April 2020 Longshore/Maritime Update (No. 251)

Notes from your Updater:

On March 6, 2020, the Fourth Circuit issued its decision in *Mayor & City Council of Baltimore v. BP, P.L.C.* (No. 19-1644). The suit was brought by the Mayor and City of Baltimore against 26 multinational oil and gas companies, asserting that they were partially responsible for climate change. The oil and gas companies removed the case on numerous grounds, including the federal jurisdiction of the Outer Continental Shelf Lands Act, and the district judge rejected all the bases for removal and remanded the case (July Update). The only basis the defendants had to appeal the remand of the case was the Federal Officer Removal Statute, but the Fourth Circuit rejected statute that as a basis for removal, affirming the remand of the case to state court.

In our December 2019 Update, we advised that a jury in federal court in Oregon found in favor of ICTSI Oregon, Inc., that the International Longshore and Warehouse Union and Local 8 engaged in unlawful labor practices causing damages in the amount of $93,635,000, with 55% attributable to ILWU and 45% attributable to Local 8. On March 5, 2020, Judge Simon ordered a remittitur to $19,061,248. *ICTSI Oregon, Inc. v. International Longshore and Warehouse Union*, No. 3:12-cv-1058 (D. Ore. Mar. 5, 2020).

On March 9, 2020, Centaur, L.L.C., filed a petition for a writ of certiorari in the United States Supreme Court, challenging the decision of the Fifth Circuit that established a test to determine whether non-oilfield contracts are maritime in connection with a contract to build a concrete rail on a dock in the Mississippi River (requiring the use of vessels). The Fifth Circuit held that admiralty law applied to the contract in connection with the injury to a marine construction worker (December 2019 Update).

On March 19, 2020, the Office of Administrative Law Judges issued an Administrative Order and Notice in light of the risks presented by COVID-19, stating that:

- All hearings, except in cases in which a decision is to be made on the record based on stipulations of fact or a stipulated record, are suspended until May 15, 2020. Parties may petition for a telephonic hearing if they can demonstrate compelling circumstances. If not filed jointly, the petition must state the other party's position or that the other party could not be reached despite diligent efforts.

- Procedural deadlines in pending cases are suspended until May 15, 2020. The presiding ALJ may order otherwise and will notify the parties if deadlines for cases scheduled for between May 18 and June 12, 2020 will also be modified.

- Procedural deadlines for cases that are not currently pending remain unaffected.

- Mediations and settlement judge conferences conducted by telephone may proceed if all parties consent.

- The OALJ is encouraging all parties to submit filings via email. National Office and District Office email addresses were provided.

- The OALJ has placed a hold on contested orders and decisions until April 15, 2020. The presiding ALJ will have discretion to issue decisions where withholding the decision will result in a significant risk to health or safety, or where delay will cause substantial prejudice.

Order and Notice

The Benefits Review Board has encouraged all parties to submit filings through the Electronic File and Service Request system to ensure timely filing. The registration page for the service can be found on the BRB's homepage. https://www.dol.gov/brb/welcome.html. Information regarding registration to access the system and a user guide can be found by following this link: https://dol-appeals.entellitrak.com/.

On March 23, 2020, the United States Supreme Court resolved the copyright infringement case involving photographs and videos of the shipwreck of the QUEEN ANNE'S REVENGE, holding that the sovereign immunity of the State of North Carolina prohibited the photographer's suit against the State for unauthorized publication of his copyrighted photographs and videos.

On the LHWCA Front . . .

From the federal appellate courts:

Fifth Circuit clarified nature element of seaman status test in holding that a welder, whose duties were performed on jack up rigs that were jacked up, was not a seaman as a matter of law and his exclusive remedy was pursuant to the LHWCA; *Sanchez v. Smart Fabricators of Texas, L.L.C.*, No. 19-20506 (5th Cir. Mar. 11, 2020) (Higginbotham).

Opinion

This important decision clarifies the requirement that a worker must have a connection to a vessel or fleet of vessels that is substantial in nature. Gilbert Sanchez was employed for 67 days by Smart Fabricators of Texas as a welder. All but two of those days were spent on jack-up rigs, and for all but four of those days the rigs were jacked-up (four days were spent on a rig under tow, but Sanchez was treated as a passenger during those four days). Sanchez was injured when he tripped on a pipe welded to the deck of a jack-up rig while it was jacked up on the outer Continental Shelf, offshore Louisiana. Sanchez brought this action in state court in Houston, Texas, asserting seaman's remedies against Smart Fabricators and the owner of the rig (he later dismissed the owner). Smart Fabricators then removed the action to federal court in Houston based on jurisdiction under the Outer Continental Shelf Lands Act, arguing that the prohibition on removal of seamen's claims did not apply because Sanchez was not a seaman as a matter of law. Chief Judge Rosenthal agreed that Smart Fabricators had sufficiently established that Sanchez was not a seaman, striking those allegations and permitting removal, and then granted summary judgment dismissing the case on the ground that Sanchez was not a seaman. Her analysis was based on the fact that Sanchez failed the requirement that, in order to be a seaman, a worker's duties must have a connection to a vessel that is substantial in nature. He failed that requirement because his work on the rigs was "while they were jacked up on the sea floor, with the body of the rig out of the water and not subject to waves, tides, or other water movement." The Fifth Circuit agreed that Sanchez was not a seaman as a matter of law and, in a published opinion, Judge Higginbotham wrote to affirm the district court's reasoning in distinguishing the Fifth Circuit's decision in *Naquin v. Elevating Boats, LLC*. In *Naquin*, the court had held that a vessel repair supervisor who spent 70% of his time on lift-boats while they were moored or jacked-up in a shipyard canal was a seaman and satisfied the nature requirement that a worker's duties "take him to sea." Judge Higginbotham agreed with Chief Judge Rosenthal, noting that Naquin's duties included operating the vessels' marine cranes and jack-up legs "while subject to the vicissitudes of a navigable waterway." However, almost all of Sanchez's work on drilling rigs was while they were jacked up on the sea floor—a workplace that "was stable, flat, and well above the water." Sanchez, did not perform marine functions, such as operating or navigating the rigs, and, as a welder, was injured when he tripped on a pipe welded to the floor, a circumstance unrelated to any perils of the sea. Therefore, Sanchez failed the requirement for seaman status that his contribution to the vessel or fleet of vessels must be substantial in nature. *Thanks to John Walker with Schouest Bamdas, Soshea & BenMaier in Houston for bringing this case to our attention.*

Worker injured on a platform that was temporarily floating on navigable waters during its construction satisfied the *Perini* test for coverage under the LHWCA, and his employer satisfied the definition of an employer under the LHWCA because the employer had an employee in maritime employment when the claimant was covered because of *Perini*; *MMR Constructors, Inc. v. Director, OWCP*, No. 19-60027 (5th Cir. Mar. 26, 2020) (Davis).

Opinion

Henry Flores worked for MMR Constructors as a quality assurance and control technician on the electrical wiring for the construction of Chevron's tension-leg platform, BIG FOOT. At the time he tore his Achilles tendon, the platform was floating on pontoons in the shipyard in Corpus Christi, Texas. Administrative Law Judge Romero held that the BIG FOOT was not a vessel, but Flores was injured on the floating hull on navigable waters, so he satisfied the geographic component of the situs test. However, Judge Romero held that Flores did not satisfy the functional component of the situs test, the status test, or the definition for MMR Constructors to be an employer. The Benefits Review Board reversed the decision on the ground that Flores' injury on navigable waters was sufficient, under *Perini*, to establish coverage under the LHWCA. Writing for the Fifth Circuit, Judge Davis held that Flores' claim was covered under the LHWCA by application of *Perini*. Judge Davis contrasted two decisions of the Fifth Circuit in reaching his decision. In *Williams v. Avondale Shipyards*, the claimant was injured on a not-yet-commissioned Coast Guard cutter on its final sea trial. The craft was not yet a vessel, but the craft was on navigable waters and therefore satisfied the situs requirement necessary for coverage under the LHWCA before the 1972 Amendments added the status test. In *Travelers Insurance Co. v. Shea*, the claimant was injured on a floating outfitting pier, which was an extension of a ramp that had been permanently anchored to the shore and seabed. Despite the fact that the structure in *Shea* was floating, the court treated it as a pier or extension of land because it was permanently anchored for 18 years. Considering these cases together, if a craft in navigable waters is permanently attached to land, the water underneath it is removed from navigation and is not navigable under the LHWCA; however, as the BIG FOOT was only temporarily attached to the land while under construction, the water underneath it was not removed from navigation. Therefore, Flores was injured on navigable waters and satisfied the test for coverage under *Perini* without having to satisfy the status test. Judge Davis then addressed the question whether MMR Construction was an employer as defined in the LHWCA--having any employees employed in maritime employment, in whole or in part on navigable waters. MMR argued that it did not satisfy the test because its only employee on the water, Flores, was engaged in the construction of a platform, which is not maritime employment. Although there is language in the *Perini* case that can be construed as requiring the employer to satisfy the definition of an employer separate from the simple *Perini* requirement that the worker be injured on navigable waters, Judge Davis noted that pre-1972 case law held that employers satisfied the definition of an employer under the LHWCA when they employed a claimant who qualified as an employee solely by being injured on navigable waters. Noting the limitation from the Fifth Circuit's en banc decision in *Bienvenu v. Texaco* (co-authored by Judge Davis) that the worker's presence on the water cannot be transient or fortuitous, Judge Davis held that Flores' work on the water for several months was sufficient for MMR Construction to be considered an employer under the LHWCA. Finally, Judge Davis addressed the argument that by applying the LHWCA to accidents that lack a connection to traditional maritime activity, the LHWCA exceeded the constitutional limits of federal maritime jurisdiction. MMR Construction sought to apply the limitations on "maritime" tort jurisdiction under the Constitution and Admiralty Jurisdiction Statute to the coverage for "maritime" employment in the LHWCA. However, even though cases determining jurisdiction under the Admiralty Jurisdiction Statute were decided after *Perini*, there was no indication from the Supreme Court that it intended to question its

analysis in *Perini*. Consequently, Judge Davis, considered the Fifth Circuit to be bound by the Supreme Court's understanding of the constitutionality of the coverage of the LHWCA in *Perini* and the cases relied on in *Perini*.

From the federal district courts:

Statement in notice of removal that other longshore workers make over $100,000 a year was insufficient to satisfy the requirement that $75,000 be in controversy for diversity jurisdiction; *Kamel v. APL Marine Services, Ltd.*, No. 20-cv-1472, 2020 U.S. Dist. Lexis 35699 (C.D. Cal. Feb. 27, 2020) (Carney).

Opinion

Judith Kamel brought suit in Los Angeles County Superior Court against APL Marine, alleging that she suffered severe and disabling injuries as a longshore worker when she fell on a catwalk that was under the active control of the defendant. APL Marine removed the case based on diversity jurisdiction, and its counsel sought to satisfy the requirement that $75,000 be in controversy by asserting that he had defended numerous cases brought by longshore workers and the vast majority of the local longshore workers had yearly incomes in the six figures. He concluded that given the claims of greatly impaired earning capacity, fringe benefits, medical expenses, and great mental and physical pain and suffering, the amount in controversy exceeded $75,000. Judge Carney concluded that the statement did "not come close to satisfying" APL Marine's burden to demonstrate that the amount in controversy was satisfied. There was no allegation of what Kamel actually made and no attempt to describe her injuries. Therefore, Judge Carney ordered the case remanded.

Court allowed removal of longshore worker's suit against employer and carrier after dismissing the stevedoring company based on improper joinder; *Pinkney v. Cooper/Ports American, LLC*, No. 4:19-cv-2180, 2020 U.S. Dist. Lexis 39098 (Mar. 6, 2020) (Eskridge).

Opinion

David Pinkney asserted that he was injured on a ship in the Port of Houston while working for Cooper/Ports American LLC. After Administrative Law Judge Johnson denied him LHWCA benefits because he did not attend a psychiatric evaluation or FCE and failed to comply with the judge's orders, Pinkney brought suit in state court against Cooper and its LHWCA carrier. The carrier removed the case to federal court based on diversity jurisdiction, asserting that non-diverse Cooper should be dismissed for improper joinder. Concluding that Pinkney's exclusive remedy against Cooper was LHWCA benefits, Judge Eskridge dismissed Cooper and upheld the removal of the case based on diverse citizenship between Pinkney and the carrier.

Employees of terminal operator at city pier were held to be covered by San Francisco's minimum wage ordinance; *Ormeno v. Pasha Automotive Services*, No. 19-cv-7258, 2020 U.S. Dist. Lexis 43245 (N.D. Cal. Mar. 12, 2020) (Chhabria).

Opinion

Pasha Automotive Services is a cargo terminal operator that ships vehicles from San Francisco's Pier 80. Two of its employees brought this action against Pasha for underpaying them under San Francisco's minimum wage ordinance. That ordinance covers anyone working in "a public off-street parking lot, garage, or storage facility for automobiles." Pasha first argued that the city pier was not a public facility as it was not accessible to members of the public, but Judge Chhabria rejected that argument as the ordinance defined a public facility as including a facility on property owned or leased by the city. Judge Chhabria also rejected Pasha's argument that a cargo terminal operator is not a storage facility for automobiles, as the job of a terminal operator is to receive cargo delivered to the terminal and keep it until someone comes to load it onto a vessel or pick it up for inland transportation. It might be true that the overarching purpose of the facility is to enable cars to be shipped, but in achieving that purpose, the cars must be stored. Consequently, Judge Chhabria held that Pasha's employees were protected by the San Francisco ordinance.

Longshore worker's claim of racial and sexual discrimination and retaliation was dismissed for failure to exhaust administrative remedies and for insufficient pleading; *McKenzie-El v. Ports of America*, No. ELH-19-1980, 2020 U.S. Dist. Lexis 43173 (D. Md. Mar. 12, 2020) (Hollander).

Opinion

Riker McKenzie-El has worked as a longshore worker at the Port of Baltimore since 1977, and has served in numerous leadership positions in International Longshoremen's Association Local 333, including vice-president. He has long been an advocate against discrimination against African-American and Asiatic longshore workers, and he claimed that he suffered retaliation for that advocacy. He therefore brought this action against Ports of America, Steamship Trade Association of Baltimore, and the International Longshoremen's Association for racial discrimination, sex discrimination, and retaliation. Steamship Trade Association of Baltimore moved to dismiss the complaint, and Judge Hollander granted the motion as to all of the counts on the grounds that McKenzie-El either had not exhausted his administrative remedies or had not sufficiently pled the asserted causes of action.

Defendant in maritime action may seek contribution from a third party even though the statute of limitations on the plaintiff's action has run against the third party; *Pilette v. United Marine Offshore LLC*, No. 6:17-cv-1672, 2020 U.S. Dist. Lexis 51667 (W.D. La. Mar. 23, 2020) (Juneau).

Opinion

Eunice Pilette, a tank cleaner on the LB SUPERIOR RESULT, was injured in a collision between that vessel and the M/V MISS ALLIE. Pilette brought suit against the owner of the MISS ALLIE, and the owner of the MISS ALLIE later brought a third-party action

against Pilette's employer, Sewart Supply, seeking to recover contribution. Sewart Supply objected on the ground that it could not be held liable because the statute of limitations on Pilette's claim had run before the third-party action. However, Judge Juneau rejected Sewart's contention and held that the owner of the MISS ALLIE could bring the contribution claim even though the statute of limitations had run on Pilette's claim against Sewart.

Shipowner's limitation of liability action in connection with death and injuries to longshore workers was transferred back to Houston where the accident occurred; *In re Grebe Shipping LLC*, No. 3:19-cv-861, 2020 U.S. Dist. Lexis 51496 (D. Conn. Mar. 25, 2020) (Shea).

Opinion

Francisco Manuel Montoya and several other longshore workers were killed in an accident on the M/V GREBE BULKER in the Port of Houston. Montoya's family sued the vessel's beneficial owner in state court in Connecticut, and the owner filed this complaint seeking limitation of liability in federal court in Houston. Claimants in the limitation action moved to transfer the limitation action to Connecticut on the ground that venue was improper in Texas and was proper in Connecticut under Supplemental Rule F(9), and the Texas judge transferred the case to Connecticut. Once the limitation action was in Connecticut, the claimants sought to lift the stay to allow them to proceed in state court. The vessel owner responded by requesting that the limitation action be transferred back to Houston pursuant to Section 1404(a) for the convenience of the parties and witnesses. Judge Shea first noted that the choice of Connecticut as the venue for the Montoya suit should be given little weight because all of the claimants live in Houston. Weighing the convenience of the parties and witnesses, the factors strongly favored transfer back to Houston where the accident occurred, the claimants live, and most of the witnesses reside. Therefore, Judge Shea transferred the limitation action back to Houston.

From the state courts:

Shipfitter employed by a staffing company was a borrowed servant of the shipyard, and his exclusive remedy against the shipyard was LHWCA compensation; *Sardina-Garcia v. Brownsville Marine Products, LLC*, No. 1254 WDA 2019, 2020 Pa. Super. Lexis 199 (Pa. Super. Mar. 13, 2020) (Pellegrini).

Opinion

MK Industries had a General Staffing Agreement to supply employees to work at Brownsville Marine Products shipyard. MK Industries employed Javier Sardina-Garcia to work as a shipfitter and supplied him to Brownsville Marine in 2003 to assist in the construction of barges. Sardina-Garcia was injured in May 2015 and received LHWCA compensation from MK Industries' carrier. Sardina-Garcia then brought this action in the court of common pleas in Fayette County, Pennsylvania, against Brownsville Marine for failing to maintain safe working conditions. The judge granted summary judgment to Brownsville Marine that Sardina-Garcia was a borrowed servant of Brownsville Marine and that his claim was barred by the exclusive-remedy provision of the LHWCA.

Following Third Circuit precedent, the appellate court focused on two primary factors to determine if there was a borrowed servant relationship, whether the borrowing employer was responsible for the employee's working conditions and whether the employment was of such duration that the borrowed employee could be presumed to have acquiesced in the risks of his new employment (the court also noted that were additional factors used in the Fifth Circuit's borrowed servant test). Judge Pellegrini noted that MK Industries performed all of the administrative functions, such as payroll, taxes, benefits, drug screens, background and eligibility checks, and unemployment and workers' compensation benefits and claims, and it also provided safety training and personal protective equipment. However, Brownsville Marine was responsible for the worker's daily working conditions and assignments and retained ultimate control over the worksite and the employee's work product. Additionally, Sardina-Garcia had been assigned to work at Brownsville Marine for 20 months, suggesting that he had acquiesced to the employment relationship with Brownsville Marine. Finally, Judge Pellegrini considered the factors used by the Fifth Circuit and concluded that they overwhelmingly supported the conclusion that Sardina-Garcia was a borrowed servant of Brownsville Marine. Therefore, the dismissal of the suit was affirmed.

And on the Maritime Front . . .

From the United States Supreme Court:

Safe berth clause in voyage charter is a guarantee of a ship's safety and not a duty of due diligence; *CITGO Asphalt Refining Co. v. Frescati Shipping Co.,* No. 18-565 (Sup. Ct. March 30, 2020) (Sotomayor).

Opinion

The Supreme Court resolved the dispute among the circuit courts on the meaning of a safe berth clause in a voyage charter party. Frescati time chartered the ATHOS I to Star Tankers, which, in turn, voyage chartered the vessel to CITGO to carry a cargo of crude oil from Venezuela to CITGO's asphalt refinery in New Jersey. After voyaging to about 900 feet from CITGO's berth, in a federal anchorage area, the vessel struck an abandoned anchor, which punctured the vessel's single hull. The puncture resulted in a spill of approximately 263,000 gallons of gasoline into the Delaware River. Frescati's liability as the Responsible Party under OPA was limited to $45,475,000, and it was reimbursed by the federal Oil Spill Trust Fund for $88 million in cleanup costs above that amount. Both Frescati and the United States brought actions against CITGO, and CITGO was ordered to pay $55 million to Frescati and $88 million to the United States based on a strict liability standard that the safe berth clause constitutes a guarantee that the vessel would safely reach the berth provided that it maintained a draft of 37 feet or less, regardless of whether CITGO had exercised due diligence. This ruling was in line with the decisions in the Second Circuit, but differed from the precedent in the Fifth Circuit that imposed on the charter a duty of due diligence to select a safe berth. The Supreme Court resolved the conflict by adopting the interpretation that the safe berth clause binds the charterer to a warranty of safety that is not subject to qualifications or conditions. Although recognizing

that the parties are free to contract for limitations, such as tort concepts of fault, Justice Sotomayor held that the parties had not done so in this case.

From the federal appellate courts:

Global Commodities Merchandiser with a distribution port in Tampa, Florida, which satisfied the V-shaped revenue pattern for the DEEPWATER HORIZON Economic Damages Class Action Settlement Agreement because of a timely price spike and drop in the price of fertilizer that was unrelated to the blowout, was not entitled to recover the $77 million that the settlement agreement formula would have awarded; *BP Exploration & Production, Inc. v. Claimant ID 100191715*, No. 19-30264 (5th Cir. Mar. 3. 2020) (Engelhardt).

Opinion

Trammo, Inc. is a global commodities merchandiser that purchases and supplies ammonia and fertilizer around the world. As it has a distribution port in Tampa, Florida, Trammo made a claim for economic loss under the DEEPWATER HORIZON Economic Damages Class Action Settlement Agreement, using the formula for Zone D (providing for recovery when the claimant suffered a decrease of revenue after the spill compared to revenue before the spill). The administrator awarded $77,688,762.55 despite BP's objection that the loss was caused by a spike in the price of fertilizer before the spill and a drop in the price of fertilizer after the spill that was unrelated to the spill. Trammo argued that it was not required to show that the decrease in revenue was related to the spill, and the award was affirmed by the appeal panel and the district court. The Fifth Circuit, however, noted that it had previously ruled that when BP introduces "credible evidence of a sole, superseding cause for a claimant's loss," it may warrant an investigation into causation. As the appeal panel and the district court did not consider whether there was credible evidence of a sole, superseding cause, Judge Englehardt remanded the case to the district court to determine whether to remand the case to the administrator for fact finding on this issue.

Second Circuit recognized the preclusive effect of a Singapore judgment and affirmed the injunction of arbitration proceedings between a vessel owner and bunker supplier; *China Shipping Container Lines Co. v. Big Port Service DMCC*, No. 19-1111 (2d Cir. Mar. 5, 2020) (per curiam).

Opinion

This case involves a dispute over the supply of bunkers to a vessel. Litigation ensued in Singapore between the parties despite the supplier's attempts to have the dispute decided in arbitration. The court in Singapore entered a judgment, and the vessel owner brought this declaratory judgment action in New York seeking to enjoin arbitration between the parties. The district court enjoined arbitration proceedings, and the Second Circuit affirmed that decision, giving effect to the judicial proceedings in Singapore. The Second Circuit first determined that it had jurisdiction over the suit, reasoning that if the suit had been one to enforce the arbitration clause in a maritime contract to supply bunkers to a

vessel, the court would have admiralty jurisdiction to decide the case. Conversely, a suit to enjoin arbitration arising from a maritime contract should also fall within the admiralty jurisdiction. The Second Circuit then addressed the substantive arguments asserted by the supplier and held that there is a strong policy in favor of arbitration, but the issue whether there was a valid arbitration agreement was litigated in Singapore and was decided against the supplier. Reasoning that the policy favoring arbitration does not require that the supplier get a second hearing on the issue in the United States, the Second Circuit affirmed the injunction against arbitration.

All-risk hull policy does not cover all losses; insured must still establish a fortuitous loss; *Chartis Property Casualty Co. v. Inganamort*, No. 19-1903 (3d Cir. Mar. 24, 2020) (Jordan).

Opinion

John and Joan Inganamort left their 65-foot fishing vessel, THREE TIMES A LADY, docked behind their part-time residence in Boca Raton, Florida. While they were at their home in New Jersey, the vessel partially sank at the dock. An investigation revealed a small hole in the hull, electrical breakers that were severely rusted and blackened from electrical failure with obvious water intrusion, and an inoperative battery charger that resulted in the bilge pumps no longer functioning. The Inganamorts made a claim against Chartis on their all-risks hull policy, and Chartis declined the claim and brought this declaratory judgment action, asserting that there was no coverage for the sinking. After prolonged discovery, Chartis filed a motion for summary judgment, arguing that the Inganamorts had failed to carry their burden of establishing that the sinking was a fortuitous loss, and the district court granted the motion. Writing for the Third Circuit, Judge Jordan began by agreeing with the decisions of the First, Second, Fifth, and Eleventh Circuits that the insured bears the burden of proving that the loss was fortuitous. He explained that the insured need not point to an exact cause of the loss, and that losses resulting from negligent behavior can be fortuitous, but not losses caused by wear and tear. However, there must be some showing that the loss occurred by chance, and the Inganamorts were unable to make that showing. Therefore, the summary judgment was affirmed.

Public utility that did not own an underwater transmission cable that was damaged in a maritime accident was barred by the economic loss rule of *Robins Dry Dock* from recovery of the increased cost of supplying power to its customers during the repair of the cable; *In re Bouchard Transportation Co.*, No. 19-1143, 2020 U.S. App. Lexis 9090 (2d Cir. Mar. 24, 2020) (per curiam).

Opinion

Bouchard Transportation brought this action seeking limitation of liability for damage to an underwater electrical transmission cable supplying power to Long Island and parts of New York City in connection with its tug ELLEN S. BOUCHARD and the barge B. No. 280. Long Island Lighting Company brought a claim for the increased cost of supplying power to its customers while the cable was repaired, but the district court denied the claim

on the ground that Long Island Lighting lacked the proprietary interest in the cable system necessary to recover its purely economic losses based on the economic loss rule from *Robins Dry Dock*. Applying collateral estoppel to prior litigation holding that Long Island Lighting did not have a proprietary interest in the cable, the Second Circuit affirmed the dismissal of its claim based on the economic loss rule.

Awareness of owner or charterer of subcontractor's involvement in supplying bunkers to the ship did not constitute authorization so as to provide a maritime lien to the subcontractor; *ING Bank N.V. v. Bomin Bunker Oil Corp.*, No. 19-30418 (5th Cir. Mar. 24, 2020) (Smith); *ING Bank, N.V. v. M/V CHARANA NAREE*, No. 2:16-cv-1003, 2020 U.S. Dist. Lexis 38928, 2020 U.S. Dist. Lexis 38929, 2020 U.S. Dist. Lexis 38933 (W.D. La. Mar. 5, 2020) (Cain).

Opinion Bomin

Opinion ING lien

Opinion Macoil claimed lien

Opinion Macoil contract

The bankruptcy of O.W. Bunker returns to the Update (July and September 2019 and January 2020 Updates). The first case involved the charterer of the BULK FINLAND M/V, which contracted with O.W. Bunker Malta to supply bunkers to the vessel, identifying BOMINFLOT as the supplier. O.W. Bunker Malta then subcontracted with O.W. Bunker U.S.A. to supply the bunkers, and O.W. Bunker U.S.A. subcontracted with Bomin Bunker Oil Corp. to supply the bunkers. Bomin delivered the fuel to the vessel, and the vessel's chief engineer signed a receipt confirming that the vessel was ultimately responsible for the debt. Each of the contracting parties issued an invoice to its respective contractual counterparty, but the O.W. Bunker entities filed bankruptcy before the invoices came due. Bomin and a secured creditor of O.W. Bunker arrested the BULK FINLAND, and the vessel's long-term charterer and the secured creditor moved for summary judgment that Bomin did not have a maritime lien pursuant to the Commercial Instruments and Maritime Liens Act. Bomin satisfied the requirements that the bunkers were necessaries and were provided to the vessel. However, the issue presented was whether Bomin supplied the bunkers on the order of the owner or person authorized by the owner. In the situation where the bunkers were supplied by a subcontractor, as in this case, Bomin was required to show that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance. Bomin first tried to establish that authority through the terms of its subcontract, but Judge Smith rejected that argument as maritime liens cannot be created by contract, only by the Lien Act. The subcontract (not entered into by the charter or owner) could not establish authorization by the vessel's owner or its agent. Bomin alternatively argued that the vessel's charterer authorized Bomin to provide the bunkers based on the contract between the charterer and O.W. Bunker Malta that specified that BOMINFLOT would supply the fuel, by Bomin's invoice directed to the master and/or owner and/or charterer of the vessel, and by the receipt signed by the vessel's chief engineer. However, Judge Smith held that these

documents demonstrated only that the charterer was aware of the supplying by Bomin and not that it authorized Bomin under the Lien Act. Consequently, the Fifth Circuit held that Bomin did not have a maritime lien. The second case involved a similar situation with the vessel M/V CHARANA NAREE. The charterer contracted with O.W. Bunker Denmark for bunkers, and O.W. Bunker Denmark contracted with O.W. Bunker Spain, which contracted with Macoil International. Judge Cain reached the same result as the Fifth Circuit did in the *Bomin* case with respect to the lien claimed by Macoil, denying a lien to Macoil after declining to apply the Egyptian choice-of-law clause in the invoice that Macoil submitted to O.W. Bunker Spain the day after the bunkers were supplied to the vessel. Unlike the *Bomin* case, Macoil also asserted a breach-of-contract claim directly against O.W. Bunker Denmark's creditor, ING Bank, based on the assignment of rights from O.W. Bunker Denmark to ING Bank. Judge Cain rejected that claim for two reasons. First, there was no language in the assignment of rights that reflected any assumption of obligations. Second, the assignment was between O.W. Bunker Denmark and ING Bank and had nothing to do with the contract between O.W. Bunker Spain and Macoil. Finally, Judge Cain upheld the lien asserted by ING Bank as assignee of O.W. Bunker Denmark, holding that the security agreement between the parties assigned the maritime lien for bunkers that O.W. Bunker Denmark acquired on the vessel by the supply of the bunkers.

From the federal district courts:

New York forum selection clauses were not sufficiently communicated to cargo to be enforceable in suit brought in New York arising from shipments of cargo from Houston and Jacksonville to Thailand; *MTS Logistics, Inc. v. Innovative Commodities Group, LLC*, No. 19-cv-4216, 2020 U.S. Dist. Lexis 32927 (S.D.N.Y. Feb. 26, 2020) (Engelmayer).

Opinion

MTS Logistics (a New York company) served as a non-vessel operating common carrier for Innovative Commodities (a Texas company) in a number of shipments of recycled material. This case involved a shipment of seven containers of plastic scrap from Houston and Jacksonville to Thailand. MTS booked the transportation with Mediterranean Shipping Company and issued booking confirmations and invoices to Innovative Commodities. Problems with the shipments arose when the port authority in Thailand suspended discharge of plastics, and the cargo was eventually offloaded in Singapore. When Innovative declined to accept the cargo in Singapore, Mediterranean Shipping incurred charges that it assessed against MTS. MTS then brought this suit in New York, citing the forum selection clause in the MTS bill of lading as well as the forum selection clause in the bill of lading issued by Mediterranean Shipping. Innovative Commodities objected to personal jurisdiction in New York, arguing that the MTS bill of lading was not provided to Innovative Commodities until the suit was filed, nor were the bills of lading from prior shipments provided at the time of the shipments or reasonably communicated to Innovative Commodities. Agreeing that the MTS bill of lading was not reasonably communicated to Innovative Commodities, Judge Englemayer held that the forum selection clause in that bill of lading could not serve as a the basis for personal jurisdiction in New York. Judge Engelmayer also declined to enforce the forum selection clause in the Mediterranean Shipping bill of lading as it did not govern the parties. Although courts in

the Second Circuit have consistently held that NVOCCs can commit cargo owners to the terms of a downstream carrier's bill of lading, this case did not involve an action between the downstream carrier and cargo. It involved a dispute between the NVOCC and cargo that was subject to the contract between those parties, not the downstream carrier's bill of lading. Consequently, Judge Engelmayer considered the question whether there was general or specific jurisdiction in this case (free of the forum selection clause) and held that the court in New York did not have personal jurisdiction and dismissed the case without prejudice.

Freight claim dismissed for insufficient pleading; *Mediterranean Shipping Co. (USA) Inc. v. Huatai USA LLC*, No. 19-cv-10756, 2020 U.S. Dist. Lexis 34701 (S.D.N.Y. Feb. 27, 2020) (Hellerstein).

Opinion

Passenger complaints in the Southern District of Florida are not the only pleadings that are dismissed for insufficient allegations. Mediterranean Shipping Company brought this action against Huatai for failure to pay amounts due for transporting cargo. As Mediterranean did not attach the contracts or reference any contractual provisions other than a jurisdictional clause, Judge Hellerstein dismissed the claims based on breach of contract without prejudice. Mediterranean also brought claims for unjust enrichment and quantum meruit, but those remedies are unavailable when there is an express contract. Judge Hellerstein instructed that it was premature to dismiss those claims, however, until there had been a ruling on the validity of the contract claim that had to be repleaded. Judge Hellerstein did note that Mediterranean could plead a claim for account, as an alternative to a breach of contract claim, but Mediterranean had not done so sufficiently. Finally, Judge Hellerstein dismissed the claim for attorney's fees without prejudice as the complaint did not set forth the contractual provision permitting recovery of attorney's fees (which are not otherwise recoverable under the general maritime law).

Insufficient allegations and lack of a domestic injury caused dismissal of fraud and RICO claims arising out of construction of superyacht in Canada; *Worldspan Marine Inc. v. Comerica Bank*, No. 18-21924 (S.D. Fla. Feb. 27, 2020; March 12, 2020) (Louis/Moreno).

Opinion

This case arose from a contract between Harry Sargeant III and Worldspan to build a superyacht at Worldspan's facility in Canada. Sargeant paid Worldspan $11 million toward construction of the yacht that Worldspan alleged was illegally obtained by fraud. Sargeant then obtained a construction loan of $9 million from Comerica that it paid to Worldspan. The relationship between Worldspan and Sargeant deteriorated when Sargeant alleged Worldspan had overcharged about $2 million and Worldspan asserted that Sargeant said "that if Worldspan did not pay Sargeant $2 million within two months, he would destroy all the companies Barnett [Worldspan's principal] was associated with and threatened to have Barnett killed." Eventually, Worldspan brought this suit in federal court in Miami against Comerica, Sargeant, and a number of co-conspirators for fraud

and violations of the federal and Florida Racketeer Influenced and Corrupt Organizations Acts. As the acts alleged in the amended complaint arose in connection with the construction of the superyacht in Canada, Magistrate Judge Louis recommended that the RICO allegations should be dismissed on the ground that Worldspan had not suffered a domestic injury. Magistrate Judge Louis then recommended dismissal of the remaining allegations because the "sprawling" complaint, although torrid, failed to sufficiently articulate the harm suffered as the result of the alleged conduct. On March 12, 2020, Judge Moreno adopted Magistrate Judge Louis's recommendations and dismissed the amended complaint with prejudice.

Three-month delay in securing release of arrested barge is not sufficient to permit interlocutory sale; *Bollinger Amelia Repair, LLC v. Bouchard Transportation Co.*, No. 2:19-cv-370, 2020 U.S. Dist. Lexis 33414 (S.D. Tex. Feb. 27, 2020) (Hampton).

Opinion

Less than three months after arresting the barge B No. 240, Bollinger moved for an interlocutory sale of the barge based on the excessive or disproportionate expense of keeping the arrested barge compared to the value of the claim or value of the barge. However, Magistrate Judge Hampton did not believe that the delay in releasing the barge was unreasonable as the owner is typically given four or more months to secure the release of the vessel before the delay is considered unreasonable. Magistrate Judge Hampton denied the motion without prejudice to refiling no sooner than 90 days from the date of her order.

Passenger who is deaf, mute, visually impaired, and functionally illiterate did not lack capacity to consent to the terms in the passage ticket, and her claim was time barred by the limitation in the ticket; *Melancon v. Carnival Corp.*, No. 19-9721, 2020 U.S. Dist. Lexis 34735 (E.D. La. Feb. 28, 2020) (Lemelle).

Opinion

Marion Melancon slipped and fell on the deck of the CARNIVAL DREAM while the ship was docked in the Port of New Orleans. When she brought this suit against Carnival in federal court in New Orleans, Carnival moved to dismiss on the ground that she brought the suit after the period stipulated in her ticket. Melancon responded that she lacked the capacity to consent to the terms of the contract because she is deaf, mute, visually impaired, and functionally illiterate. In deciding whether she was bound by the terms of the ticket, Judge Lemelle first noted that the ticket was a maritime contract and that her capacity and consent would be determined pursuant to federal law. Applying federal law, Judge Lemelle noted that the disabilities pled by Melancon have been held to be insufficient to excuse the signer of an instrument from complying with its terms (giving examples of illiteracy, blindness, and inability to understand the language of a contract as failing to establish lack of the requisite capacity to consent). In the absence of any pleading of fraudulent inducement by the defendant, Melancon was bound by the terms of the ticket. As the ticket provided in bold type in all capital letters on its first page that it

contained limitations, and the limitations in the ticket included a one-year time limit to file suit, Melancon's suit brought after one year was untimely, and Judge Lemelle dismissed the suit.

Passenger's demand for jury in federal complaint was stricken when there was only admiralty jurisdiction over her suit; *Wheeler v. Carnival Corp.*, No. 20-20859, 2020 U.S. Dist. Lexis 34302 (S.D. Fla. Feb. 28, 2020) (Scola).

Opinion

Rebecca Wheeler brought this suit in federal court seeking to recover for injuries sustained as a passenger on Carnival's vessel. After holding that the complaint would have to be dismissed as a shotgun pleading, Judge Scola addressed her plea for a jury trial based on diversity jurisdiction. As the parties were not diverse, Judge Scola held that the case could not proceed under diversity jurisdiction. This left only admiralty jurisdiction for the complaint, and, consequently, Judge Scola struck her demand for a jury trial as incompatible with a case proceeding solely under the court's admiralty jurisdiction.

Judge declined to reconsider application of Singapore law to the collision of the U.S.S. JOHN S. MCCAIN and the M/V ALNIC MC, and declined to apply the depecage doctrine so as to apply different law for different claims; *In re Energetic Tank, Inc.*, No. 1:18-cv-1359, 2020 U.S. Dist. Lexis 34903 (S.D.N.Y. Feb. 27, 2020) (Crotty).

Opinion

The collision between the destroyer U.S.S. JOHN S. MCCAIN and the Liberian merchant vessel M/V ALNIC MC, resulting in the deaths of ten sailors and injuries to more than 40 others, returns to the Update (January and February 2020 Updates). Judge Crotty previously ruled that Singapore law applied to the liability and damage claims of all of the seamen who were injured or killed in the collision. In this opinion, he declined to reconsider that decision, and he also declined to apply the depecage doctrine so that different law would apply to different claims arising out of the same collision.

Liability was apportioned for a collision in the Mississippi River between a cargo vessel and the flotilla in tow of a tug, and limitation of liability was denied to the tug based on the privity of its owner; *ADM International SARL v. River Ventures, LLC*, No. 18-3466, 2020 U.S. Dist. Lexis 34737 (E.D. La. Feb. 28, 2020) (Fallon).

Opinion

Trial was held before Judge Fallon for the collision of the cargo ship M/V HARVEST MOON and the flotilla in tow of the M/V FREEDOM in the Mississippi River. Judge Fallon assessed 80% of the fault against the HARVEST MOON because it had a temporarily repaired port windlass that needed to be replaced, but the pilot was unaware of that during his maneuvers. Additionally, the HARVEST MOON was traveling at high

speed when it tried to drop anchor, which led to the vessel veering outside of the anchorage area where it was caught up in the strong current of the river and collided with the flotilla. However, the FREEDOM's slow speed and failure to widen out for the HARVEST MOON, as had been agreed, contributed 20% to the collision. As the owner of the FREEDOM knew, or should have known, that the tug was underpowered and unable to readily maneuver in the strong current, Judge Fallon denied limitation of liability for the tug owner.

Negligence claim against vessel engine repairer for fire damage to the vessel survived an economic loss rule challenge, but the contract claims required more sufficient pleading; *Roe Boat, LLC v. N&G Engineering, Inc.*, No. 19-61503, 2020 U.S. Dist. Lexis 38021 (S.D. Fla. Mar. 2, 2020) (Dimitrouleas).

Opinion

N&G completed repairs to the starboard main propulsion engine exhaust turbocharger of the yacht ROE BOAT in August 2016 pursuant to an oral agreement, and almost a year later a fire started in the area of the repairs, causing damage to the vessel. The owner of the vessel then brought this suit against the repairer for breach of contract, breach of the implied warranty of merchantability, and negligence. The repairer objected to the contract, warranty, and negligence allegations as conclusory, and Judge Dimitrouleas agreed. Alleging that the defendant failed to properly perform repairs, that the defendant failed to perform the repairs in a skilled and workman like manner, and that the defendant failed to exercise reasonable care in performing the work was insufficient to state a cause of action and had to be repleaded. Additionally, the repairer argued that the negligence claim was barred by the economic loss rule that prohibits tort claims when the product only injures itself. However, as the owner alleged damage to other property, the economic loss rule was not a bar to the negligence claim.

Sanctions were imposed against bankrupt Jones Act employer for wrongfully transferring commercial use permit for the vessel; *Barnes v. Sea Hawai'i Rafting, LLC*, No. 13-cv-2, 2020 U.S. Dist. Lexis 37442 (D. Haw. Mar. 2, 2020) (Kay).

Opinion

The long saga of Chad Barnes' efforts to collect maintenance and cure took a turn in his favor when Judge Kay agreed to impose enhanced monetary sanctions against his bankrupt employer for the value of the commercial use permit for his vessel that was wrongfully transferred to another company, together with attorney's fees and costs for responding to the sanctionable conduct.

Judge disbelieved seaman who said he did not understand the pre-employment medical questionnaire when he denied having a prior back injury and denied his claim for maintenance and cure; judge also granted summary judgment to the employer/vessel owner on the Jones Act and unseaworthiness claims of the seaman who claimed to have hurt his back when he slipped and fell after cleaning the vessel's bilge but could not

identify what caused him to fall; *Adriatic Marine, LLC v. Harrington*, No. 19-2440, 2020 U.S Dist. Lexis 36127, 36138 (E.D. La. Mar. 3, 2020) (Vitter).

Opinion maintenance and cure

Opinion Jones Act and unseaworthiness

Roland Harrington was employed as an engineer on Adriatic's vessel M/V ADRIATIC on March 18, 2018. He claims that he had cleaned inside the vessel's bilge around the port main engine and slipped and fell while departing the bilge, hurting his back. Adriatic initiated maintenance and cure in response to a demand from Harrington's attorney, and sought a medical examination when Harrington's physician recommended a two-level fusion in Harrington's back. When the examining physician disagreed with the recommendation and an investigation revealed that Harrington had misrepresented his back condition on his pre-employment medical questionnaire, Adriatic brought this action in federal court seeking a declaratory judgment that it did not owe maintenance and cure. Harrington filed a counterclaim asserting that he was entitled to maintenance and cure and punitive damages for willful failure to pay maintenance and cure and that he was entitled to recover under the Jones Act for negligence and under the general maritime law for unseaworthiness. Adriatic filed motions for summary judgment on all of the counterclaims. Adriatic asserted a *McCorpen* defense to the maintenance and cure claim based on Harrington's denial that he either currently had or previously had neck or back problems. Harrington claimed that he did not understand the questions, but his testimony at his deposition, where he read and understood other documents, and his completion of a similar questionnaire after this incident in which he denied neck or back problems one day after a visit to the emergency room complaining of back claim, convinced Judge Vitter to disbelieve Harrington. After she concluded that Adriatic had established the elements of the willful concealment defense, Judge Vitter turned to the motions for summary judgment on the counts of Jones Act negligence and unseaworthiness. In his deposition, Harrington testified that he did not know how the accident happened, stating only that he had slipped while stepping on a pipe in the bilge. In response to the motion for summary judgment, Harrington posited that he was a large man and was unable to look at his shoes before attempting to exit the bilge. He argued that the court could therefore reasonably conclude that there was oil on his shoes that caused him to slip. Judge Vitter considered the argument to be pure speculation, however, and dismissed the Jones Act and unseaworthiness counts.

Maintenance and cure declaratory judgment action was allowed to continue in Louisiana federal court despite parallel proceeding in Texas state court; *Ensco Offshore Co. v. Turner*, No. 2:19-cv-128, 2020 U.S. Dist. Lexis 37285 (S.D. Miss. Mar. 4, 2020) (Starrett).

Opinion

Gregory Cornelius Turner claimed that he injured his back while employed by Ensco on a vessel in the Gulf of Mexico. Ensco brought this action in federal court seeking a declaratory judgment that it did not have any further obligation to pay maintenance and

cure to Turner, and Turner sought to dismiss the federal action on the ground that he had brought suit against Ensco in state court in Texas for the same incident. However, Turner did not present any substantial argument why the court should exercise its discretion to decline to hear the federal proceeding, and Judge Starrett denied the motion to dismiss. Turner then sought reconsideration of that decision but did not cite any intervening change in the law or new evidence that was previously unavailable. Turner did not even provide the court with a copy of the state-court petition. Therefore, Judge Starrett declined to reconsider his previous decision.

Suit against cruise line and spa contractor for neck injury to passenger during massage survived motions for summary judgment except for punitive damages for intentional misconduct; *Medeiros v. NCL (Bahamas) Ltd.*, No. 19-cv-20957, 2020 U.S. Dist. Lexis 39450 (S.D. Fla. Mar. 5, 2020) (Moreno/Louis).

Opinion

Edward Medeiros went to the Mandara Spa on the cruise ship NORWEGIAN DAWN for a massage, but he felt pain when the masseuse put her elbow into the back of his neck. Eventually he underwent a two-level fusion on his neck and brought this action against the cruise line and the independent contractor that owned and operated the spa, asserting several grounds for recovery on which the defendants moved for summary judgment. Magistrate Judge Louis recommended denial of the motions for all claims except for the claims seeking punitive damages for intentional conduct, and Judge Moreno adopted the recommendations. Summary judgment on the claims of negligent hiring and negligent training of the masseuse were denied because Mandara was not able to establish that it had checked the credentials of the masseuse and because Medeiros's expert opined that the level of training of the masseuse was not up to industry standards. Summary judgment on the claim of negligent retention/monitoring was denied because Mandara failed to conduct an evaluation of the masseuse after her hiring even though it never had a complaint or negative feedback about her. Summary judgment on the claim of failure to warn was denied because Mandara had received six complaints in the five years preceding the accident of injuries during massages, three of which allegedly sustained significant injuries and resulted in formal complaints seeking relief. Although there was no evidence that NCL was on notice of the unfitness of Mandara when it engaged Mandara as a contractor, Magistrate Judge Louis found sufficient evidence that NCL was on notice of the unfitness of Mandara thereafter by the claims presented against Mandara, which allowed the claims of negligent retention and failure to warn to proceed. Although the ticket stated that massage therapists were independent contractors and the intake form at the spa identified the owner as Mandara, Magistrate Judge Louis found there to be a fact question whether Mandara was acting as an apparent agent of NCL because the persons performing services for the contractors wore NCL branded name tags. Following the maritime rule in the Eleventh Circuit that punitive damages are not available absent intentional conduct, the claims for punitive damages were dismissed for failing to satisfy the standard necessary for intentional conduct.

Court applied forum-selection clause in charter party even though bills of lading were the contract of carriage, because the bills of lading permitted

jurisdiction to be defined by the charter party; *BST Corp. v. M/V ELLIOTT BAY*, No. 19-cv-2063, 2020 U.S. Dist. Lexis 39482 (S.D.N.Y. Mar. 6, 2020) (Failla).

Opinion

Tung Ho Steel Enterprise chartered the M/V ELLIOTT BAY for a shipment of steel beams from Taiwan to Los Angeles. Seventeen bills of lading were issued to Tung Ho as shipper with BST Corp. listed as the consignee. The charter party contained a forum-selection clause for the Southern District of New York, but the bills of lading provided that all disputes in connection with the bills of lading would be settled in the flag-state of the vessel or otherwise in the place mutually agreed between the carrier and the merchant. The cargo was damaged during the shipment, and BST obtained an assignment of the charter party from Tung Ho. BST then brought this suit against the carrier in the Southern District of New York, seeking to recover for the cargo damage, citing the forum-selection clause in the charter party. The carrier argued that BST was not a party to the charter party, so the bills of lading contained the relevant contract of carriage between BST and the carrier. Although Judge Failla agreed with that contention, she did not agree that the forum-selection clause in the charter party was not applicable. As the bills of lading permitted the merchant and carrier to select the forum for suit, and as they did select the forum in the charter party, Judge Failla concluded that, read together, the charter party and bills of lading provided that cargo damage claims must be brought in the Southern District of New York.

Failure to advise seaman of statute of limitations, continued payment of medical bills, and discussions of settlement were insufficient to estop employer from asserting statute of limitations on seaman's Jones Act and unseaworthiness claims, but seaman's maintenance and cure claim was not barred by laches; *Zalimeni v. Cooper Marine*, No. 1:19-245, 2020 U.S. Dist. Lexis 40625 (S.D. Ala. Mar. 10, 2020) (DuBose).

Opinion

Donald A. Zalimeni, Jr., was injured on May 6, 2016 while employed by Cooper as a derrick crane operator on the vessel MOODY in the Port of Mobile. From 2016 to 2019, Zalimeni met four times with Cooper's claims personnel who explained the claims process and the payment of his medical bills, advised him that he was free to get an attorney but that his benefits would stop if he did, and discussed settlement with him; however, they did not advise him of the three-year statute of limitations for Jones Act and unseaworthiness claims. Cooper paid maintenance at the rate of $40 per day until the three-year anniversary of the accident, paid medical bills after that date, and was willing to discuss settlement until terminating all benefits after Zalimeni retained counsel. Zalimeni then brought this action for negligence under the Jones Act and for unseaworthiness and maintenance and cure under the general maritime law, and Cooper responded by asserting the statute of limitations. Zalimeni asserted equitable estoppel, but Judge DuBose rejected that defense as Cooper had not made any false statements and none of its actions amounted to pernicious lulling of Zalimeni into missing the deadline to file the suit (in fact Zalimeni could not point to a single specific promise). Therefore,

Judge DuBose held that the Jones Act and unseaworthiness claims were untimely. However, the maintenance and cure claim is governed by laches, and Judge DuBose concluded that Cooper had not established undue prejudice in the late filing of that claim. Therefore, she declined to dismiss the maintenance and cure claim.

Supreme Court's decision in *Kirby* dictated that the bill of lading issued by the ocean carrier governed the land carriage as well as the ocean carriage in a shipment from Germany to Ghent, Kentucky, where the damage occurred during the land carriage; *Siemens Energy, Inc. v. CSX Transportation, Inc.*, No. 3:15-cv-18, 2020 U.S. Dist. Lexis 41272 (E.D. Kent. Mar. 10, 2020) (Tatenhove).

Opinion

Siemens agreed to sell two electrical transformers, manufactured in Germany, to Gallatin Steel, located in Ghent, Kentucky. Siemens contacted a freight forwarder to make the arrangements for the shipment, and an arm of the freight forwarder, Blue Anchor Line, issued bills of lading that listed Ghent as the place of delivery and Gallatin Steel as the party to be notified. Those bills of lading incorporated the Carriage of Goods by Sea Act for the entire journey as long as the goods remained in the custody of the carrier or its subcontractor, and included a covenant that Siemens would not sue any subcontractor. The freight forwarder arranged the ocean carriage to Baltimore with K-Line, which issued a separate waybill that referenced the Blue Anchor bills as the applicable bill of lading, and it arranged with CSX for the inland carriage from Baltimore to Ghent. Siemens brought this action against CSX seeking to recover for the damage to the transformers during the inland carriage, and CSX moved for summary judgment that it was not liable pursuant to the exculpatory clause in the Blue Anchor bills of lading. CSX cited *Norfolk Southern Ry. v. Kirby*, in which the Supreme Court held that a through bill of lading was a maritime contract and that maritime law applied to both the ocean and land portions of the carriage. Siemens argued that the Blue Anchor bills did not apply to the inland carriage because the bills were not through bills to which the inland carriage was subject. However, Judge Tatenhove found the Blue Anchor bills to be indistinguishable from those in *Kirby*, reflecting that the carriage was multimodal and that the delivery was in Kentucky. Consequently, CSX was entitled to judgment as a matter of law that Siemens' claim was barred by the covenant not to sue in the Blue Anchor bills of lading.

Court denied challenge to the rates set by the Coast Guard for seamen piloting vessels in international shipping on the Great Lakes; *American Great Lake Ports Association v. United States Coast Guard*, No. 18-cv-2650, 2020 U.S. Dist. Lexis 41134 (D.D.C. Mar. 10, 2020) (Cooper).

Opinion

Every year the Coast Guard establishes rates that international shipping companies operating on the Great Lakes pay to the American seamen who pilot their vessels. The rates are usually challenged either by the shipping companies or the associations that supply the pilots. The 2018 rates were challenged by the shipping companies, but Judge Cooper rejected their challenge and upheld the rates.

Court ordered interlocutory sale of arrested vessel within three months of arrest (sale to take place in 45 days) when the vessel was deteriorating and there was no evidence of effort to obtain its release; court also ordered an appraisal to expedite confirmation of the sale; *E.N. Bisso & Son, Inc. v. DONNA J. BOUCHARD M/V*, No. 19-14666, 2020 U.S. Dist. Lexis 40943, 41943 (E.D. La. Mar. 10, 11, 2020) (Morgan).

Opinion Sale

Opinion Appraisal

E.N. Bisso arrested the M/V DONNA J. BOUCHARD and Barge B. No. 272 based on its maritime lien for towage services provided to the vessels. A month after the vessels were arrested, the owner of the vessels was appointed a substitute custodian, but the vessels started to deteriorate and were threatened with the loss of crewmembers because the crew had not been paid., The Coast Guard took custody of the vessels and moved them to a location where oil was scheduled to removed from them. Bisso then filed an opposed motion for an interlocutory sale before the expiration of three months based on deterioration and under-manning. Judge Morgan noted that owners of arrested vessels are normally given at least four months to arrange for security, but that is absent other considerations. In this case, there was no evidence of active efforts to secure the release of the vessels, and the vessels were subject to deterioration. Consequently, Judge Morgan agreed to a sale in 45 days, which would be more than four months from the arrest. Additionally, in a separate order, Judge Morgan ordered an appraisal prior to the sale in order to expedite the confirmation process.

Willful concealment defense was upheld even though the seaman claimed that he orally advised his employer of his pre-existing condition after denying the condition on his pre-employment medical questionnaire; *Wallgren v. Dale Martin Offshore LLC*, No. 6:18-cv-1479, 2020 U.S. Dist. Lexis 42721 (W.D. La. Mar. 11, 2020) (Summerhays).

Opinion

Jeramey Wallgren allegedly injured his shoulder while assigned to the towing vessel M/V RELENTLESS and brought this action with counts for Jones Act negligence and unseaworthiness and maintenance and cure under the general maritime law. His employer asserted a *McCorpen* defense of willful concealment because Wallgren had denied any joint problems, limited motion in any joints, or shoulder injuries when he answered his pre-employment medical questionnaire. However, 39 days before he sought employment, Wallgren had reported to the emergency room to seek treatment for a right shoulder injury resulting from lifting or carrying a heavy object (for which he was prescribed narcotic pain relievers, anti-inflammatories, and muscle relaxers). Wallgren first argued that he did not intentionally conceal a shoulder injury because he was only treated for pain. However, the medical records contradicted that explanation, leaving Wallgren to argue that he had actually disclosed the injury to the defendant's port captain,

telling him that he had recently taken medication for the shoulder injury. The port captain specifically rebutted Wallgren's statement, and Judge Summerhays followed the Fifth Circuit's decision in *Meche v. Doucet* that a seaman who has provided false information on his medical questionnaire cannot later argue that his concealment was not intentional by his claim of a verbal disclosure to the employer that the employer disputes. Consequently, Judge Summerhays dismissed Wallgren's maintenance and cure claim.

Boatyard held responsible for sinking of pleasure craft, but still recovered for pre-sinking repairs but not for damage to the dock caused by the sinking; *National Liability & Fire Insurance Co. v. Rick's Marine Corp.*, No. 15-cv-6352, 2020 U.S. Dist. Lexis 43339 (E.D.N.Y. Mar. 11, 2020) (Hurley).

Opinion

Adam Weinstein purchased the 39-foot pleasure boat, PELAGIC, in June 2014 for $300,000 and operated the vessel until November 2014 when he delivered it to Rick's Marine for repairs, winterizing, and storage for the winter. The PELAGIC was launched on May 8, 2015 and sank a few hours later due to a hose on the seacock valve that became loose because it had been overtightened. Rick's Marine denied that it was responsible for the overtightening, and Weinstein asserted that Rick's should have detected the problem during the winterization. Weinstein's insurer, National Liability, paid Weinstein the face value of its insurance policy, $290,000, and National Liability and Weinstein brought this suit against Rick's Marine, which counterclaimed for damage to its dock, unpaid repairs on the vessel, and storage costs. With the aid of the presumption of negligence from the bailment of the vessel, Judge Hurley found that the sole cause of the sinking was the negligence of Rick's Marine. He then awarded $290,000 to National Liability against Rick's Marine, but held that Weinstein had failed to establish that the value of the vessel at the time of the incident was greater than its insured value and denied Weinstein any recovery for the damage to the vessel. Finding that the repairs had been completed before the sinking, Judge Hurley entered judgment in favor of Rick's Marine against Weinstein for the cost of the repairs, and he awarded Rick's Marine judgment against National Liability for the cost of storage of the vessel after the incident at the rate Rick's Marine had been charging before the incident. As Weinstein had transferred the vessel to National free of liens after payment of the policy limit, National Liability was granted indemnity from Weinstein for the storage charges. As Rick's Marine was found solely responsible for the sinking, Rick's Marine's claim for damage to its dock from the sinking was denied.

BELO suit of clean-up worker for exposure to oil, dispersants, and other harmful chemicals after the DEEPWATER HORIZON/Macondo blowout was dismissed for lack of an expert opinion on the worker's diagnosis and causation; *Herrera v. BP Exploration & Production, Inc.*, No. 18-8322, 2020 U.S. Dist. Lexis 41650 (E.D. La. Mar. 11, 2020) (Vance).

Opinion

Fanny Herrera brought this Back-End Litigation Option suit against BP for chronic medical conditions she claimed were caused by her exposure to oil, dispersants, and other harmful chemicals during her service as a clean-up worker after the DEEPWATER HORIZON/Macondo blowout. In order to recover, she was required to establish her diagnosis and the causation for the diagnosed condition, but she did not retain an expert to carry her burden. The only evidence before the court was the diagnostic form of Industrial Medical Specialists, but it lacked an opinion on causation, and Judge Vance noted that the clinicians at that facility did not follow the standards generally accepted in the medical community for establishing medical diagnoses. Consequently, Judge Vance granted summary judgment and dismissed the suit.

A private party may not have a duty to rescue vessels in distress, but once the party becomes involved in the rescue, a duty may arise; *In re Bruce Oakley, Inc.*, No. 19-cv-184, 2020 U.S. Dist. Lexis 42254 (E.D. Okla. Mar. 11, 2020) (Palk).

Opinion

Southern Towing's M/V DENNIS COLLINS navigated down the Verdigris and Arkansas Rivers with two barges in tow to an area near Bruce Oakley's Muskogee fleet of barges. The DENNIS COLLINS requested permission to moor alongside the barges, but, because of an eddy, it obtained permission to move its tow into the Grand River alongside Oakley's Marquette barges. The DENNIS COLLINS barges then broke loose along with two Marquette barges, and Oakley's vessel, the M/V LEGACY, was notified. The captain of the LEGACY was not aboard, and the vessel was left in charge of a pilot employed by Jantran. The pilot did not respond to the breakaway and waited for the LEGACY's captain to return. The LEGACY eventually captured the Marquette barges and secured them to trees along the bank of the Arkansas River, but they later pulled loose from the trees, drifted downriver, and struck the Webber Falls Lock and Dam and sank. Oakley then filed this action to limit liability for the LEGACY and brought a third-party complaint against the owner of the DENNIS COLLINS, which brought a third-party complaint against Jantran. Jantran argued that it should be dismissed because its pilot was a private party who had no duty to rescue a vessel in distress. However, Judge Palk disagreed with the characterization of the case as one of failure to rescue. The allegations in the third-party complaint alleged that Jantran's pilot did take command of the LEGACY in the absence of the captain, and the LEGACY did undertake to capture the barges, indicating a relationship that was the basis for imposition of a duty. When and how the pilot assumed those duties was unclear at this stage of the litigation, but dismissal was inappropriate.

Court ordered Philippine seaman to arbitration and appointed arbitrator; *Llagas v. Sealift Holdings Inc.*, No. 2:17-cv-472, 2020 U.S. Dist. Lexis 44766 (W.D. La. Mar. 13, 2020) (Cain).

Opinion

Daniel Gonzales Llagas, a citizen of the Philippines, brought suit in state court in Louisiana seeking unpaid wages on behalf of himself and other seamen aboard a fleet of Sealift vessels. Sealift removed the case to federal court and sought to compel arbitration

in accordance with Llagas' employment contract and the incorporated Standard Terms and Conditions of the Philippine Overseas Employment Administration. After lengthy wrangling, Llagas was ordered to arbitration, but, instead of complying the POEA provision with respect to appointment of an arbitrator, Llagas submitted a letter to the President of the Integrated Bar of the Philippines requesting that the President appoint an arbitrator selected by Llagas. As that request was not in compliance with the terms of the POEA, Judge Cain ruled that he had authority pursuant to 9 U.S.C. § 5 to appoint the arbitrator. Consequently, he selected an arbitrator through the process set forth in the POEA.

Defendant did not waive the right to arbitrate by waiting more than two months to seek arbitration and by moving to dismiss the complaint, and the plaintiff was not sanctioned with attorney's fees for bringing the suit that was subject to arbitration; *Asia Maritime Pacific Chartering Ltd v. A. Cayume Hakh & Sons*, No. 19-cv-24919, 2020 U.S. Dist. Lexis 44893 (S.D. Fla. Mar. 16, 2020) (Bloom).

Opinion

This case involves a dispute over demurrage from chartered bulk cargo shipments of rice. The operator of the vessels brought this action against the charterer although the fixture recaps, which formed the charter party terms, contained a London arbitration clause. The charterer filed an answer without asserting an affirmative defense demanding arbitration and then filed a motion to dismiss the complaint with prejudice two months after filing its answer, based on the arbitration clause, and sought attorney's fees for bringing a frivolous suit. The operator argued that the charterer had waived the right to arbitrate by waiting for more than two months after filing its answer to raise the arbitration clause and by moving to dismiss the complaint rather than seeking to stay it and compel arbitration. Judge Bloom disagreed and held that the charterer's actions fell short of what was required in the cases for waiver. Judge Bloom did agree that the case should be dismissed, and not just stayed, where all of the claims in the suit were subject to arbitration. However, the dismissal was without prejudice. Finally, Judge Bloom did not consider the filing of the suit to have been in bad faith so as to permit an award of attorney's fees, stating that the operator's conduct in the face of the arbitration provision was no more worthy of condemnation than the charterer's actions taken with the same awareness of the arbitration provision.

Rattling of vessel did not cause the accident that injured a worker on the vessel; *In re CF, LLC*, No. 2:19-cv-154, 2020 U.S. Dist. Lexis 47463 (W.D. La. Mar. 18, 2020) (Cain).

Opinion

CF and LeBlanc Marine worked together on a levee construction project in the coastal waters of Cameron Parish, Louisiana. When Durward LeBleu, an equipment supplier, had to be transported to the location of equipment he had supplied, CF employee Guidry operated a LeBlanc vessel, the LISA ANN, to take LeBleu to the site. Guidry became distracted by a fallen tape measure and took his eyes off the vessel's course. The vessel

struck an underwater obstruction that caused the vessel to run onto the bank, injuring LeBleu. In response to LeBleu's suit, LeBlanc asserted that it had no employees on board the LISA ANN and that the sole fault was the operation by Guidry. LeBleu and CF responded that the vessel "rattled" and that the rattling caused the tape measure to fall, which caused the accident. Judge Cain disagreed that the rattling created a genuine issue of material fact for trial. He reasoned that even if the vessel rattled, it was not foreseeable that a tape measure would be put in such a strategic position on the vessel that the rattling would cause it to fall, which would cause the operator to become distracted, which would cause the operator to take his eyes of the vessel's course, which would cause him to hit an underwater obstruction, which would cause the vessel to hit the bank and injure its passenger. He therefore granted summary judgment to LeBlanc.

Court upheld P&I Club's cancellation of coverage of its member that applied to pending claims; *Quest Shipping Ltd. v. American Club*, No. 18-cv-10667, 2020 U.S. Dist. Lexis 47022 (S.D.N.Y. Mar. 18, 2020) (Ramos).

Opinion

Quest Shipping is a Nigerian company that insured two vessels with the American Club, a non-profit mutual protection and indemnity insurance association. On at least seven occasions, Quest was late in paying premium installments to the Club. The Club notified Quest's broker that the failure to timely pay the premium installment due on December 20, 2017 would result in a five day notice of cancellation. The payment was not received on that date, and the notice of cancellation was issued on December 22. When payment was not received on December 27, the coverage was terminated on that date, and the cancellation applied to two existing claims involving Quest vessels. Quest appealed the cancellation to the Club's Board, contending that all but two days after the notice of cancellation were holidays in Nigeria and that the coverage was terminated because the Club was looking for a way to get out of paying the existing claims. When the Board denied the appeal, Quest brought this suit for breach of contract and for a declaratory judgment on coverage, and the Club filed a motion for summary judgment that it had fully complied with the Club rules in terminating coverage. The first issue to be resolved was the standard to apply in reviewing the Board's decision. As the decision was the product of a contractually agreed alternative dispute resolution process, Judge Ramos held that his review was based on an arbitrary and capricious standard, rejecting Quest's argument that the standard should not apply because the Club had a conflict of interest because the insurance administrator was the same as the entity that pays out claims. Applying the arbitrary and capricious standard, Judge Ramos found no evidence that the Club cancelled coverage to deny payment of claims and found sufficient warnings regarding the payment that was due. He saw no reason to disturb the decision of the Board, which he called "thorough, well-reasoned, and supported by the record."

Maritime law applied to land-based injury to cruise-ship passenger, and one-year limitation to bring suit in the Cruise Contract barred the passenger's suit; *Werner v. Holland America Line, Inc.*, No. 19-1439, 2020 U.S. Dist. Lexis 47197 (W.D. Wash. Mar. 18, 2020) (Robart).

Opinion

Donna Werner and her husband booked an Alaskan cruise on Holland America's cruise ship, M/S NOORDAM. She also booked a tour of the Tracy Arm fjord and glacier, but she was injured while stepping off the tour bus near Juneau. She brought this lawsuit in state court in Alaska, and Holland America removed the case to federal court and moved to transfer the case to the Western District of Washington pursuant to the forum selection clause in the Cruise Contract. After the case was transferred, Holland America moved for summary judgment that the case, which was filed more than one year after the accident, was barred by the limitation provision in the Cruise Contract. Werner contended that either Alaska or Washington law applied to determine the enforceability of the limitation provision as her accident occurred on land. Judge Robart noted that a cruise line passage contract is a maritime contract, governed by maritime law, and the contract applied to all activities on excursions and shoreside facilities. Thus, maritime law applied even to the accident that occurred while disembarking the tour bus. Judge Robart then considered the Ninth Circuit's test for reasonable communicativeness and fundamental fairness of the limitation clause and concluded that the clause had been sufficiently communicated to Werner and that the clause passed judicial scrutiny for fundamental fairness. Therefore, Judge Robart dismissed Werner's claim as barred by the limitation clause.

Passenger who tripped over a photographer's leg still failed to plead sufficient facts to overcome the open and obvious defense or to establish constructive notice, but the judge gave her one more chance to amend her complaint; *Navarro v. Carnival Corp.*, No. 19-21072, 2020 U.S. Dist. Lexis 47953 (S.D. Fla. Mar. 19, 2020) (Moreno).

Opinion

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

area when she kneeled to take a photograph, the complaint did not allege how Carnival was aware of the risk so that it could have corrected it. Without evidence of prior incidents, close calls, or complaints about photographers tripping passengers, the complaint would be based on a "general foreseeability" theory of liability that would convert carriers into insurers of passenger safety. Although the amended complaint did not correct the deficiencies in the first complaint, Judge Moreno did give Navarro leave to file another complaint; however, he warned that the failure to state a claim a third time would result in dismissal with prejudice.

Cargo of circuit breakers shipped in open-top containers was not subject to all risk coverage under cargo policy and was only subject to limited coverage that did not include water damage; *National Union Fire Insurance Co. of Pittsburgh, P.A. v. Vinardell Power Systems, Inc.*, No. 19-20093, 2020 U.S. Dist. Lexis 47952 (S.D. Fla. Mar. 19, 2020) (Moreno).

Opinion

Vinardell shipped a cargo of circuit breakers from Miami, Florida, to Acajutla, El Salvador in open top containers that were stowed on deck of the vessels. Either before or while the circuit breakers were en route to El Salvador, twenty-three were damaged by water. Vinardell purchased marine cargo insurance from National Union that provided all-risk coverage from warehouse to warehouse in accordance with the German General Rules of Marine Insurance, Special Conditions for Cargo. The German Rules, however, provide an on deck, open-top container exclusion that provides only stranding cover, which is limited to risks such as stranding, collapse of buildings, natural catastrophes, goods being washed overboard, etc., none of which would apply to the damage by water in this case. Vinardell contended that the all-risk representation applied so that the water damage was covered under the cargo policy, and National Union argued that the all-risk provision and the limited stranding coverage could be harmonized as the policy afforded all risk coverage except for the limited circumstances to which the stranding cover applied. Judge Moreno agreed with National Union and held that as the cargo was loaded on deck in open-top containers, the stranding coverage applied and there was no coverage for the water damage.

Court declined to second guess the decision of the Federal On-Scene Coordinator with respect to the contractor chosen to remove a vessel grounded in an environmentally sensitive area; *Donjon-SMIT, LLC v. Schultz*, No. 2:20-cv011, 2020 U.S. Dist. Lexis 50986 (S.D. Ga. Mar. 24, 2020) (Wood).

Opinion

On September 8, 2019, the M/V GOLDEN RAY capsized in an environmentally sensitive area off the Georgia coast. It was the largest cargo shipwreck in the coastal waters of the United States since the EXXON VALDEZ, and there was a significant environmental threat from the 380,000 gallons of oil on board the vessel. Under the Oil Pollution Act of 1990, the owner of the GOLDEN RAY was required to have a Response Plan in place for

situations such as this, and the owner is not allowed to deviate from the plan without authorization from the Federal On-Scene Coordinator. The vessel owner sought permission from the FOSC for a deviation from Response Plan for T&T Marine Salvage to remove the wreck, and Donjon-SMIT brought this suit to challenge that decision. Noting that the role of the court was only to ensure that the FOSC came to a rational conclusion, Judge Wood upheld the decision as well documented, within his discretion as the FOSC, and not arbitrary or capricious.

Coast Guard was immune from suit for its efforts to rescue a stranded vessel, but there was a fact question whether the captain and vessel that acted as a good Samaritan could be liable; *Lane v. United States*, No. 17-12356, 2020 U.S. Dist. Lexis 50702 (D. Mass. Mar. 24, 2020) (Saris).

Opinion

While on a fishing expedition from Gloucester, the ORIN C experienced engine problems and became dead in the water. Instead of calling the Coast Guard, Captain Sutherland sought assistance from the only commercial fishing boat within radio range, the FOXY LADY. Captain Powell on the FOXY LADY agreed to tow the vessel to port, but the tow line broke four times as the weather deteriorated. The last break was the result of a rogue wave that caused damage to the ORIN C and the entry of water. The Coast Guard was finally called and deployed a vessel to assist. When the vessel arrived, the Coast Guard took over the rescue operation, but the ORIN C sank, causing injuries to its crewmembers Lane and Palmer and the death of Captain Sutherland. The surviving crewmembers and estate of the deceased captain brought this suit against the United States and the FOXY LADY and its captain. Concluding that the Coast Guard's decisions about search and rescue operations fell within the discretionary function exception to the waiver of sovereign immunity in the Public Vessels Act and Suits in Admiralty Act, Judge Saris held that the claims against the United States were barred by sovereign immunity. The plaintiffs argued that the FOXY LADY and its captain could be liable under the Good Samaritan doctrine for negligently increasing the risk of harm to the ORIN C and its crew by using an inappropriate tow line, which resulted in the damage to the vessel that caused it to sink. They argued that Captain Powell should not have undertaken the rescue or should have sought assistance earlier. Although Judge Saris considered the actions of the FOXY LADY to be admirable, steaming away from home to help mariners in trouble, there were disputed facts whether the ORIN C suffered damage during and because of the FOXY LADY's tow. Therefore, Judge Saris denied the motion for summary judgment of Powell and the FOXY LADY.

Testimony of other crewmembers did not establish the frequency, regularity, or proximity of the deceased crewmember's exposure to defendants' products containing asbestos to satisfy the burden of establishing that the exposure was a substantial factor in causing the decedent's mesothelioma; *Vocciante v. Air & Liquid Systems Corp.*, No. 18-540, 2020 U.S. Dist. Lexis 51487 (D. Del. Mar. 25, 2020) (Fallon).

Opinion

Pietro Vocciante worked as a cadet engineer on vessels from 1971 to 1975 and brought suit against defendants who manufactured, designed, sold, marketed, installed, and packaged asbestos to which he asserted exposure on the vessels. Vocciante died from mesothelioma before testifying, and his estate continued the suit, relying on the testimony of other crew members to carry the burden of establishing that exposure to the defendants' products was a substantial factor in causing Vocciante's mesothelioma. However, the testimony of the other crew members was insufficient to establish the frequency, regularity, or proximity of Vocciante's work to products containing asbestos that was necessary to create a genuine issue of material fact regarding causation. Consequently, Magistrate Judge Fallon recommended that the defendants' motions for summary judgment be granted.

Court held it was premature to limit punitive damages for willful failure to pay maintenance and cure to a 1:1 ratio to compensatory damages prior to a verdict and allowed discovery of financial information from the employer's parent company which made the maintenance and cure payments; *Knudson v. M/V American Spirit*, No. 14-14854, 2020 U.S. Dist. Lexis 52165 (E.D. Mich. Mar. 25, 2020) (Steeh).

Opinion

Jeffrey Todd Knudson brought this seaman's action against the parent company of his employer, asserting that the parent was his borrowing employer and that it had willfully failed to pay him maintenance and cure. The parent company objected to Knudson's attempt to obtain discovery of financial information from the parent on the ground that it was the subsidiary that employed Knudson and that was the proper party defendant. However, Judge Steeh permitted the discovery as the parent had taken on several obligations typical of an employer, and, most importantly, the parent made maintenance payments to Knudson and allegedly made the decision to withhold payment of a higher amount of maintenance in order to force Knudson to arbitrate his claims. The parent also argued that the court should limit evidence or argument that would suggest an amount of punitive damages that would exceed a 1:1 ratio to compensatory damages, based on the decision of the Supreme Court in *Exxon Shipping Co. v. Baker*. Noting the decision in *Clausen v. Icicle Seafoods* that declined to apply the 1:1 ratio when the defendant's conduct was more reprehensible than Exxon's conduct in the *Exxon* case, Judge Steeh held that it was premature to decide that issue until there was a jury verdict on punitive damages.

Court vacated attachment against sister company in New York for lack of sufficient alter ego allegations with the responsible defendant, lack of assets in the district, and equitable vacatur; *WAG SPV I, LLC v. Fortune Global Shipping & Logistics, Ltd.*, No. 19-cv-6207, 2020 U.S. Dist. Lexis 53864 (S.D.N.Y. Mar. 27, 2020) (Failla).

Opinion

Asserting that Fortune Global Nigeria wrongfully attached its vessel SEA HORIZON in Ghana, WAG SPV brought this attachment action in New York against Fortune Global Nigeria and its sister company, Fortune Global USA, a Texas company. WAG SPV asserted alter ego liability of Fortune Global Nigeria and Fortune Global USA as they had common ownership, common directors, a single website, and a common LinkedIn page. However, that was insufficient to pierce the corporate veil, and Judge Failla held that there was no prima facie admiralty case on which to base an attachment. She also noted that Fortune Global USA is a Texas company and its accounts are located at the branches of a bank in Texas. Thus, an attachment against a Manhattan branch of the bank was improper. Finally, Judge Failla applied the doctrine of equitable vacatur to hold that the attachment should be vacated because Fortune Global USA is a Texas company and is subject to in personam jurisdiction in Texas.

Attorney's fees were awarded for violating discovery orders in a seaman's case, and the employer's attorney and his client were sanctioned for the attorney's conduct during the 30(b)(6) deposition of the employer; *REC Marine Logistics, L.L.C. v. Richard*, No. 2:19-cv-11149 (E.D. La. Mar. 27, 2020) (Douglas).

Opinion

DeQuincy Richard claimed that he suffered an injury while serving as a deckhand on the M/V DUSTIN DANOS, but his employer argued that he did not suffer an injury on the vessel and brought this action seeking a declaratory judgment that it did not owe maintenance and cure to Richard. Richard counterclaimed for maintenance and cure, unseaworthiness, and Jones Act negligence. After REC Marine violated the court's orders on discovery requests and for an inspection of the vessel, Magistrate Judge Douglas awarded attorney's fees against REC Marine. However, the judge declined to award fees at $450 per hour as requested by Richard's attorney and instead concluded that $375 per hour was reasonable in the Eastern District of Louisiana for an attorney with 13 years of experience. Magistrate Judge Douglas then addressed Richard's motion for sanctions for the conduct of the employer's attorney during the 30(b)(6) deposition of REC Marine. The attorney interrupted the questioning 145 times, presented 106 objections, including 52 speaking objections, instructed the witness not to answer 16 times, and asked questions to the witness 11 times during the questioning of Richard's attorney. Some of the objections covered pages of transcript, and there was even an accusation of Richard's counsel having committed a crime. This was in addition to the fact that the witness was unprepared for a 30(b)(6) deposition. Magistrate Judge Douglas ordered REC Marine and its counsel to pay the attorney's fees of a second deposition (of a properly prepared witness) and attorney's fees for the preparation of the motion for sanctions. She also sanctioned the employer's attorney $1,000.

From the state courts:

Louisiana court affirmed use of the Oyster Lease Damage Evaluation Board formulas for restoration and loss of production, applicable to damage to oyster beds from oil and gas activities, in calculating damages to an oyster

lease caused by the grounding of a tug; *Melerine v. Tom's Marine & Salvage, LLC*, No. 2019-CA0672, 2020 La. App. Lexis 406 (La. App. 4th Cir. Mar. 4, 2020) (Atkins).

Opinion

After a vessel owned by Tom's Marine & Salvage grounded in Bayou Lacombe, along the Northshore of Lake Pontchartrain, Tom's Marine sent a tug and crane barge to rescue it. The sunken vessel was rescued, however, the tug grounded over Marty Melerine's oyster lease. The captain of the tug tried to rock the tug back and forth to move off the lease, stirring up sediment, but it was not until the next day that the tug was freed. Melerine brought this suit to recover for damage to his lease, and the jury awarded $6,087,701.47 in damages, using the formulas devised by the Oyster Lease Damage Evaluation Board (created by the Louisiana legislature to effect an equitable resolution of claims for damage to oyster beds by the oil and gas industry in Louisiana). Although Tom's Marine argued that the formulas were inapplicable outside of oil and gas cases, the court of appeal held that it was not error to use the formulas in cases outside of oil and gas matters and affirmed the award of damages.

Maritime proportionate fault rule implicated Navy decisions in ocean crash of Navy helicopter, and suit against maintenance company was dismissed as non-justiciable under the political question doctrine; *Preston v. M1 Support Services, L.P.*, No. 2-18-348-CV, 2020 Tex. App. Lexis 1922 (Tex. App.—Ft. Worth Mar. 5, 2020) (Womack).

Opinion

Three Navy service members were killed and two were injured in the crash of a Navy helicopter off the coast of Virginia during a minesweeping exercise, and the cause of the crash was determined to be related to Kapton wiring issues. One of the injured service members and the spouses of the three service members who were killed brought this suit in state court in Texas against M1 Support, which contracted with the Navy to perform maintenance on the helicopter. M1 asserted that the case was non-justiciable pursuant to the political question doctrine as it would inextricably involve an examination of professional Navy decisions that is beyond the court's power to conduct, and the district court dismissed the case on that basis. In determining whether such an examination would be required, Justice Womack considered the effect of the maritime proportionate fault rule from *McDermott, Inc. v. AmClyde*. The plaintiffs argued that M1 would not be allowed to allocate fault to the Navy under *AmClyde* because the Navy was immune from suit and its fault could not be used to reduce any fault assessed against M1. However, the issue whether the fault of the Navy would be allowed on the jury form was not dispositive as several other potentially responsible parties had already settled (Sikorsky, GE, DuPont, and L-3) in related litigation in Connecticut. As consideration of the fault of those parties under *AmClyde* would implicate assessment of the Navy's decisions in this case, the court of appeals affirmed the dismissal of the case as non-justiciable.

Reality television show production company was held not liable under the Jones Act for injury to crewmember of the fishing boat during filming of *Big*

***Fish Texas*;** *McHenry v. Asylum Entertainment Delaware, LLC*, No. B292457, 2020 Cal. App. Lexis 203 (Cal. App. (2d Dist.) Mar. 12, 2020) (Hoffstadt).

Opinion

Asylum Entertainment is a production company that films reality television shows. National Geographic hired Asylum to produce a reality show about the trials and tribulations of life on a commercial fishing vessel in the Gulf of Mexico called *Big Fish Texas*. National Geographic arranged with Buddy Guindon to allow Asylum to film the crew of one of Buddy's vessels, M/V BLACK JACK IV, with a cameraman and producer aboard during a two-week voyage. Buddy hired Eddy McHenry to serve on the crew, and he was dubbed a "greenhorn" because he had never worked aboard a commercial fishing boat like the BLACK JACK IV. The primary duty of the Asylum employees was to observe and document the crew's activities, but they did ask crewmembers to repeat activities for filming or to explain what they were doing. Two or three days into the voyage, McHenry cut his hands on hooks or fish gills, and his hands began to swell. At the suggestion of another crewmember, McHenry cut his hands with a razor blade to drain the excess fluid and puss and then submerged his hands in rubbing alcohol while the cameras were filming. This operation only made his condition worse, and McHenry sought help from the producer and cameraman. McHenry said that they promised to get a helicopter to evacuate him, but they contended that they only promised to pass the information to the captain of the vessel (Buddy's son Hans). Hans ultimately decided to have Buddy rendezvous with the BLACK JACK IV in Buddy's high-speed boat, M/V HULLRAISER, and Asylum arranged to have an emergency medical technician, cameraman, and producer on the HULLRAISER. McHenry was evacuated to shore on the HULLRAISER, but the EMT was unable to treat McHenry's condition on the boat because he had no antibiotics. By the time McHenry was treated in Galveston, he had to have several fingers amputated. McHenry brought this suit in state court in California against Asylum under the Jones Act and general maritime law, and the district court granted summary judgment to Asylum. The Jones Act claim was based on McHenry's contention that he was a borrowed servant of Asylum. Writing for the court of appeal, Justice Hoffstadt stated that there was no fixed test to determine when a worker becomes a borrowed servant, but the power to control and direct the worker is the most important factor. Although McHenry argued that the producer and cameraman were running the show, it was the captain who dictated what McHenry did, provided his tools and workplace, paid him, and had the right to fire him. Asking him to re-do an operation and to explain what he was doing was too far short of the right to control his activities to make McHenry a borrowed servant of Asylum. Consequently, Judge Hoffstadt affirmed the judgment that McHenry could not recover against Asylum under the Jones Act. The claim against Asylum under the general maritime law was based on a failure to rescue him by getting him medical attention. Justice Hoffstadt first noted that there is no general duty to come to the aid of another, absent a special relationship between the parties, voluntarily undertaking to rescue the person, or taking charge of a helpless person. He then held that none of these circumstances were present in this case and affirmed the dismissal of the general maritime claim.

Disputed extrinsic evidence prevented enforcement of settlement agreement between seaman and his employer's insurance carrier; *McCormick v. Chippewa, Inc.*, No. S-16619, 2020 Alas. Lexis 21 (Alaska Mar. 20, 2020) (Bolger).

Opinion

Brent McCormick was injured while working on the F/V CHIPPEWA and brought a suit against his employer/vessel owner and the vessel's captain. The owner had an insurance policy with a $500,000 per-occurrence limit that was eroded by defense costs. McCormick's attorney began negotiating with the owner's insurer and sent an offer for policy limits in which two accidents were described. The carrier accepted the offer, indicating that approximately $370,000 remained on the limit. This was followed by a discussion between counsel for the seaman and employer about the policy limits, a settlement agreement dismissing the employer in consideration of the remaining policy limits available, and this suit by the seaman to enforce the agreement. McCormick contended that there were three occurrences under the policy, which tripled the policy limit. The employer and carrier argued that the terms of the settlement reflected that one policy limit would be paid minus the defense costs. The district court considered the language of the settlement agreement to be clear and held that the insurer only owed one policy limit, but Chief Justice Bolger, writing for the Alaska Supreme Court, held that there was a factual dispute between the parties that had to be resolved. As there may have been no agreement on the policy limits based on what was said during the telephone call, there was a genuine issue of material fact that required resolution and precluded summary judgment enforcing the settlement agreement based on a single policy limit of $500,000.

Thanks to Monica Markovich for her help in preparing this Update.

Kenneth G. Engerrand
President
BROWN SIMS, P.C.

HOUSTON
1177 West Loop South
Tenth Floor
Houston, TX 77027
O 713.629-1580

LAFAYETTE
600 Jefferson Street
Suite 800
Lafayette, LA 70501
O 337.484-1240

NEW ORLEANS
1100 Poydras Street
39th Floor
New Orleans, LA 70163
O 504.569-1007

GULFPORT
2304 19th Street
Suite 101
Gulfport, MS 39501
O 228.867-8711

MIAMI
4000 Ponce De Leon Blvd
Suite 630
Coral Gables, FL 33146
O 305.274-5507

Quote:

Plaintiff admitted "out there thoughts:" "that words have power through their sound," "that we are under Maritime Admiralty law because we are birthed by DOCKtors, (docks being close to water) and come through a channel," and that "TeleVISION means telepathic vision by forces."

Alfredo C.1 v. Saul, No. 6:18-cv-1460, 2020 U.S. Dist. Lexis 29142 (D. Ore. Feb. 20, 2020) (Simon).

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