decide whether the parties were bound to arbitrate, Judge Ramos held that it decided the broader question whether the parties were bound by any agreement at all and the court held that they were not. That was conclusive for the allegations in the New York suit seeking to compel arbitration, and Judge Ramos held that F.T. Maritime was collaterally estopped from bringing the New York action. Regardless of collateral estoppel, Judge Ramos also held that none of the Standard Terms and Conditions were incorporated into the Confirmation beyond a

reasonable doubt, so there was no agreement to arbitrate and the New York suit should be dismissed on that basis as well.

Alabama Historical Commission was awarded title to the wrecked Schooner CLOTILDA that was abandoned in Alabama waters in 1860; *Alabama v. Unidentified Shipwrecked Vessel Believed to be the Schooner CLOTILDA*, No. 1:19-423, 2021 U.S. Dist. LEXIS 70164 (S.D. Ala. Apr. 12, 2021) (DuBose).

Opinion

The Schooner CLOTILDA was the last slave ship to arrive in the United States, sailing into the Port of Mobile in 1860 with a cargo of 109 enslaved persons (importing enslaved persons had been outlawed more than 50 years earlier). After the enslaved persons were offloaded, the vessel was scuttled by the captain and located 159 years later. The State of Alabama, through the Alabama Historical Commission, brought this in rem action against the remains of the CLOTILDA, seeking to establish its ownership. After giving notice of the action, the Commission moved for summary judgment that it was entitled to the res based on the Abandoned Shipwreck Act, which provides that the United States holds title to abandoned shipwrecks that are embedded in the submerged lands of a state, and that title is transferred to the state in whose submerged lands the vessel was embedded. The primary question was whether the CLOTILDA had been abandoned, and Judge DuBose concluded that the act of burning and scuttling the vessel after discharge of the enslaved persons on the illegal voyage was sufficient evidence of abandonment. As the title was therefore transferred to the state via the federal statute, and as the Alabama Historical Commission was the proper state agency to undertake actions attendant to the ownership of the wreck, Judge DuBose held that title to the CLOTILDA was transferred to the state and that the Commission should take the steps to preserve, document, and protect the wreck.

Judge denied salvor's intervention six years after arrest of a shipwrecked vessel and three years after salvage rights were awarded, holding that the in rem proceeding satisfied due process; *Atlantic Wreck Salvage, LLC v. Wrecked and Abandoned Vessel Known as the S.S. CAROLINA*, No. 1:14-cv-3280, 2021 U.S. Dist. LEXIS 71080 (D.N.J. Apr. 13, 2021) (Rodriguez).

Opinion

The S.S. CAROLINA was a passenger and cargo ship that was sunk by German gunfire in 1918 approximately 94 miles southeast of Sandy Hook, New Jersey. John Chatterton located the wreck in 1995 and arrested the vessel. He allowed diving on the vessel but did not renew his salvage rights to the vessel, and that case was closed in 1996. In 2014, Atlantic Wreck Salvage filed an in rem action against the CAROLINA. Notice was affixed to the wreck, published in the Press of Atlantic City, and published in an article on the New Jersey Scuba Divers Message Board. No one challenged the claim to the CAROLINA, and in 2017 the court granted a default judgment to Atlantic Wreck Salvage, awarding it exclusive salvage rights to the CAROLINA. Three years later, Atlantic Wreck Salvage obtained an injunction against Rustin Cassway, preventing him from conducting salvage

dives on the vessel. Cassway moved to intervene in the suit and sought to set aside the default judgment and dissolve the injunction against Cassway. After Judge Rodriguez found that the efforts made by Atlantic Wreck Salvage were sufficient to provide constructive notice of the arrest, he addressed Cassway's argument that he was denied due process because he never received notice of the claim to the CAROLINA even though Atlantic Wreck Salvage was aware of Cassway's name and address. Judge Rodriguez rejected that argument, holding that interested parties have a duty to stay aware, and the publication requirements that were used in this case satisfied due process. Accordingly, Judge Rodriguez declined to allow Cassway to intervene in the suit.

Costs were awarded after the vessel owner was held entitled to recover against the captain of a yacht for conversion of equipment, supplies, and furnishings that he removed from the vessel; *Versilia Supply Service SRL v. M/Y WAKU*, No. 18-62975, 2021 U.S. Dist. Lexis 73008 (S.D. Fla. Apr. 13, 2021) (Strauss).

Opinion

This action resulted from the freezing of assets of the beneficial owner of the M/Y WAKU, a yacht registered in the Cayman Islands that was sold for $20,575,000 at a judicial auction. In a nonjury trial, Judge Cohn addressed the lien claims that were asserted against the vessel. Crewmembers brought wage claims based on their contracts that were governed by the law of the vessel's flag. Applying the law of the Cayman Islands, Judge Cohn held that the crew members had liens for unearned wages, repatriation expenses, unpaid vacation days, and penalty wages. He also found that the claims were inflated and reduced the amounts awarded. Judge Cohn did not find that any severance was allowed under the agreements signed by the crew or under Cayman Islands law. Judge Cohn awarded judgment on the counterclaim against the captain of the vessel for conversion as the captain had removed appurtenances, equipment, furnishings, and supplies that were the property of the vessel and denied the claim of the company beneficially owned by the captain for necessaries (based on credit card balances) because there was no evidence establishing what was purchased to support the credit card balances. (*See* February 2021 Update). The vessel's beneficial owner then sought costs from the captain for the successful counterclaim, and Magistrate Judge Strauss recommended that costs be assessed in the amount of $19,844.30 for deposition transcripts, $2,101.68 for trial transcripts, $130 for costs of service, and $7,530.47 for the bond for the vessel.

Worker's Jones Act and general maritime law claims for injury on a non-navigable, land-locked lake, were dismissed; *Carney v. Ballard Marine Construction, LLC*, No. 20-372, 2021 U.S. Dist. LEXIS 71631 (E.D. La. Apr. 14, 2021) (Feldman).

Opinion

Quentin Carney brought this suit against Ballard Marine alleging that he was injured while working as a Jones Act seaman on the M/V PHANTOM. The defendant moved for summary judgment on the ground that Carney did not qualify as a seaman and the tort did not occur on navigable waters so the court lacked admiralty jurisdiction. The

defendant established that Carney's entire employment with the defendant occurred on Lake Parrish, which is a land-locked, non-navigable body of water, in Florida. Carney did not respond to the motion, and Judge Feldman held that the assignment to a job on a non-navigable lake prevented Carney's status as a seaman. Therefore, he dismissed the Jones Act claim with prejudice. As the tort claims occurred on waters that were not navigable, Judge Feldman held that the court lacked admiralty jurisdiction over the other claims and dismissed them without prejudice.

Court lacked in personam jurisdiction over vessel owner that filed restricted appearance and counterclaim against arrested vessel, but the in rem claim remained; *Dry Bulk Singapore Pte. Ltd. v. Amis Integrity S.A.*, No. 3:19-cv-1671, 2021 U.S. Dist. LEXIS 73356 (D. Ore. Apr. 16, 2021) (Brown).

Opinion

After the vessel owner withdrew the M/V AMIS INTEGRITY from its charter for failure to pay charter hire, the subcharterer arrested the vessel in this suit in federal court in Oregon. The owner entered a restricted appearance, filed an answer and counterclaim for wrongful arrest, and obtained countersecurity for the counterclaim. The owner, and other entities that were sued as alter egos, moved to dismiss the in personam claims for lack of personal jurisdiction, and Judge Brown agreed that the court did not have either general or specific jurisdiction over the defendants. The in rem claims and counterclaim were not dismissed and remained pending where the vessel was arrested.

Cruise line was granted summary judgment for insufficient evidence to establish notice of a substance on the deck of the ship; *Cogburn v. Carnival Corp.*, No. 20-cv-22166, 2021 U.S. Dist. LEXIS 73927 (S.D. Fla. Apr. 16, 2021) (Ungaro).

Opinion

Marjorie Cogburn, a passenger on the cruise ship ECSTASY, fell while walking on a walkway of the Promenade Deck. She was wearing two-and-a-half-inch wedged sandals and asserted that she slipped in an unidentified brown liquid substance on the tile floor. Neither she nor her husband saw the substance before she fell, and her husband reported that her shoes may have caused the accident. Cogburn did not see any crew mopping in the area; she did not see anything leaking from the ceiling, and she did not see any bartenders walking with drinks in the area. A crew member who was eight to ten feet away testified that the deck was dry. The cruise line moved for summary judgment on the ground that it did not have actual or constructive notice of the risk-creating condition. Cogburn responded that minutes of meetings showing that the cruise line had general knowledge of accidents on the Promenade Deck due to spilled drinks, but Judge Ungaro answered that this fell short of establishing that the cruise line had notice of the brown liquid that allegedly caused Cogburn to slip and fall. There was no evidence how long the substance had been on the deck, and evidence of other falls on the walkway on the Promenade Deck were not sufficiently similar for Judge Ungaro to consider them as constructive notice of the danger of the brown liquid. Finally, the presence of a crew

member eight to ten feet away did not provide constructive notice without some evidence of how long or large the puddle of brown liquid was.

Evidence was insufficient to establish energy company's ownership or placement of obstruction that damaged recreational vessel; *Trosclair v. Hilcorp Energy Co.*, No. 19-11404, 2021 U.S. Dist. LEXIS 74574 (E.D. La. Apr. 19, 2021) (Vitter).

Opinion

This decision reached the same conclusion as in *Puderer v. Hilcorp Energy Co.* (*see* April 2021 Update) in connection with an allision between a fishing trawler and a submerged obstruction in South Louisiana. Billy Trosclair was operating a 38-foot recreational vessel near a platform in Lake Pelto in Terrebonne Parish, Louisiana, when his vessel struck an unmarked, submerged portion of a pipeline, causing injuries to Trosclair and his vessel. He brought this suit against Hilcorp Energy, alleging that it owned or operated the pipeline. Hilcorp Energy moved for summary judgment, and Trosclair responded that the accident occurred on Hilcorp Energy's lease and Hilcorp Energy was liable under the general maritime law for unmarked obstructions. Hilcorp asserted that a mineral lessee is not liable for an allision with an object in navigable waters unless the lessee owned, maintained, controlled, or placed the obstruction, and there was no evidence that Hilcorp did any of those acts. Judge Vitter agreed, citing cases in which defendants that operated wells near an allision site were not held liable absent evidence connecting them to the obstruction.

Judge allowed pre-claim objection to jurisdiction in limitation action (asserting that the action was untimely), but held that notice of a traumatic brain injury was insufficient to trigger the six-month period to file the limitation action; *In re Star & Crescent Boat Co.,* No. 3:21-cv-169, 2021 U.S. Dist. LEXIS 74534 (S.D. Cal. Apr. 19, 2021) (Benitez).

Opinion

In our March 2021 Update we discussed the limitation action brought by Star & Crescent after Jade Spurr was injured on August 5, 2018, during a jet boat tour of San Diego Bay on Star & Crescent's PATRIOT. Spurr brought suit in San Diego Superior Court against Starr & Crescent, which filed this limitation action. Star & Crescent submitted an Ad Interim Stipulation for Value in the amount of $775,000 together with a letter of undertaking and requested issuance of the stay required by Supplemental Rule F. Judge Benitez noted that courts have held that a stipulation supported by a letter of undertaking qualifies as sufficient security; however, he pointed out that the amount of the letter of undertaking has to be in the same amount as the stipulated value. Although the insurers listed three policies with sufficient coverage for the value of the vessel, the letter of undertaking was in the amount of $750,000 ($25,000 less than the value of the vessel). Accordingly, Judge Benitez found the security to be inadequate and denied the request to stay proceedings without prejudice to resubmission of the security. After Star & Crescent submitted an amended ad interim stipulation and letter of undertaking, Spurr appeared in the action and filed an opposition to the amended security before filing an answer and

claim. The basis of the opposition was that there was no jurisdiction over the limitation action because it had not been filed within six months of written notice of the claim. Star & Crescent argued that Spurr did not have standing to challenge the limitation action, but Judge Benitez disagreed. He reasoned that the court could examine its jurisdiction at any time, even before an answer and claim were filed. Spurr's counsel sent written notice on October 8, 2018, advising that he would be representing Spurr. Star & Crescent responded by requesting documentation and information to support the claim for damages and liability. Spurr's counsel sent several responses, including a letter on April 5, 2019, enclosing a report from a neurologist diagnosing Spurr with a diffuse traumatic brain injury. Star & Crescent requested medical bills, and Spurr's counsel responded that there was insufficient billing information to send at that time. No correspondence from Spurr's counsel provided information as to the amount of damages Spurr was seeking. The suit in state court was filed on July 31, 2020, and the limitation action was filed on January 28, 2021, within six months of the state suit, but outside of six months from correspondence with the medical report reflecting the traumatic brain injury. Judge Benitez held that the correspondence was insufficient to trigger the six-month period to file the limitation action. He agreed that the notices did not have to include a monetary amount to trigger the filing requirement; however, it did not follow that Spurr's suffering from a traumatic brain injury was sufficient notice that the amount of the claim would exceed the value of the vessel ($775,000). Judge Benitez did note that a demand in excess of the value of the vessel or submission of the requested medical bills would like have resulted in the case being time barred. Judge Martinez then approved the revised security and granted the limitation stay/injunction.

Insured was not entitled to a jury trial on its counterclaim, brought based on diversity jurisdiction, in the insurer's declaratory judgment action on a marine insurance policy brought under the court's admiralty jurisdiction; *New York Marine & General Insurance Co. v. Boss Interior Contractors, Inc.*, No. 20-cv-23777, 2021 U.S. Dist. LEXIS 74244 (S.D. Fla. Apr. 19, 2021) (Bloom).

Opinion

This case involves a dispute over insurance coverage for the sinking of a barge in Key Largo, Florida. The insurer denied the insured's claim on the ground that the sinking was the result of the insured's failure to exercise due diligence to keep the vessel seaworthy and based on misrepresentations regarding the condition and price of the vessel. The marine insurer brought this suit in federal court in Florida under the court's admiralty jurisdiction, seeking a declaratory judgment that the policy did not afford coverage for the loss. The insured filed a counterclaim based on diversity jurisdiction, asserting the right to a jury trial under the saving-to-suitors clause. The insured sought to distinguish the case law from the Eleventh Circuit, holding that no jury was allowed on such a counterclaim, on the basis that the causes of action in the insurer's suit involved pre-contract misrepresentations and were different from an insured's suit asserting breach of contract for denying the claim. Judge Bloom disagreed and held that both the insured's and insurer's claims arose from the same facts. She likewise held that it would not be in the interest of judicial economy to empanel an advisory jury for the counterclaim.

Magistrate judge recommended that expert opinion (that a sound monitor should be placed on the stage rather than on the dance floor where it posed a tripping hazard) should be stricken as it concerned a lay matter that the jury could understand without the opinion; *Katzoff v. NCL Bahamas, Ltd.*, No. 19-22754, 2021 U.S. Dist. LEXIS 74247 (S.D. Fla. Apr. 19, 2021) (Goodman).

Opinion

Jerald Katzoff was injured while dancing in a lounge on the NORWEGIAN SKY when he tripped on a sound monitor on the dance floor. Katzoff retained Edward Wankel as an expert witness to opine on the placement of the sound monitor, and the cruise line moved to strike his opinions for several reasons. Magistrate Judge Goodman noted that Wankel has a bachelors degree in Business Administration and a master's degree in Public Administration, and that he is not an engineer, biomechanical engineer, medical professional, accident reconstructionist, or human factors expert. He does not have any experience with cruise ship dance spaces, has never used a monitor, and has no experience in designing or selling sound equipment. However, Katzoff focused on Wankel's opinion that the sound monitor should have been placed on the stage rather than on the dance floor where it posed a tripping hazard. On this issue, Magistrate Judge Goodman did not have to address Wankel's qualifications as he believed that the average jury did not need an expert to opine on whether it was negligent to place a monitor on a dance floor in front of the stage where cruise ship passengers were dancing. Consequently, Magistrate Judge Goodman recommended that Wankel's opinions be stricken.

Fact questions resulted in denial of employer's motion for summary judgment on seaman's maintenance and cure claim based on failure to disclose a prior herniated disc and failure to engage in medical treatment; *Meaux v. Cooper Consolidated, LLC*, No. 19-10628, 2021 U.S. Dist. LEXIS 77150 (E.D. La. Apr. 22, 2021) (Ashe).

Opinion

Jonathon Meaux was hired by Savard Marine, which supplies workers to marine companies such as Cooper Consolidated. Savard completed a pre-employment medical questionnaire on which he indicated that he did not have a ruptured or herniated disc. He was hired and was injured while helping to put covers on a barge in the Mississippi River in Convent, Louisiana, when he was struck in the head with a barge cover. Meaux injured his neck and aggravated a pre-existing lower back condition. The tests reflected new herniated discs in Meaux's neck and a herniation in his lower back that was present on an MRI scan from 2012. Meaux ultimately had surgery on his neck, and Savard terminated his maintenance and cure because he had failed to disclose the herniated disc in his lower back and because he had not attended physical therapy sessions before and after his neck surgery. Savard moved for summary judgment on these defenses, and Meaux argued that he was aware of his back pain but did not know he had a ruptured or herniated disc, so his answer on the questionnaire could not be intentional concealment. Meaux argued that the MRI was performed for an employment application, and he was not informed of the results, and Judge Ashe held that was sufficient to create a fact question as to what Meaux

actually knew. Meaux also argued that he missed the physical therapy sessions before the surgery on his neck because they were too painful, and he missed sessions after the surgery because of flu-like symptoms. Based on that explanation, Judge Ashe held that summary judgment was inappropriate on the defense that Meaux failed to engage in medical treatment.

Fact questions on whether the danger was open and obvious and whether the cruise ship operator was on notice of the danger prevented summary judgment in the case of a passenger's fall on a plastic crate that was used as a step-up to help the passenger get in out of bed because of a thick mattress; *Weil v. Victory Operating Co.*, No. 4:19-cv-260, 2021 U.S. Dist. LEXIS 78421 (S.D. Ind. Apr. 23, 2021) (Magnus-Stinson).

Opinion

Roberta Weil had suffered from a number of orthopedic problems (before her cruise on the MS VICTORY I) that affected her gait and stability and required that she use a cane for balance. Also prior to the cruise, new mattresses had been installed on the VICTORY I that were approximately 13 inches high, which was higher than the mattresses previously used on the ship. When Weil boarded the vessel for a cruise on the Great Lakes, she commented to the cabin steward on the height of the bed and asked for a step stool. The steward, who was hired by a company that employed the crew of the vessel, provided a plastic crate with openings on the top and sides, like those used to load dishes at banquets. She could not stand on the crate, so the steward put a towel over it. That evening, when she got up to exit the bed, her foot slipped on the towel on the crate and she fell and hit her head on the nightstand, splitting a vertebra in her neck. Weil brought this suit against the operator of the cruise ship, and the defendant moved for summary judgment on the grounds that the danger was open and obvious and based on lack of notice of the danger. Although the height of the mattress was open and obvious, the danger involved slipping because of the towel on the crate used to accommodate Weil because of the height of the mattress. Weil had tried stepping on the covered crate and it appeared stable, so Judge Magnus-Stinson could not say as a matter of law that the danger was open and obvious. With respect to the notice to the operator, complaints of the height of the mattresses were received as soon as guests went to their cabins. Judge Magnus-Stinson concluded that these complaints were sufficient to put the operator on notice of the dangers of the height of the mattresses. Whether notice to the steward, who was employed by a contractor, was sufficient depended on whether there was evidence that he could be an agent of the operator.

From the state courts:

Insurance broker was held liable for failing to notify the appropriate insurance carriers of claims arising from an injury to a worker ascending from a tug to a barge during construction work on the Broadway Bridge spanning the Harlem River; *Commodore Maintenance Corp. v. Insight Cos.*, Case No. 2018-12298, 2021 N.Y. App. Div. LEXIS 2251 (N.Y. App. Div. 2d Dep't Apr. 7, 2021) (per curiam).

Opinion

Joseph Pastorino's injury returns to the Update in the insurance context. Pastorino was employed by Commodore Maintenance Corp. as a dock builder foreman for the construction on the Broadway Bridge spanning the Harlem River. Commodore Maintenance, which was hired by New York City, chartered a tugboat from Ocean Marine Development Corp. to assist in the work. The tug performed various operations, including moving barges from one side of the bridge to the other. Pastorino was allegedly injured when he was ascending from the tugboat onto a barge by stepping on a tire that was hanging from the barge. Pastorino brought this action against the City under the New York Labor Law (based on an alleged violation of the New York Industrial Code) and against his employer, Commodore Maintenance. The parties filed motions for summary judgment and appealed the decisions to the Appellate Division. With respect to Commodore Maintenance, the court reviewed the charter for the tug and held that it did not provide for the complete and exclusive relinquishment of possession, command, and navigation of the vessel to Commodore Maintenance in order to be a bareboat charter. In the absence of a bareboat charter, the court held that LHWCA compensation was Pastorino's exclusive remedy against Commodore Maintenance. Additionally, Ocean Marine Development, owner of the tug, was precluded from bringing indemnity and contribution claims against Commodore Maintenance in accordance with Section 905(b) of the LHWCA. Turning to the claims against the City, the court held that federal law did not preempt application of the New York Labor Law as the work was "essentially local in character," and, although the City did not own the tug or barge, it could be held liable under the Labor Law as the "project owner." Finally, the appellate court ruled that the City's indemnity and contribution actions against Commodore Maintenance were barred by the anti-subrogation rule as the City was a named additional insured under Commodore's commercial general liability policy. (March 2021 Update). Commodore Maintenance brought this action against its insurance broker, Insight Cos., for failing to timely notify the appropriate insurance carriers (P&I insurer and LHWCA carrier) of the incident and to submit to them the complaint or amended complaint filed bv Pastorino. The insurers disclaimed coverage based on the late notice, and the New York Supreme Court granted summary judgment to Commodore Maintenance, holding that the broker breached its duty to Commodore Maintenance and that breach was a proximate cause of losses to the insured. The appellate court agreed and remanded the case for entry of a judgment declaring that the broker is obligated to indemnify Commodore Maintenance in connection with Pastorino's suit.

Failure to object to general submission to the jury resulted in affirmance of verdict for Jones Act negligence and unseaworthiness despite improper admission of expert testimony, but the case was remanded for reconsideration of remittitur for the $20.3 million award of damages; *Royal Caribbean Cruises, Ltd. v. Spearman*, No. 3D18-2188 (Fla. 3d DCA Apr. 28, 2021) (Hendon).

Opinion

Lisa Spearman was injured while serving as a crewmember on the cruise ship VOYAGER when her fingers were caught in the pinch point of a Semi-Watertight Door that was retracting into the bulkhead after a nurse improperly overrode Bridge Control during a safety drill. Spearman brought this suit against the cruise line in the circuit court for Miami-Dade County Florida under the Jones Act and for unseaworthiness under the general maritime law. The cruise line moved to exclude the testimony of Spearman's liability experts, Eric Van Iderstine and John W. Sullivan, that there was a safer alternative design for the door, but the trial court allowed the testimony. The case was submitted to the jury on four theories of liability, that the door could have been designed to eliminate the pinch point; that the cruise line failed to train the crew on how to avoid the pinch point; that the door lacked a warning sign or sticker regarding the pinch point; and that the nurse was negligent in overriding Bridge Control during the safety drill. The jury returned a verdict of both negligence and unseaworthiness and awarded damages of $20.3 million ($6 million for past and $6 million for future bodily injury and resulting pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity for the enjoyment of life; $7 million for future expenses; $500,000 for lost earnings; and $800,000 for lost earning capacity). The trial court granted a remittitur of $833,533 in future medical expenses, but declined any further reduction on the ground that the judge is a firm believer in the right to a jury trial and did not have a sufficient grasp of Spearman's condition to pass judgment on it. The cruise line rejected the remittitur, and the judge entered judgment in accordance with the verdict. The appellate court held that the trial court erred in admitting the opinions of experts Van Iderstine and Sullivan with respect to an alternative safe design as the design was unproven and the opinions were speculative and did not pass muster under *Daubert*. However, the design of the door was only one of the theories for liability, and the general verdict form did not require the jury to indicate which theory was resolved in favor of which party. As such, Florida's "two-issue" rule required that the appellate court conclusively presume that that the verdict was based on the nurse's negligence, as to which the cruise line conceded there was no error in the trial. Accordingly, the appellate court could not reverse the liability finding even though the expert opinions were erroneously admitted. The appellate court did reverse the award of damages, however, because Florida law requires the court to consider five criteria in determining whether a jury's damage award is excessive or inadequate, and the judge declined to consider the factors. The case was remanded for a new hearing on the cruise line's motion for remittitur.

Thanks to Katherine E. Kaplan for her help in preparing this Update.

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Quote:

The dissent begins by expressing "due respect" to the majority—and then ends with a well-known literary quote about idiots. *Post*, at 24, 37 & n.39. It concludes that my opinion in this case is worth "nothing." *Id.* at 37.

To some, statements like these may be reminiscent of the wisdom of Ricky Bobby. *See* Talladega Nights: The Ballad of Ricky Bobby (2006) ("What? I said 'with all due respect!'"). To others, it may call to mind a recent observation by one of our respected colleagues: "More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective." *Keohane v. Fla. Dep't of Corrs. Sec'y*, ___ F.3d ___, ___ (11th Cir. 2020) (Newsom, J., concurring in the denial of rehearing en banc).

As the adage goes, the loudest voice in the room is usually the weakest.

Hewitt v. Helix Energy Solutions Group, Inc., No. 19-20023 (5th Cir. Dec. 21, 2020) (Ho, J., concurring). The Fifth Circuit agreed to rehear the case *en banc* on March 9, 2021).

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