February 2020 Longshore Update (No. 249)

Note from your Updater:

The long dispute over the constitutionality/preemption of the Massachusetts Oil Spill Prevention Act (the litigation began in 2005, the year after enactment of the statute) took a new turn when American Waterways Operators sought to compel the Coast Guard to comply with the decision of the First Circuit and to reopen the litigation on the merits. Judge Casper of the District of Massachusetts declined the request. *American Waterways Operators v. United States Coast Guard*, No. 18-cv-12070, 2020 U.S. Dist. Lexis 10449 (D. Mass. Jan. 22, 2020).

On the LHWCA Front . . .

From the federal appellate courts:

ALJ's findings--based on decision that the employer's medical expert was more credible than the treating doctor--were affirmed by the Fifth Circuit; *Bourgeois v. Director, OWCP*, No. 19-60337 (5th Cir. Jan. 2, 2020) (Higginson).

Opinion

ALJ Price found that Tramond Bourgeois suffered injuries to his right shoulder, right ankle, and low back, and Bourgeois appealed, arguing that he suffered more severe shoulder and back injuries, including a labrum tear and lumbar facet arthrosis. Judge Price concluded that the employer's medical expert, Dr. Sweeney, presented a more thorough and credible opinion than the treating physician, Dr. Johnston. Although an MRI shortly after the accident suggested that Bourgeois suffered a small ventral labral tear, Dr. Johnston treated Bourgeois for a superior tear three years later. Judge Price agreed with Dr. Sweeney that Dr. Johnston found tears in structures that were not present three years earlier. Additionally, the Fifth Circuit declined to address the claimant's argument that his shoulder surgery was intended to address an AC joint sprain, as it was not raised until claimant's motion for reconsideration in the Benefits Review Board. Finally, the Fifth Circuit affirmed the finding that Bourgeois did not suffer from lumbar

facet arthrosis, based on the testimony of Dr. Sweeney, who relied on a higher resolution MRI than the lower resolution MRI that suggested that Bourgeois might have sustained facet arthrosis.

Video of plaintiff's attorney manipulating hatch cover until it fell on the third try did not establish a defect in the hatch cover at the time of the longshore worker's injury; *Purvis v. Maersk Line A/S*, No. 19-12041 (11th Cir. Jan. 3, 2020) (per curiam).

Opinion

Albert Purvis was injured while working as a lasher on the ANNA MAERSK in the Port of Savannah while climbing a ladder when the open hatch cover crashed down on his head, causing him to fall to the deck below. Purvis brought this suit against the owner of the vessel for breach of *Scindia*'s turnover duty—that the vessel be turned over to the stevedore in such a condition that the stevedore can carry out the cargo operations with reasonable safety. To support his argument that the hatch cover and its latch were defective, Purvis submitted a video showing his attorney manipulating the hatch cover and latch, resulting in the hatch cover falling on the third manipulation. However, there was no evidence that the hatch cover was in the same condition at the time of the filming as it was at the time of the accident. Therefore, the video was insufficient evidence to defeat Maersk's motion for summary judgment. Purvis also argued that a Maersk employee must have left the hatch open without locking it, but the court responded that the condition of an unlatched hatch cover would have been obvious to Purvis as a reasonably competent longshore worker, precluding recovery for breach of the turnover duty, even if it was dark.

Payment of medical bills was not payment of compensation that would extend the time for modification of an award; *Katagiri v. Matson Terminals, Inc.*, No. 18-72398 (9th Cir. Jan. 13, 2020) (per curiam).

Opinion

Robert Katagiri injured the prosthesis in his right knee while employed by Matson Terminals. The Administrative Law Judge found the injury was work-related and awarded Katagiri temporary total disability for 102 days but no permanent disability benefits. Compensation payments ceased on December 21, 2015, but Matson paid medical bills in 2017. On February 8, 2017, Katagiri filed a request for permanent partial disability for a 75% impairment to his leg. ALJ Berlin denied the request as untimely, and the Benefits Review Board and the Ninth Circuit agreed. The question was whether Katagiri's request for permanent disability satisfied Section 22's requirement that a modification be filed within one year of the last payment of compensation. Holding that payments by the employer for medical services provided to the employee are not payments of compensation, the Ninth Circuit ruled that the medical payments, even though made pursuant to the compensation order, did not extend the one-year period to seek modification of the order.

From the federal district courts:

Painter/blaster employed by a contractor was held to be a borrowed servant of the shipyard for his injury on a barge in the shipyard; *Skipper v. A&M Dockside Repair, Inc.*, No. 18-6164, 2020 U.S. Dist. Lexis 201 (E.D. La. Jan. 2, 2020) (Vance).

Opinion

Walter Skipper was employed by Helix Resources as a painter/blaster and was working on a barge in a shipyard that is owned and operated by A&M Dockside Repair. Skipper fell into an open manhole cover on the barge and brought this suit against the shipyard, A&M, and the owner of the barge, Cashman Equipment. Cashman was dismissed from the suit, and A&M brought Helix into the case as a third-party defendant. A&M and Helix then moved for summary judgment on the basis that A&M was the borrowing employer of Skipper and that the LHWCA was the exclusive remedy for Skipper against A&M. Skipper first argued that A&M had waived the right to assert a borrowed-servant defense as it did not assert the defense in its answer. However, Helix asserted in its answer that the Louisiana Workers' Compensation Act or LHWCA was the exclusive remedy for Skipper, so Skipper was on notice that the defense would be asserted. Judge Vance then evaluated each of the nine factors of the *Ruiz* test to determine if a worker is a borrowed servant, and she concluded that seven of the nine factors favored a borrowed servant relationship; one factor was neutral; and one factor suggested that a borrowed servant relationship did not exist. Notably, three of the four factors that are weighed most heavily favored a finding of borrowed servant status. Consequently, Judge Vance held that A&M was Skipper's borrowing employer for purposes of the LHWCA.

Failure to file suit within three years of the date of awareness of a work-related asbestos disease of a shipyard worker barred a wrongful death suit by his widow against manufacturers of asbestos products; *Deem v. Air & Liquid Systems Corp.*, No. C17-5965, 2020 U.S. Dist. Lexis 418 (W.D. Wash. Jan. 2, 2020), 2020 U.S. Dist. Lexis 4446 (W.D. Wash. Jan. 9, 2020), 2020 U.S. Dist. Lexis 14877 (W.D. Wash Jan. 24, 2020) (Settle).

Opinion January 2

Opinion January 9

Opinion January 24

The death of Thomas Deem from exposure to asbestos-containing products during his employment as an apprentice and journeyman outside machinist at the Puget Sound Naval Shipyard, returns to the Update (Sept. 2019 Update; Jan. 2020 Update). In the January 2020 Update, we reported that Judge Settle had held that the trigger for the three-year maritime statute of limitations was not the worker's death but the date of his diagnosis of a work-related disease. Applying that same rule to defendants in the first two opinions issued in January 2020, Judge Settle likewise dismissed actions that were not brought within three years of Deem's diagnosis—the date his widow was aware of his work-related injury. In the third opinion, Judge Settle dismissed claims against three defendants where there was insufficient evidence of Deem's exposure to products from the defendant companies.

Employee's claims for a land-based injury under Section 905(b) were dismissed, but he presented fact questions on his claims for seaman status; *Gage v. Canal Barge Co.*, No. 18-cv-990, 2020 U.S. Dist. Lexis 1720 (M.D. La. Jan. 6, 2020) (deGravelles).

Opinion

Dillon Gage was employed by Canal Barge as a deckhand on its tugs. He requested a transfer to the position of barge readiness technician, and it was in that capacity that he injured his back while lifting a Yamaha outboard motor onto the bed of a pickup truck. Gage brought suit against Canal Barge as a seaman and, alternatively, under Section 905(b) of the LHWCA. Canal Barge argued that the transfer of Gage to the shoreside department would have continued for at least a year, so his status should be determined after the change in his assignment and not from his employment as a whole with Canal Barge. Gage contended that the transfer was not permanent because his ultimate goal was to become a tankerman aboard Canal Barge's barges, which he contended was seaman's work. Therefore, the analysis of his status should not just include the work performed after the change in assignment but his employment as a whole, in which he had spent more than 30% of his time as a deckhand. Finding there to be fact questions on permanency of the change in assignment, Judge deGravelles denied Canal Barge summary judgment on Gage's status as a seaman. However, as the accident occurred on land, without any vessel involvement, Judge deGravelles granted Canal Barge summary judgment on Gage's alternate claim under Section 905(b) of the LHWCA.

Shipyard worker's maritime claims of exposure to asbestos failed for inability to identify exposure from defendant's products; *Carlson v. CBS Corp.*, No. 3:17-cv-1916, 2020 U.S. Dist. Lexis 4856 (D. Conn. Jan. 7, 2020) (Bryant).

Opinion

Kurt Carlson claimed that he was exposed to asbestos-containing products manufactured by several defendants while he was employed as a radiological control technician for General Dynamics/Electric Boat Corp. in Groton, Connecticut. Although Carlson brought this action under Connecticut law, Judge Bryant applied substantive maritime law and concluded that Carlson failed to establish exposure to any General Electric equipment (let alone equipment containing asbestos). Therefore, she entered summary judgment in favor of General Electric.

Union day engineer who was injured while performing repair on a vessel was an employee of the vessel owner and the borrowed servant of its contractor, was not a seaman, and his exclusive remedy was pursuant to the LHWCA; *Fetter v. Maersk Line, Ltd.*, No. 2:14-cv-2108, 2020 U.S. Dist. Lexis 13453 (D.N.J. Jan. 27, 2020) (Hayden).

Opinion

When Maersk Line's M/V MAERSK MONTANA was in port in Newark, New Jersey, the ship's captain requested five engineers from the Marine Engineers Beneficial Association

to work as day engineers to perform repair work on the vessel. It requested that its vendor, 3MC, supervise the day engineers in their work through 3MC's employee, Greg Higgs. Jason Fetter successfully bid on the job through the Union and went to work on the vessel for one day and was injured while trying to remove a stuck injector in the ship's main engine. Fetter brought this suit in state court in Texas against Maersk Line and 3MC, alleging that he was a seaman, and the defendants removed the case to federal court where it was transferred to New Jersey. Both Maersk Line and 3MC moved for summary judgment, asserting that Maersk Line was Fetter's employer, 3MC was his borrowing employer, Fetter was not a seaman, and LHWCA compensation was Fetter's exclusive remedy. Based on the collective bargaining agreement and the relationship between Maersk Line and the Union and its members, Judge Hayden concluded that Maersk Line was Fetter's employer. However, as Higgs's supervision of Fetter was performed under the control of Maersk Line, Higgs was a borrowed servant of Maersk Line, and 3MC was also immunized from Fetter's claims to the extent that the LHWCA was applicable. That led to the question whether Fetter was covered under the LHWCA or the Jones Act. Judge Hayden held that Fetter was not a seaman for two reasons. First, he failed to satisfy the "substantial in nature" element of the seaman status test (that his duties take him to sea) because his entire work was on a vessel at the dock and he was not hired to sail with the vessel. Second, he failed to satisfy the "substantial in duration" element from his working for one day as an engineer on the docked vessel. Fitter objected to the application of the LHWCA based on the vendor exclusion of Section 902(3)(d)—individuals employed by suppliers, transporters, or vendors. Noting that the exclusion contains an exception for workers who are performing tasks routinely engaged in by maritime employees of the employer, Judge Hayden held that the exception to the exclusion was applicable so that Fetter was covered under the LHWCA. Finally, Judge Hayden rejected Fetter's argument that the LHWCA allowed him to bring a suit against Maersk Line in its capacity as owner of the vessel, as the 1984 Amendments eliminated that action for workers, such as Fetter, who are engaged in ship repair.

Claims under the Trafficking Victims Protection Reauthorization Act of fired workers employed by a contractor working pursuant to a contract with the U.S. Army were not displaced by the exclusive remedy provisions of the DBA and LHWCA; *United States ex rel. Hawkins v. ManTech International Corp.*, No. 15-2105, 2020 U.S. Dist. Lexis 13733 (D.D.C. Jan. 28, 2020) (Jackson).

Opinion

The U.S. Army awarded a contract to ManTech to provide logistics and support for mine-resistant ambush-protected vehicles in Kuwait. Larry Hawkins and others were hired by ManTech to perform engineering services pursuant to that contract. After they were fired for reporting hours that were too low, they brought this qui tam complaint against ManTech under the False Claims Act and the Trafficking Victims Protection Reauthorization Act (TVPRA). As some of the damages sought by the plaintiffs included exposure to potentially deadly fumes, ManTech argued that the exclusive remedy provisions of the Defense Base Act (and the LHWCA by incorporation into the DBA) barred the plaintiffs' claims to the extent that they sought damages for the harm they suffered due to work conditions. However, it was not clear how the plaintiffs intended to recover under the TVPRA for chemical exposure damages (the False Claims Act claims

were dismissed). Therefore, Judge Jackson denied ManTech's motion to dismiss but required that the plaintiffs clarify the nature of the damages that they were seeking.

Claims for the asbestos-related death of a shipyard employee were removable based on the Federal Officer Removal Statute; *Dempster v. Lamorak Insurance Co.*, No. 20-95, 2020 U.S. Dist. Lexis 14400 (E.D. La. Jan. 28, 2020) (Brown).

Opinion

This case involves allegations that decedent Callen L. Dempster was exposed to asbestos and asbestos-containing products while employed by Avondale Shipyards. The case was removed to federal court the second time on the eve of trial, and the plaintiffs sought to remand the case to state court on an expedited basis. The removal was based on the Federal Officer Removal Statute and federal defenses that included federal contractor immunity and the exclusive remedy of the LHWCA. The application of the Federal Officer Removal Statute came into play with the development of evidence that the decedent was exposed to asbestos aboard U.S. Navy vessels. The question then became, under Fifth Circuit precedent, whether the allegations against the shipyard were based on strict liability for the shipyard's mere use of asbestos under the government contract as that would implicate the Federal Officer Removal Statute. The plaintiffs argued that their pleadings did not allege strict liability against the shipyard, only negligence, and that the strict liability allegations were against the product suppliers. However, the proposed jury interrogatories submitted shortly before trial demonstrated an intent to hold Avondale liable under a theory of strict liability. Consequently, Chief Judge Brown held that the Federal Officer Removal Statute was implicated. She then turned to whether Avondale had articulated a colorable defense, and she found that the federal contractor immunity defense had been sufficiently alleged. Therefore, she did not have to determine whether the exclusive remedy defense from the LHWCA was applicable, and she denied the motion to remand.

And on the Maritime Front . . .

From the federal appellate courts:

Under the Reagan Proclamation, the federal government exercises control over the United States Exclusive Economic Zone and can therefore designate a national monument in the EEZ southeast of Cape Cod under the Antiquities Act; *Massachusetts Lobstermen's Association v. Ross*, No. 18-5353 (D.C. Cir. Dec. 27, 2019) (Tatel).

Opinion

Acting pursuant to the Antiquities Act, President Obama issued a Proclamation establishing the Northeast Canyons and Seamounts Marine National Monument, covering roughly 5,000 square miles about 130 miles southeast of Cape Cod. Several commercial fishing associations argued that the Proclamation exceeded the President's authority for several reasons. Of particular interest to readers of the Update, the fishing interests argued that the federal government does not control the area of ocean where the Monument is located. Noting that the Antiquities Act grants the President the authority

to create monuments over land that is "owned or controlled" by the federal government, the fishing interests cited the *Treasure Salvors* case from the Fifth Circuit, which held that a shipwreck located on the outer Continental Shelf, outside the territorial waters of the United States, was "not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act." However, that decision was before the Reagan Proclamation established federal sovereign dominion over the United States Exclusive Economic Zone for the purpose of exploring, exploiting, conserving, and managing natural resources of the seabed and subsoil and adjacent waters as well as jurisdiction with regard to the protection and preservation of the marine environment. As such, the D.C. Circuit held that the designation of an area on the OCS as a National Monument was within the authority granted to the President under the Antiquities Act.

Decision staying maritime case for arbitration and administratively closing the case was not a final order, and appeal of the order was dismissed for lack of appellate jurisdiction; *Psara Energy, Ltd. v. Advantage Arrow Shipping, L.L.C.*, No. 19-40071 (5th Cir. Jan. 9, 2020) (Jones).

Opinion

This case involves a dispute arising out of the charter of the CV STEALTH that was detained in Venezuela for more than three years and was eventually sold as scrap. Before the vessel owner initiated London arbitration pursuant to the charter party against the charterer and the charterer's guarantor of performance, the owner discovered that the guarantor had transferred its fleet of vessels to other entities, including Advantage Arrow Shipping. The owner then initiated attachment actions in Texas and Louisiana against Advantage vessels for which Advantage posted security. Advantage then sought referral of the cases to arbitration in accordance with the charter party entered into by the charterer, citing the intertwined claims rule—that without the charter and performance guarantee, the owner would have no claims against Advantage Arrow. The district judge referred the case to arbitration, stayed the suit pending arbitration, and administratively closed the case. The owner appealed, arguing that the order was a final appealable judgment; alternatively, that it was appealable under the collateral order doctrine; or, alternatively, that it was appealable as an interlocutory appeal in an admiralty case. Judge Jones rejected these arguments. She noted that the Fifth Circuit has drawn the distinction between a stay of a case and a dismissal of the case. Concluding that an administrative closure is not a dismissal and is no different than a stay, she held that the order was not final and appealable. Judge Jones also rejected the argument that the collateral order doctrine applied to an order compelling arbitration as the Fifth Circuit and all other circuits have rejected that argument. Finally, Judge Jones addressed whether the appeal was from an order that determined the rights and liabilities of the parties to admiralty cases. In rejecting that claim, Judge Jones noted that a referral to arbitration determined how and where the rights and liabilities would be determined and was not itself a determination of rights and liabilities. Therefore, the appeal was dismissed for lack of appellate jurisdiction.

First Circuit punted to the Maine Supreme Court whether the zoning ordinance in the City of South Portland, prohibiting bulk loading of crude oil onto vessels in the City's harbor, is displaced by Maine law; *Portland Pipe Line Corp. v. City of South Portland*, No. 18-2118 (1st Cir. Jan. 10, 2020) (per curiam).

Opinion

Portland Pipe Line Corp, which is engaged in international transportation of oil from its facility in the City of South Portland, Maine, challenged a zoning ordinance enacted by the City prohibiting the bulk loading of crude oil onto vessels in the City's harbor. The first Circuit decided to sidestep issues with respect to federal preemption (calling that a "quagmire") and instead certified the case to the Maine Supreme Court for determination of whether the zoning ordinance is preempted [the correct term is displaced] by Maine law.

Changes in Walmart's accounting system one month after the Deepwater Horizon/Macondo Blowout only resulted in minimal discrepancies in comparing income before and after the blowout, resulting in affirmance of the award to Walmart from the Deepwater Horizon Economic and Property Damages Settlement Agreement; *BP Exploration & Production, Inc. v. Claimant ID 100354107*, No 18-31115, c/w 18-31118, 18-31122, 18-31123, 18-31128 (5th Cir. Jan. 14, 2020) (Southwick).

Opinion

Walmart submitted claims to the Claims Administrator for the Deepwater Horizon Economic and Property Damages Settlement Agreement for nine stores along the Gulf Coast, and this appeal involves awards totaling more than $17 million for five of the stores (the award to another store is discussed below). BP challenged the awards on the ground that the month after the Blowout, Walmart changed its accounting system, which BP contended inflated the award amounts because the pre-disaster period appeared to be more profitable than it really was in comparison to the period after the disaster. Finding the amounts in question were minimal, the Appeal Panels reduced the total award to slightly more than $15 million, and the district court denied review. As BP could not present any split in the decisions of the Appeal Panels, this was a factual dispute entrusted to the Claims Administrator and Appeal Panels for which the Fifth Circuit declined review.

Shareholder payments and pre-spill debts that were forgiven do not increase the value of a non-bankrupt claimant in calculating economic losses as a failed business for the Deepwater Horizon Economic and Property Damages Settlement Agreement; *Claimant ID 100245152 v. BP Exploration & Production, Inc.*, No. 18-31304 (5th Cir. Jan. 15, 2020) (per curiam).

Opinion

This case involves the claim brought by USA Hosts, a Nevada corporation engaged in destination management--designing and implementing events, tours, and activities in particular geographic areas. One such location was New Orleans. USA Hosts sold that branch of its operations 7 months after the Deepwater Horizon/Macondo Blowout and made a claim for economic loss from that location as a failed business. The Claims Administrator concluded that USA Hosts was not entitled to compensation, using the bankruptcy methodology of including forgiven debts and shareholder payments in order

to increase a failed business's liquidation value even though USA Hosts had not filed for bankruptcy. As this was not a matter entrusted to the discretion of the Claims Administrator (as in the previous case and following case in this Update), the Fifth Circuit held that the district court abused its discretion in not granting review of the decision.

Fact specific arguments based on millions of dollars in discrepancies between the claimant's financials and tax returns are insufficient to overturn the award to a Mississippi copper-tube producer in the Deepwater Horizon Economic and Property Damages Settlement Agreement; *BP Exploration & Production, Inc. v. Claimant ID 100319411*, No. 19-30145 (5th Cir. Jan. 15, 2020) (per curiam).

Opinion

Mueller Copper Tube Co. brought a claim for loss of sales at its Fulton, Mississippi, location based on the Deepwater Horizon Economic and Property Damages Settlement Agreement. The Claims Administrator awarded Mueller more than $29 million, and BP objected based on millions of dollars in discrepancies between Mueller's financial documents and tax returns. The Appeal Panel affirmed more than $27 million of the claimed amount, noting the daunting task of the program's accountants under difficult circumstances, and the district court declined to review that decision. Noting that BP's arguments were fact-specific and did not involve any split in decisions or misinterpretation of the Settlement Agreement, the Fifth Circuit affirmed the denial of discretionary review by the district court.

Eleventh Circuit affirmed finding that the cruise line was not negligent for serving its passenger at least 16 drinks before she fell overboard; *Broberg v. Carnival Corp.*, Nos. 19-10388, 19-12033 (11th Cir. Jan. 24, 2020) (per curiam).

Opinion

Samantha Broberg went on a Carnival cruise with two of her friends. By 8:00 p.m. on the evening of May 12, 2016, she had been served approximately ten drinks. Her friends saw last saw her at 11:30 p.m. and believed that she appeared inebriated but was not in danger. She was served six additional drinks in the casino between 11:30 p.m. and 1:00 a.m. Another passenger, whose husband had not returned to his cabin, found her husband with his arm around Broberg, trying to stabilize her. The passenger took photos of Broberg (and her husband), and Broberg's friend testified that Broberg appeared to be more intoxicated, but not in danger. Broberg left the casino around 2:00 a.m. with Israel Cervantez. They went to the exterior deck, where Broberg sat on an exterior deck railing and fell overboard. Cervantez did not report her fall and returned to the bar for another beer. The next morning, Broberg's friends realized that she was missing and reported that to the cruise line around 11:00 a.m. Broberg's body was never recovered. The case was tried to Judge Moreno, who concluded that the issues presented were whether Broberg was under the influence of alcohol to such an extent as to be a danger to herself and whether the cruise line was on notice that she was so intoxicated and continued to serve her alcohol, resulting in her falling overboard. There was a dispute whether more drinks were served than were charged to Broberg's account, resulting in her intoxication, but Judge Moreno found against that contention based on the testimony of Broberg's friends

and two crewmembers who stated that she appeared to be fine. Judge Moreno concluded that Broberg was indeed intoxicated but that Carnival was not on notice that she was intoxicated to the point of being in danger. The Eleventh Circuit affirmed that decision, stating that Judge Moreno had "properly framed the question as whether Carnival was on notice that Mrs. Broberg was intoxicated to the extent that she was in danger" and agreeing that Judge Moreno did not clearly err in finding that the cruise line was not on notice.

Walmart store in Pass Christian that was damaged by Hurricane Katrina and re-opened six months before the Macondo/Deepwater Horizon blowout was classified as a start-up business and granted recovery from the Deepwater Horizon Economic and Property Damages Settlement Agreement; *BP Exploration & Production, Inc. v. Claimant ID 100454107*, No. 18-31275 (5th Cir. Jan. 28, 2020) (Duncan).

Opinion

Walmart opened a supercenter store in Pass Christian, Mississippi, in 2003, but the store was devastated by Hurricane Katrina in August 2005. The expanded and rebuilt store finally re-opened on October 14, 2009, six months before the Macondo/Deepwater Horizon blowout. Walmart presented a claim for economic loss for this store as a start-up business based on the Deepwater Horizon Economic and Property Damages Settlement Agreement, where start-up claimants recover by showing that profits during the spill year were less than profits during the subsequent year (Walmart would recover nearly a million dollars). BP responded that the store should be classified as a regular, ongoing business, so that Walmart would have to show profits during the spill year were less than profits during the preceding year(s) (Walmart would recover nothing). The Agreement defined a start-up business as having less than 18 months of operating history at the time of the blowout. Did that mean 18 months of total operating history or 18 months of continuous operating history at the time of the blowout? The Administrator interpreted the Agreement in favor of Walmart, and the Appeal Panel affirmed the award to Walmart. Writing for the Fifth Circuit (and applying maritime law to the Agreement as a maritime contract), Judge Duncan considered the Agreement to be subject to at least two reasonable interpretations. As the Appeal Panel made a discretionary decision that was "not incongruent with the language of the Settlement Agreement" and that did not contradict or misapply it, and as there was no split of Appeal Panels on the issue, the Fifth Circuit held that the district court did not abuse its discretion in denying review of the Appeal Panel's affirmance of the award to Walmart.

From the federal district courts:

Claims of owners of floating home against City of Key West for wrongful prosecution of code violations, wrongful termination of lease, and negligently sinking their home were recommended for dismissal; *Kessler v. City of Key West*, No. 19-10030, 2019 U.S. Dist. Lexis 221875 (S.D. Fla. Dec. 20, 2019) (Otazo-Reyes).

Opinion

After docking their floating home at the Garrison Bight Slip in Key West for 14 years, Pamela and Stuart Kessler became embroiled in a dispute with the City that led to the City prosecuting the Kesslers for code violations and seeking to evict them, with the Kesslers' floating home sinking in the aftermath of Hurricane Irma and the City terminating their lease agreement. The Kesslers brought this action alleging, inter alia, violations of due process, equal protection, and the takings clause; negligence; and strict liability. Magistrate Judge Otazo-Reyes recommended dismissal of the due process and takings clause claims for failing to allege that adequate state remedies were unavailable and the due process claim because the termination of the lease was an executive action addressing property interests that were created by state law. Judge Otazo-Reyes recommended dismissal of the negligence and strict liability claims for failing to comply with the notice provision of the Florida statute waiving sovereign immunity.

Allegations in Rule B proceeding held insufficient to order attachment of property; *E.N. Bisso & Son, Inc. v. Bouchard Transportation Co.*, No. SAG-19-3629, 2019 U.S. Dist. Lexis 220997 (D. Md. Dec. 26, 2019) (Gallagher).

Opinion

E.N. Bisso brought suit in federal court in Maryland against Bouchard Transportation, a New York company that owns and operates tugs and barges, and sought the issuance of process for a Rule B maritime garnishment with respect to four companies holding property or assets of Bouchard within the district. Bisso alleged that Bouchard was believed to have, or will have, property or assets in the jurisdiction of the court consisting of cash, funds, freight, hire, or credits in the hands of the garnishees in the district. After reviewing the allegations, Judge Gallagher declined to order the garnishments, concluding that the allegations were conclusory and were no more than "a prolonged fishing expedition."

Claimant in a limitation action was allowed to bring a third-party claim against a party it sued in the claimant's stayed tort suit; *In re Weeks Marine, Inc.*, No. 2:18-cv-14929, 2019 U.S. Dist. Lexis 221824 (D.N.J. Dec. 27, 2019) (Vazquez).

Opinion

Brannin J. Beeks was killed on the crane barge WEEKS 5229, and his widow, Susan Wang, brought suit against Weeks Marine, owner of the barge, and North American Aggregates, the operator of the barge. That action was stayed when Weeks filed a limitation action. Wang answered the limitation action, filed a claim, and brought a third-party action against North American Aggregates. Discovery was consolidated for the two actions, and both were assigned to the same judge. North American Aggregates objected to the third-party action based on the first-filed rule--that the claim should be decided by the court in which the claim was first filed. However, Judge Vazquez did not believe that the rule should be mechanically applied in this context. The principles underlying the rule, judicial economy and comity, were not implicated where both actions were pending in the same court and where discovery was consolidated. Therefore, Judge Vazquez denied the motion to dismiss the third-party action against North American Aggregates without prejudice.

Unproven conspiracy theories of incarcerated boat owner did not prevent sale of vessel to enforce maritime lien; *Moore v. M/V SUNNY USA*, No. 18-81181, 2019 U.S. Dist. Lexis 223208 (S.D. Fla. Dec. 27, 2019) (Altman).

Opinion

Edward M. Moore entered into a contract with John Dong for dockage and maintenance of Dong's 73-foot motor yacht, M/V SUNNY USA. Dong eventually stopped paying for dockage and maintenance, and the vessel did damage to Moore's dock and to the surrounding environment that required Moore's intervention. Moore brought this action against the vessel, in rem, based on breach of contract and tort. After the vessel was arrested, Dong filed a pro se motion to dismiss the complaint as an extortion scheme. As Dong had never filed a verified claim of owner, the court denied his motion to dismiss and ordered an interlocutory sale of the vessel. Dong objected, filing a supplemental statement of interest that the court considered sufficient to constitute a claim to the vessel. However, the court declined to set aside the interlocutory sale, but the court did give Dong the opportunity to bond the vessel for $60,000 before the sale on March 22, 2019. When no bond or security was forthcoming by that date, the vessel was sold for $1,000 and then resold by the buyer to Moore for the same price. After Moore filed a Request for Confirmation of the Sale, the court received from Dong a $60,000 check for the vessel's release and a request for extra time to receive and respond to court documents as he was pro se and incarcerated. Judge Altman denied the request to modify the mailbox rule, confirmed the sale, and granted Moore the after-cost proceeds of the sale ($600). Dong asserted that there were material fact questions that his refusal to pay was justifiable as a response to Moore's attempts to extort him for money. However, Judge Altman held that Dong had no personal knowledge of this alleged scheme to defraud him and sabotage his boat and had not established how that scheme kept him from vacating the dock or prevented him from discharging his obligations under the lease. Therefore, Judge Altman ordered the disbursement of the net proceeds of the sale to Moore as partial payment of his lien.

Fact questions on whether attempted salvor satisfied the requirements to obtain a salvage award; *Atlantis Marine Towing, Salvage & Services, Inc. v. DEEP IMPACT*, No. 19-20782, 2019 U.S. Dist. Lexis 223314 (S.D. Fla. Dec. 31, 2019) (Louis).

Opinion

Alberto Valdes set out from Dinner Key Marina in Miami on his vessel DEEP IMPACT, but the vessel struck a channel marker and Valdes was thrown into the water. That did not end the voyage of the DEEP IMPACT, which sailed away unmanned. Shortly thereafter, Captain Bert Korpela and his wife Erika Burkwest, owners of Atlantis Marine, heard about a collision on the radio and took their patrol boat to the scene where they witnessed the DEEP IMPACT collide with a catamaran. Burkwest testified that the DEEP IMPACT was atop the catamaran with its engines still running, causing it to turn the catamaran around. She boarded the DEEP IMPACT and shut off the engines and then began checking out the vessel. She then found William Girard on the boat (he had also responded to the radio report of a collision). After hearing on the radio that Valdes had been rescued, Korpela and Burkwest left to find Mr. Valdes. After confirming that he was the only passenger on the DEEP IMPACT, Korpela and Burkwest returned to the DEEP

IMPACT, which was surrounded by other boats, including one from the Florida Fish and Wildlife Conservation Commission. When the DEEP IMPACT slid off the catamaran, Korpela secured it with a tow line and began towing it between the vessels at the scene. Officer Sarmiento ordered Korpela to release the DEEP IMPACT, and ultimately it was towed by a separate company that was contracted by Valdes. Altantis Marine sought a salvage award against the DEEP IMPACT based on two actions, the boarding of the vessel and shutting down the engines and the attaching of a line to the vessel after it slid off the catarmaran. Valdes opposed both theories in a motion for summary judgment. First, Girard testified that he boarded the DEEP IMPACT before Burkwest and put the throttles in neutral. Thus, the vessel was not in peril when Burkwest subsequently shut off the engines. Second, Valdes argued that the DEEP IMPACT was not in peril when it slid off the catamaran because officers of the Florida Fish and Wildlife Conservation Commission were present at the scene and could have rescued the vessel if it were in danger. Magistrate Judge Louis found the evidence on the first theory to be hotly disputed and concluded that, if believed, Burkwest's testimony was sufficient to support an award that her actions succeeded, in whole or in part, in saving the DEEP IMPACT. As to the second theory, Magistrate Judge Louis agreed that a vessel that is floating free as a result of a collision could be considered to be in maritime peril and that the salvor need not show that salvage could not have occurred without its assistance. Therefore, a salvage claim would not be precluded by the presence of the other vessels or by the fact that Valdes had called another boat to the scene to perform the salvage. Consequently, Magistrate Judge Louis recommended that Valdes' motion for summary judgment should be denied.

Danger of passenger being flung to the floor by her crewmember-dance partner was not open and obvious, but the cruise line was not on notice of the risk; *Yusko v. NCL (Bahamas) Ltd.*, No. 1:19-cv-20479, 2020 U.S. Dist. Lexis 1126 (S.D. Fla. Jan. 3, 2020) (Moore).

Opinion

Joann Yusko, a passenger on the NORWEGIAN GEM, participated in a dance competition on the vessel. She was paired with Michael Kaskie, a professional dancer employed by the cruise line. After dancing with Kaskie for less than a minute, she fell and hit her head. She brought suit against the cruise line, alleging that Kaskie's method of dancing was unreasonably dangerous as he flung her around the dance floor. The cruise line moved for summary judgment on the ground that the danger of falling while dancing is open and obvious. After rejecting Yusko's argument that the open and obvious defense only applies to a premises liability claim, Chief Judge Moore denied the summary judgment on the ground that the danger would not be open and obvious if Kaskie's manner of dancing was unreasonable, and there was a fact question from Yusko's complaint on that issue. The cruise line also moved for summary judgment on the ground that it had no notice of the risk-creating condition. Yusko argued that notice should be presumed where the injury is caused by the defendant's own direct action. However, Chief Judge Moore noted that the Eleventh Circuit has held that notice is a prerequisite to liability even when the risk-creating condition is of the defendant's own creation. Yusko then sought to establish notice by arguing that Kaskie surely had notice of the risk of his own actions—flinging Yusko around the dance floor. However, without any evidence of similar accidents involving Kaskie or other crewmembers, there was insufficient evidence of notice, and Chief Judge Moore granted summary judgment to the cruise line.

Worker's maritime suit arising from his injury on a vessel supporting platform operations on the outer Continental Shelf was removable based on the OCSLA; *Sam v. Laborde Marine, L.L.C.*, No. H-19-4041, 2020 U.S. Dist. Lexis 1585 (S.D. Tex. Jan. 6, 2020) (Lake).

Opinion

Ray Sam was employed as an inspector and was assigned to perform tests on a platform on the outer Continental Shelf, offshore Louisiana. He was housed on a support vessel owned and operated by Laborde Marine that was located alongside the platform. Sam was injured while descending stairs on the vessel. Sam brought suit in state court in Texas against Laborde Marine and the operator of the platform. They removed the case to federal court based on federal jurisdiction under the Outer Continental Shelf Lands Act. Sam argued that there was no federal jurisdiction, contending that the OCSLA requires situs on a platform or other structure that is attached to the OCS. However, the Fifth Circuit rejected that requirement in the *DEEPWATER HORIZON* case, holding that federal jurisdiction under the OCSLA only requires that there be a but-for connection to oil and gas exploration and development on the OCS. As Sam's employment was to further exploration and development activities on the platform located on the OCS, Judge Lake held that there was federal jurisdiction over this maritime claim under the OCSLA and that the case was properly removed to federal court.

Passenger injured on excursion sufficiently alleged notice of specific dangers involving the excursion to survive the cruise line's motion to dismiss but did not sufficiently allege how the failure to warn proximately caused the passenger's accident; *Long v. NCL (Bahamas) Ltd.*, No. 19-23324, 2020 U.S. Dist. Lexis 3008 (S.D. Fla. Jan. 6, 2020) (Altonaga).

Opinion

Rodrick Long, a passenger on NCL's NORWEGIAN SKY, was injured in an offshore jet-skiing excursion when another passenger on the excursion crashed into his jet ski. Long brought suit against NCL, which moved to dismiss the complaint for failing to allege that NCL knew or should have known about any dangerous conditions that caused Long's injury and because Long failed to allege that those dangerous and risk-creating conditions proximately caused his injury. Judge Altonaga noted that Long had alleged a number of dangerous conditions, including the use of poorly trained tour guides and employees, inadequate supervision of participants in the excursion, and failure to ensure the sobriety of the excursion participants. Further, Judge Altonaga noted that Long had alleged that NCL had notice of these conditions through its exercise of control of the excursion and its location. She considered these allegations to be a sufficient pleading of dangerous conditions and notice of them. However, there was no allegation why the jet ski crashed into Long's jet ski. Therefore, Judge Altonaga could not state whether any of the alleged failures of the cruise line proximately caused the accident. Without evidence as to what caused the collision, Judge Altonaga dismissed the complaint without prejudice for a repleading of proximate causation.

Maritime economic loss rule does not apply to defective product that caused damage to the rest of the vessel; *ACE American Insurance Co. v. Florida Bow Thrusters, Inc.*, No. 6:17-cv-1056, 2020 U.S. Dist. Lexis 1346 (M.D. Fla. Jan. 6, 2020) (Presnell).

Opinion

Eric Slifka purchased the vessel E=MC2, which included a bow thruster that had been manufactured by Vetus Maxwell, Inc. and installed by Florida Bow Thrusters. A fire destroyed much of the vessel, and the vessel's insurer, ACE American Insurance, brought a subrogation action against the seller (Oyster Harbors), which brought the manufacturer of the vessel (Regulator Marine) into the suit. After the expert retained by ACE American determined that the likely cause of the fire was the bow thruster, Florida Bow Thrusters and Vetus Maxwell were added to the suit by Regulator Marine. Because of a forum-selection clause in the contract between Regulator Marine and Florida Bow Thrusters, Florida Bow Thrusters was dismissed from the suit. After the original case settled without participation of Florida Bow Thrusters, Regulator Marine and ACE American brought this action in Florida federal court against Florida Bow Thrusters. Florida Bow Thrusters argued that the maritime economic loss rule barred the claim, preventing a tort action where liability arises from a contract. That argument was based on the decision of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, in which the Court held that a manufacturer in a commercial relationship has no duty under a negligence or products-liability theory to prevent a product from injuring itself. However, that argument was unavailing in this case as ACE American's claim was not for the damage to the bow thruster but to the remainder of the vessel. Therefore, the economic loss rule did not apply. Additionally, Florida Bow Thrusters argued that ACE American (as subrogee of the settling party, Regulator Marine) had no right of contribution from a non-settling tortfeasor who was not released from liability because the non-settling defendant remains liable for its proportionate share of damages. As ACE American responded with a Settlement Agreement that contained language that the claims against Florida Bow Thrusters had been released, Judge Presnell declined to dismiss the case.

Allegation that defendant and garnishee are working together on a project was insufficient to permit issuance of a Rule B writ of garnishment; *Tango Marine S.A. v. Elephant Group, Ltd.*, No. 4:19-cv-119, 2020 U.S. Dist. Lexis 1911 (E.D. Va. Jan. 6, 2020) (Morgan).

Opinion

Tango Marine, owner of the M/V TEAM TANGO, contracted with Elephant Group to carry urea to Nigeria where the vessel was detained, allegedly because Elephant Group failed to have the proper paperwork. Tango Marine sought damages from Elephant Group and sought a writ of garnishment from Shine Bridge Global for property that the garnishee held in the district that belonged to Elephant Group. Tango Marine argued that Elephant Group and Shine Bridge Global were working together on a "high quality cassava flour project" that involved over $9 million in investment. Therefore, Tango Marine asserted that it had a good faith belief that there were accounts in the possession

of Shine Bridge Global that Tango Marine could garnish. Judge Morgan declined to issue the writ on the basis that the allegations were insufficient that Shine Bridge Global was in possession of property in which Elephant Group had an interest. The fact that they were working together as partners on the project did not establish that the garnishee owed money to the defendant or that the garnishee held accounts in which the defendant had an interest.

Court denied summary judgment to seaman on his maintenance and cure claim as it was patently inappropriate to grant summary judgment with many fact controversies raised by the seaman's employer; *Mullen v. Daigle Towing Service, L.L.C.*, No. 19-11954, 2020 U.S. Dist. Lexis 2799 (E.D. La. Jan. 8, 2020) (Feldman).

Opinion

Daigle Towing Service employed Mark Mullen as a deckhand on the MISS LAURIE. Mullen claims that sometime in the beginning of December 2018 he fell on the wet deck of a barge in tow of the MISS LAURIE at Tiger Fleet in Baton Rouge, Louisiana. He did not report the incident or seek medical attention for weeks, and there was no onset of back pain until his shift was over and he was off the boat staying in a hotel. He continued to work his hitches thereafter (14 days on/7 days off) until he sought medical attention for his back pain in February 2019. After X-rays and lab work on February 25, 2019, he was diagnosed with non-Hodgkin's lymphoma. He stopped working and obtained treatment for the non-Hodgkin's lymphoma that is now in remission. However, Mullen continues to complain of back pain. Mullen's first notice to Daigle Towing of a work-related injury was the letter from his attorney dated May 15, 2019 (more than 5 months after the alleged fall), demanding payment of maintenance and cure. Mullen filed this suit and then filed a motion for summary judgment to compel payment of maintenance and cure, and Daigle Towing responded by arguing that Mullen had failed to carry his burden to show that he suffered an injury in service of the vessel. Daigle Towing noted that it was five months before Mullen reported an injury; he never reported the injury to any member of the crew while he continued to work on the vessel; the logs contradicted details of the narrative of his injury; medical records indicated that he did not complain to any medical provider about back pain related to the early December incident until March 21, 2019; and Mullen declined to attend an independent medical examination. After reviewing the disputed evidence, Judge Feldman declared that it was "patently inappropriate" to compel payment of maintenance and cure at this time. He also noted that Daigle Towing had the right to investigate the incident before paying maintenance and cure and that there was no suggestion that its investigation was unreasonably lax. He therefore ordered that Mullen's motion be denied as premature.

Magistrate Judge recommended remand of injury case removed based on admiralty jurisdiction and dismissal of the limitation of liability petition as inadequately pled; *Estate of Umar v. Bensch*, Nos. 18-cv-01414, 19-cv-00035, 19-cv-00559, 2020 U.S. Dist. Lexis 4699 (W.D.N.Y. Jan. 9, 2020) (McCarthy).

Opinion

This report and recommendation arises from a boating accident on the Niagara River that resulted in the death of Ahmed Abdulla Umar when he was struck by a boat owned and operated by Christopher Bensch after falling off a jet ski that he rented from Waikiki Watercraft. The executrix of Umar's estate brought suit against Bensch and Waikiki, and Umar removed the action to federal court based on the federal court's original admiralty jurisdiction. Both Bensch and Waikiki then filed limitation actions, staying the injury action. Citing the Supreme Court's authority that admiralty cases do not fall within the scope of the federal question jurisdiction of the federal courts, Magistrate Judge McCarthy recommended that the removal based on original admiralty jurisdiction was clearly improper and should be remanded to state court (even though the case was not removed based on federal question jurisdiction). He also recommended an award of attorney's fees even though other courts, such as the Fifth Circuit, have held that there is "an objectively reasonable basis for removal" in this circumstance. E.g., *Riverside Construction Co. v. Entergy Mississippi, Inc.,* 626 Fed. Appx 443, 447 (5th Cir. 2015). Magistrate Judge McCarthy then recommended that both of the limitation actions should be dismissed for failure to plead sufficient facts to support limitation of liability and further recommended that leave be denied to amend them. Vessel owner Bensch has already filed his objection to Magistrate Judge McCarthy's recommendations.

Court declined to bifurcate subject matter jurisdiction from the merits in Jones Act case brought under the court's admiralty jurisdiction; *Horning v. Resolve Marine Group, Inc.*, No. 19-60899, 2020 U.S. Dist. Lexis 4233 (S.D. Fla. Jan. 10, 2020) (Scola).

Opinion

Danny Horning brought this suit alleging an injury he suffered as a crewmember of Resolve Marine's vessels. He sought to recover under the Jones Act and general maritime law (unseaworthiness and maintenance and cure). Resolve Marine contested that Horning was a seaman and contended that his exclusive remedy was under the LHWCA. Horning and Resolve Marine then filed a joint motion seeking a bifurcation of Resolve Marine's challenge to subject matter jurisdiction under the Jones Act so that the question of subject matter jurisdiction under the Jones Act would be tried first (to a jury) followed by trial on the merits (to a jury) of the seamen's claims in the event jurisdiction under the Jones Act was upheld. Judge Scola denied the motion. He first noted that the case was proceeding under the court's admiralty jurisdiction, so a jury trial was not available on the jurisdiction issue or on the merits. Additionally, he stated that challenges to the court's subject matter jurisdiction often arise in federal cases and they are rarely bifurcated. He found no reason to exercise his discretion to bifurcate in this case.

Passenger's complaint for slip and fall was dismissed without prejudice as another shotgun pleading from the passenger's counsel; *Johnson v. Carnival Corp.*, No. 19-cv-23167, 2020 U.S. Dist. Lexis 4235 (S.D. Fla. Jan. 10, 2020) (Bloom).

Opinion

Sherry Johnson, a passenger on Carnival's M/S FREEDOM, slipped while going down a staircase between decks when her shoe became caught on the metal nosing on a step. Her amended complaint asserted multiple claims for relief in one section. The claims were all

premised on negligence, but they were based on at least three different theories of liability, failure to maintain, failure to warn, and failure to establish adequate policies and procedures. Judge Bloom noted that the passenger's counsel had been advised multiple times in several cases about shotgun pleadings, and at least seven of counsel's complaints had been sticken or dismissed on that basis. Once again, Judge Bloom explained to counsel that the theories asserted in the amended complaint should be asserted separately with supporting factual allegations for each theory. Consequently, the amended complaint was dismissed without prejudice, and leave was given to file a second amended complaint that complies with federal pleading standards.

Court declined to apply *Lauritzen* factors to collision between ships with different flags in foreign waters and applied Singapore law to the collision between the U.S.S. JOHN S. MCCAIN and the Liberian vessel ALNIC; *In re Energetic Tank, Inc.*, No. 1:18-cv-1359, 2020 U.S. Dist. Lexis 6456 (S.D.N.Y. Jan. 10, 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 2020 Update). Both ships were bound for destinations in Singapore, and they collided approximately 24 nautical miles from the Singapore mainland. The claimants sought to apply the test set forth by the Supreme Court in Jones Act cases in *Lauritzen v. Larsen*, 345 U.S. 1 (1953) (as expanded by the Court in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970)). However, Judge Crotty held that the *Lauritzen/Rhoditis* test was unsuited to deciding a choice-of-law question involving a collision halfway around the globe involving a U.S. Navy warship based in Japan and a Liberian-flagged vessel. Although there was a dispute between Malaysia and Singapore over sovereignty of the area in question, Judge Crotty applied Singapore law to the collision based on the facts that the vessel were both en route to Singapore and were in the Singapore Traffic Separation Scheme.

Seaman allowed to pursue in rem maintenance and cure claim against vessel of bankrupt defendant, but not in personam claim; *Barnes v. Henry*, Nos. 19-cv-00210, 00211, 00214, 00216, 2020 U.S. Dist. Lexis 6529, 6531 (D. Haw. Jan. 13, 2020) (Watson).

Opinion 6529

Opinion 6531

The long procedural saga of Chad Barry Barnes' maintenance and cure claims returns to the Update (June, July, September, and November 2019 Updates, January 2020 Update). The bankruptcy court held that Barnes' claims were unsecured and discharged by the bankruptcy of the defendant. However, Judge Watson found a narrow exception for Barnes. If he is successful in piercing the corporate veil of the bankrupt corporation so as to pursue his claims against the bankrupt owner of the corporation, then his maintenance and cure claim would be a secured claim (because of its maritime lien) and would not be the subject of the discharge of unsecured claims against the owner. To the extent the value

of the vessel is insufficient to satisfy the maintenance and cure claims, Barnes was barred from pursuing in personam claims against the owner. Barnes' latest appellate action, seeking a writ of mandamus from the Ninth Circuit to order the district judge and U.S. Marshal to arrest the vessel, was denied by the Ninth Circuit. *In re Barnes*, No. 18-72203 (9th Cir. Jan. 23, 2020).

Court will retain jurisdiction and proceed to trial on damages despite claimant's filing interlocutory appeal of decision declining to lift the stay in a limitation action so that the claimant could proceed in state court; *In re Fire Island Ferries, Inc.*, No. 11-cv-3475, 2020 U.S. Dist. Lexis 7863 (E.D.N.Y Jan. 16, 2020) (Hurley).

Opinion

This case returns to the Update after Judge Hurley ruled that the right to lift the limitation stay was waived by the claimant's previous elections to proceed in federal court (January 2020 Update). The claimant, Kevin Diaz, filed a notice of appeal of Judge Hurley's decision. The question presented was whether the district court was divested of jurisdiction by the filing of the notice of appeal. Concluding that the decision that the stay would not be lifted was not a decree that "determined the rights and liabilities of the parties" as set forth for interlocutory appeals in admiralty cases by 28 U.S.C. § 1292(a)(3), Judge Hurley held that the district court continued to have jurisdiction over the case despite Diaz's appeal.

Federal court in Florida applied Florida law to insurance dispute despite policy choice of New York law (in absence of admiralty rule) but dismissed the insured's claim for breach of fiduciary duty under Florida law; *Great Lakes Insurance SE v. Boat Rental Miami, Inc.*, No. 19-20623, 2020 U.S. Dist. Lexis 8300 (S.D. Fla. Jan. 17, 2020) (Altonaga).

Opinion

This case involves an insurance dispute arising after Claudia Baerlin-Gallegos was injured on a boat rented to a friend by Miami Boat Rental (MBR), although the boat was owned by Boat Rental Miami (BRM). MBR and BRM are both owned by Edgardo Velez. Each company obtained an insurance policy from Great Lakes Insurance (a German company) providing for hull and liability insurance, but neither company was named on the other's policy. Velez, who is not sophisticated in insurance, incorrectly listed MBR as the owner of Velez's vessels, but BRM was the actual owner of the vessels listed on the MBR policy. Baerlin-Gallegos brought suit against BRM in state court (for the liability of the vessel insured on the MBR policy), and Great Lakes defended the suit without a reservation of rights for more than a year. Eventually, Great Lakes brought this declaratory judgment action against BRM and MBR, asserting that BRM was not insured under the MBR policy that covered the vessel, and BRM and BRM filed a counterclaim including claims for breach of fiduciary duty, equitable estoppel, and reformation, based on Florida law. The policy contained a choice-of-law clause that disputes arising under the policy would be adjudicated under well-established principles of substantive United States admiralty law, and when there were no such well-established principles, that the agreement was subject to New York law. Noting that the clause was limited to the insuring agreement and did

not say that all disputes between the parties would be subject to New York law, Judge Altonaga declined to apply New York law to claims such as breach of fiduciary duty. However, Judge Altonaga found that the parties were dealing with each other at arm's length, and there were no factual allegations establishing that a fiduciary relationship developed between the parties under Florida law. Therefore, she dismissed the claim for breach of fiduciary duty without prejudice.

Service of process on the captain of a different vessel than the one on which the plaintiff-seaman contracted malaria was insufficient; *Ganpat v. Eastern Pacific Shipping, PTE. Ltd.*, No. 18-13556, 2020 U.S. Dist. Lexis 8411 (E.D. La. Jan. 17, 2020) (Morgan).

Opinion

Kholkar Vishveshwar Ganpat claimed that he contracted malaria while serving as a crewmember of the M/V STARGATE and brought this suit against Eastern Pacific under the Jones Act and general maritime law. Ganpat served Captain Owen Bona on the M/V BANDA SEA while the ship lay at anchor in the Mississippi River just below New Orleans, asserting that Captain Bona was a managing agent of Eastern Pacific. Eastern Pacific objected to the service, arguing that Captain Bona was an employee of Ventnor Navigation, not Eastern Pacific. Ganpat responded that Eastern Pacific was the manager of the STARGATE and that Captain Bona was a borrowed servant or managing agent of Eastern Pacific. As there was no evidence that Captain Bona was employed by Eastern Pacific, the question presented was whether he could be considered a managing agent of Eastern Pacific. However, the evidence established that Captain Bona was not involved in any aspect of Eastern Pacific's business that related to the vessel on which the cause of action arose. Judge Morgan declined to conclude that service could be made on a foreign corporation that was not transacting business in Louisiana through a non-employee captain of a vessel on which the accident did not occur who had no control over any operations of the defendant in the forum state. Judge Morgan did give Ganpat an extension until March 17, 2020, to properly serve Eastern Pacific.

No tort or statutory remedies were available for a seaman confined to his cabin and the brig during his psychotic episode on the ship; *Timberlake v. Carnival Corp.*, No. 18-24250, 2020 U.S. Dist. Lexis 9998 (S.D. Fla. Jan. 20, 2020) (Cooke).

Opinion

Aaron Timberlake was employed as a disc jockey for Carnival for three years. His employment with Carnival was generally uneventful until two weeks before embarking on the CARNIVAL FREEDOM for two seven-night cruises when he admitted himself to a behavioral health facility complaining of insomnia, mood disorder, and paranoid delusions. After boarding the vessel without disclosing his stay at the behavioral health facility, he failed to appear for his scheduled shift and was found acting strangely. When his strange behavior persisted, he insisted that he was entitled to a day off and threatened a lawsuit, while denying any past psychological history. He was relieved of duty and safeguarded in his cabin, but his behavior worsened, including flooding his cabin by blocking a drain with a towel while running water from the faucet. Security personnel

confiscated a bottle containing Citalopram, an anti-depressant (that was not prescribed to Timberlake), and he admitted to ingesting the drug. As his aggression increased, Timberlake shouted that there was smoke on the ship and he ripped a metal handrail off the wall as he attempted to run out of his cabin. He was restrained, handcuffed, sedated, and placed in the ship's brig where he banged his head and face against the wall and floor. When the ship docked, Timberlake was taken to a hospital for a full psychiatric evaluation and was diagnosed with a mood disorder and psychosis. His employment was terminated, and he brought this action under the Americans with Disabilities Act and the Florida Civil Rights Act, along with tort claims for false imprisonment, assault, battery, and negligent infliction of emotional distress. After dismissing the statutory claims, Judge Cooke addressed Timberlake's tort claims. She held that his false imprisonment claim failed because Carnival was justified in confining him to protect himself and others from the dangers incident to his condition. The assault claims failed because Timberlake was not in apprehension of immediate harmful conduct. The battery charge failed because Timberlake agreed in Carnival's Seafarer Manual to contact by Carnival, including medical and mental health testing and analysis. Finally, Judge Cooke held that Timberlake's claim for negligent infliction of emotional distress failed because, under Florida law, his mental distress was not manifested by physical injury.

Employer's federal declaratory judgment action on maintenance and cure was stayed pending resolution of the seaman's state court action; *Starlight Marine Services Inc. v. Thompson***,** No. 19-cv-1822, 2020 U.S., Dist. Lexis 10042 (W.D. Wash. Jan. 21, 2020) (Martinez).

Opinion

After Christopher Shane Thompson sustained a back injury while employed on Starlight Marine's vessel, Starlight Marine paid maintenance and cure until Thompson advised that maintenance and cure should stop due to his impending employment with a third party (Thompson represented to that employer and a subsequent employer that he had not previously been injured and that he was physically able to work). When the parties disagreed on whether Starlight Marine had satisfied its obligations, Starlight Marine brought this action in federal court asserting fraud, breach of contract, unjust enrichment and injurious falsehood claims along with a claim for a declaratory judgment on its maintenance and cure obligations. Thompson brought a suit in state court asserting maintenance and cure claims and asked the federal court to dismiss or stay the federal action. In order to balance Starlight Marine's argument that it was being deprived of its chosen forum, Chief Judge Martinez ruled that the federal suit would be stayed, pending resolution of the state suit. Once the state suit is resolved, Chief Judge Martinez will determine if there are claims remaining to be resolved in the federal action.

Court rejected claim of deckhand that he was a land-based worker entitled to recover state workers' compensation and held that he was a seaman; *Upper River Services, L.L.C. v. Heiderscheid*, No. 19-cv-242, 2020 U.S. Dist. Lexis 9757 (D. Minn. Jan. 21, 2020) (Nelson).

Opinion

Andrew Heiderscheid worked as a deckhand for Upper River Services, an inland harbor towing service that operates two shipyards and a fleet of vessels that move barges on the Mississippi River. As such, he worked on at least four of Upper River Services' vessels, towing barges between docks and line boats. However, every year, the winter conditions on the Mississippi River caused Upper River Services to cease operations in December, and its deckhands were laid off. When Upper River Services closed for the season in December 2018, Heiderscheid requested that he be permitted to work during the off-season, and he began working shoreside with the understanding that he would return to his work as a deckhand when the off-season was over. He was injured ten days later and brought a claim for Minnesota workers' compensation benefits. Upper River Services then brought this action asserting that Heiderscheid was a seaman, and both parties moved for summary judgment on Heiderscheid's status. Judge Nelson first reviewed the work Heiderscheid performed during the normal operating season and found that he was a seaman during that time. Judge Nelson then addressed whether Heiderscheid retained his status as a seaman after his assignment to shoreside duties during the off-season. As his work in that capacity was temporary, as he would have returned to work as a deckhand when the dams and locks on the River reopened, as the vessels remained in the water during his shoreside work and Heiderscheid was subject to the vessels' call should the need arise, and as 59% of his hours while employed by Upper River Services were onboard vessels, Judge Nelson held that Heiderscheid remained a seaman at the time of his injury.

Contract for shipment of tiles from China to Long Beach to New York was maritime, and the suit for damage was barred by the incorporation of COGSA's one-year statute of limitation in the applicable Sea Waybill; *Herod's Stone Design v. Mediterranean Shipping Co.*, No. 18-cv-5720, 2020 U.S. Dist. Lexis 11591 (S.D.N.Y. Jan. 22, 2020) (Torres).

Opinion

Herod's Stone Design contracted for the shipment of marble tiles from China to New York with Mediterranean Shipping Company (MSC). MSC handled the ocean carriage to Long Beach and contracted with BNSF Railway for the carriage from Long Beach to New York. The tiles were undamaged when they were discharged in Long Beach, but they were damaged upon arrival in New York on June 29, 2016, and July 6, 2016. The carriage was undertaken pursuant to a Sea Waybill that incorporated the terms of the Carriage of Goods by Sea Act and that also contained a provision that all suits for damage to the cargo must be brought against MSC and not any subcontractor. Herod's contacted MSC to present a claim and there was extensive discussion about the claim, including alleged assurances that the claim was being approved and processed. After more than a year of waiting, Herod's brought this suit against MSC in New Jersey state court, and MSC removed the action to federal court based on federal question and admiralty jurisdiction. The case was transferred to the Southern District of New York, and Herod's brought an amended complaint, naming both MSC and BNSF, including claims for violation of New Jersey law. BNSF moved to dismiss the case for lack of personal jurisdiction, but Judge Torres denied the motion on the ground that BNSF was subject to personal jurisdiction for undertaking to deliver the tiles to New York. Judge Torres then addressed the motions for summary judgment of both BNSF and MSC and held that, pursuant to the Supreme Court's decision in *Norfolk Southern Railway v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004), the contract of carriage was maritime and maritime law applied to the land-based

damage. This was fatal to the argument that state law applied to the land-based damage despite the incorporation of COGSA (rejecting the pre-*Kirby* decision in *Colgate Palmolive Co. v. S/S DART CANADA*, 724 F.2d 313 (2d Cir.1983)). Applying the terms of the Sea Waybill, Judge Torres held that Herod's could not bring a claim against BNSF and that the claim against MSC was barred by COGSA's one-year statute of limitation. Finally, Judge Torres addressed the argument that MSC was equitably estopped from asserting the statute of limitation because it had engaged in trickery by running Herod's in circles until the statute of limitations had expired and then denying its claim. Concluding that Herod's had failed to show that its failure to file suit within a year of delivery was the result of inequitable conduct, Judge Torres rejected the argument.

Cruise line was not on notice that boneless food contained a hidden bone; *Cisneros v. Carnival Corp.*, No. 1:19-cv-24155, 2020 U.S. Dist. Lexis 11120 (S.D. Fla. Jan. 23, 2020) (King).

Opinion

Ralph Cisneros was injured on Carnival's cruise ship FANTASY when food represented to be boneless contained a hidden bone that became lodged in Cisneros's throat. The cruise line moved to dismiss the suit for lack of notice of the dangerous condition of the food, and Cisneros argued that notice was not required because the cruise line had created the unsafe condition and, alternatively, that he had satisfied any notice requirement because the cruise line should have known of the dangerous condition through its maintenance and inspections of the kitchen area. Judge King rejected both of Cisneros's arguments. As in Chief Judge Moore's *Yusko* decision above, Judge King noted that the Eleventh Circuit had rejected the argument that notice is not required when the ship created the hazardous condition. Turning to the allegations of notice, Judge King responded that Cisneros had not pleaded sufficient facts demonstrating that the cruise line had knowledge of the dangerous condition of the food, only conclusory statements. Consequently, Judge King dismissed the case without prejudice.

Unseaworthiness claim of deckhand of tug who was injured on a dock by a cable between the dock and barges survived a motion to dismiss; *Beam v. Watco Transloading, LLC*, No. 18-cv-2018, 2020 U.S. Dist. Lexis 11816 (S.D. Ill. Jan. 24, 2020) (Yandle).

Opinion

Kevin Beam was employed by Watco as a deckhand assigned to the tow boat IDLE L, which operated on the Mississippi River. The tug had pushed a row of barges against Watco's floating dock for the loading of coal. The barges were connected with a centerline, and a mule was attached to one end of the barges with a steel cable running through a pulley system that connected the mule to the floating dock. Beam was standing on the floating dock when the cable connecting the dock to the mule snapped and struck Beam in the back. Beam brought suit against Watco under the Jones Act and general maritime law (unseaworthiness and maintenance and cure) and sought punitive damages. Contending that the cable was not an appurtenance of the tug to which Beam was assigned, Watco moved to dismiss the unseaworthiness claim. Considering the issue whether the cable and pulley system are an appurtenance of the vessel (Judge Yandle did

not specify what vessel, but seaman are not owed a warranty of seaworthiness to vessels to which they do not attain seaman status) to be an open question that could not be decided on a motion to dismiss, Judge Yandle decline to dismiss the unseaworthiness allegation. Judge Yandle did agree that punitive damages were only available on the maintenance and cure claim and not with respect to the unseaworthiness claim.

No jury on Jones Act counterclaim to employer's complaint for a declaratory judgment on maintenance and cure; *D&S Marine Service, L.L.C. v. Encarnacion*, No. 19-1702, 2020 U.S. Dist. Lexis 12298 (E.D. La. Jan. 24, 2020) (Guidry).

Opinion

D&S Marine brought this action seeking a declaratory judgment that it owed no obligation to pay maintenance and cure to Josiah Encarnacion. Encarnacion filed a counterclaim and an amended counterclaim asserting claims under the Jones Act and general maritime law. Encarnacion based jurisdiction for the counterclaims on the Jones Act and general maritime law but requested a jury trial. D&S Marine moved to strike the request for a jury trial on the ground that the plaintiff's invocation of admiralty jurisdiction precludes a jury trial for the case. Judge Guidry noted that the jurisdictional statements in the seaman's counterclaims constituted a Rule 9(h) election. Consequently, as both parties had opted to proceed in admiralty, the jury demand was stricken.

Breach of named operator warranty voided coverage for damage to vessel whether under admiralty law or state law; *Openwater Safety IV, LLC v. Great Lakes Insurance SE*, No. 18-cv-1400, 2020 U.S. Dist. Lexis 13066 (D. Colo. Jan. 24, 2020) (Wang).

Opinion

Openwater Safety purchased a catamaran and applied for insurance coverage with Great Lakes. The application included the following: "**WARNING: THIS IS A NAMED OPERATOR ONLY POLICY.**" Openwater Safety listed two operators of the vessel, Evan-Pierre Bernard Genaud and Manuel Giovanni Cardenas Martinez. A temporary binder was issued with information that identified the insurer, the insured, the vessel, the period of coverage, and the named operators, and the binder referred to policy wordings and forms on the insurer's website. There was a dispute whether the insured actually received the policy, but there was no dispute that the policy form was available electronically and that it contained a warranty that the vessel would be operated only by the enumerated named operators. A few weeks after coverage was bound, the mast of the vessel came down causing extensive damage to the vessel. The vessel's log identified the watchman on duty as Jean Pierre Yupanqui, and Genaud later testified that Yupanqui was at the helm at the time of the damage, operating the wheel and throttle of the vessel. Great Lakes declined to pay the claim on the ground that Openwater Safety had violated the named operator warranty, and Openwater Safety brought this suit against Great Lakes. Great Lakes counterclaimed and sought a declaration that the policy was void. Both parties moved for summary judgment, and Magistrate Judge Wang began by concluding that, regardless of whether Openwater Safety received a copy of the policy, the binder and the insuring agreement comprised the policy. The insuring agreement contained a choice-of-law provision for the application of federal admiralty law when there are entrenched

principles of admiralty law and for the application of New York law when such principles are lacking. Noting that both admiralty law and New York law provide that a breach of warranty in a marine insurance policy constitutes a bar to coverage regardless of whether the loss was caused by the breach, Magistrate Judge Wang found there to be no conflict between application of maritime law or state law as both would strictly construe the warranty. As Genaud testified that Yupanqui (not named as an operator) was at the helm of the vessel at the time of the damage, and as the insuring agreement defined the term "operate" as to be in control or at the helm of the vessel, Magistrate Judge Wang held that Great Lakes was not responsible for the damage to Openwater Safety's vessel.

Conclusory allegations of notice were insufficient to avoid cruise line's motion to dismiss claims of injured passenger; *Baker v. NCL America, LLC*, No. 1:19-cv-24442, 2012 U.S. Dist. Lexis 13035 (S.D. Fla. Jan. 24, 2020) (King).

Opinion

Kathryn Baker, a passenger on the NORWEGIAN PRIDE OF AMERICA, slipped and fell on a large puddle of water on the vessel and brought this suit against the cruise line. The cruise line moved to dismiss on several grounds, but Judge King granted the motion for failing to adequately prove actual or constructive notice of the dangerous condition, considering the allegations conclusory. Examples of conclusory allegations in the complaint are that the cruise line cleans the floor regularly and knows from that cleaning that the floor becomes wet frequently and that the cruise line knows from prior slip-and-fall incidents that the deck on which Baker fell becomes dangerously slick when wet and causes people to fall.

Injury while boarding vessel is maritime; *In re Fish Stix Charter Fishing, LLC*, No. 18-864, 2020 U.S. Dist. Lexis 13340 (D.N.J. Jan. 27, 2020) (Shipp).

Opinion

Mark Cure and three of his friends chartered the FISH STIX for a fishing trip, embarking from the Shark River. Cure was boarding the vessel from stairs bolted to the dock and had put his right foot on the cap rail of the vessel. He then lifted his left foot from the steps to transfer it to the cap rail when he fell into the water and was injured. Cure brought suit in state court in New Jersey, and the vessel owner brought this limitation action in federal court in New Jersey. Cure objected to maritime jurisdiction for the limitation action on the ground that negligence in failing to supply a handrail with steps attached to a dock cannot form the basis for a maritime tort. Judge Shipp disagreed. Looking first at the locality prong of the test for admiralty jurisdiction, Judge Shipp noted that Cure was injured after departing the stairs. He had thus left land behind and had entered navigable water when he suffered the injury—"either by becoming injured while part of him was only onboard the FISH STIX, or by falling from the FISH STIX into navigable water." Judge Shipp then concluded that boarding a vessel is a traditional maritime activity and that allegedly unsafe boarding conditions had the potential to disrupt maritime commerce. Therefore, Cure's motion to dismiss the limitation action for lack of subject matter jurisdiction was denied.

Suit by pollution liability insurer against the National Pollution Funds Center must be brought in the district where the pollution occurred or in the District of Columbia; *Water Quality Insurance Syndicate v. National Pollution Funds Center*, No. 19-cv-6344, 2020 U.S. Dist. Lexis 13333 (S.D.N.Y. Jan. 27, 2020) (Engelmayer).

Opinion

This is another case arising from the grounding of two oil-carrying barges owned by Genesis Marine in the Mississippi River in 2014. Prior litigation in the Southern District of New York between Water Quality Insurance Syndicate (WQIS) and Starr Indemnity over substantial salvage costs established that WQIS was not responsible for the costs. Therefore, when the United States sought to impose liability on Genesis Marine, insured on WQIS's pollution policy, for response costs under the Oil Pollution Act of 1990, WQIS brought this action in the Southern District of New York seeking a declaration that Genesis Marine was not liable for the response costs. The prior action was between two insurance companies with principal places of business in New York. The venue provision of OPA, however, is for the district in which the discharge, injury, or damages occurred or, for the National Pollution Funds Center, the District of Columbia. As this action was brought by WQIS against the National Pollution Funds Center, Judge Engelmayer dismissed the suit for lack of proper venue.

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

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Quote:

. . . Batterton points to the maritime doctrine that encourages special solicitude for the welfare of seamen. But that doctrine has its roots in the paternalistic approach taken toward mariners by 19th century courts. . . . The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law.

Justice Alito, *Dutra Group v. Batterton*, 139 S. Ct. 2278, 2287 (2019).

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