January 2020 Longshore Update (No. 248)

Notes from your Updater:

On December 16, 2019, the Fifth Circuit denied Centaur's petition for rehearing en banc in *Barrios v. Centaur, L.L.C*, 942 F.3d 670 (5th Cir. Nov. 19, 2019) (Smith) (December 2019 Update). The panel held that a contract to build a concrete rail on a dock in the Mississippi River that required the use of vessels for the construction was a maritime contract. Therefore, admiralty law applied to the contract in connection with the injury to a marine construction worker.

On the LHWCA Front . . .

From the federal appellate courts:

Ninth Circuit rejected *Lucia* argument and affirmed ruling that claimant's neck injury did not permanently aggravate the pre-existing degenerative condition of his neck; *Bussanich v. Ports America*, No. 18-71189, 2019 U.S. App. Lexis 36541 (9th Cir. Dec. 10, 2019) (per curiam).

Opinion

Steve Bussanich suffered from degenerative joint disease in his neck since 2004. On December 1, 2013, he was hit by a turnbuckle swinging from a crane; he was transported to the hospital where he was diagnosed with a head and neck injury. He has not returned to work since his injury. The claim was tried to Administrative Law Judge Gee, who found that Bussanich had sustained a temporary cervical strain that did not aggravate his pre-existing degenerative disc disease, that his strain had resolved by October 17, 2014, and that the employer had established the availability of suitable alternate employment as of March 21, 2014. Bussanich appealed and asserted that the ALJ had erred in finding that the work injury did not permanently aggravate his pre-existing condition and result in permanent disability. The Benefits Review Board and the Ninth Circuit affirmed Judge Gee's decision. Before turning to the factual dispute, the Ninth Circuit rejected the claimant's *Lucia* argument (from *Lucia v. SEC*, 138 S. Ct. 2044 (2018)) that Judge Gee

was not properly appointed under the Appointments Clause of the Constitution as the issue was not raised to the BRB. The court then addressed the several arguments raised by the claimant that Judge Gee's decision was not supported by substantial evidence. It was not error for Judge Gee to give less weight to the opinion of the claimant's primary care physician as he was not a specialist in neck injuries. Judge Gee's evaluation of the opinions of other doctors was not erroneous when one testified that it was possible that the claimant's condition was the result of a natural progression of his neck and did not testify whether the aggravation was temporary or permanent and another testified that the injury did not permanently aggravate the underlying condition but acknowledged uncertainty. As the medical evidence was "equivocal," Judge Gee's finding that the claimant did not meet his burden of proof was affirmed. Finally, the Ninth Circuit affirmed Judge Gee's giving of less weight to the timeline of the claimant's symptoms and treatment. She noted that he had small improvements, but continued to experience the same symptoms before his accident.

Time to file a motion for reconsideration of an ALJ's decision on attorney's fees is 10 days, not 13 days; *Lucia* challenge to the appointment of the ALJ was forfeited by raising it for the first time on reconsideration in the BRB; *Zumwalt v. National Steel & Shipbuilding Co.*, No. 18-72257 (9th Cir. Dec. 20, 2019) (per curiam).

Opinion

This is an appeal of attorney Jeffrey Winter of the award of attorney's fees issued by the ALJ (Judge Berlin) under the LHWCA. Winter moved for reconsideration of Judge Berlin's decision on the thirteenth day, and Judge Berlin denied the motion as untimely under 20 C.F.R. §802.206(b)(1), which provides a ten-day deadline to file a motion for reconsideration. Winter argued that the mailbox rule should apply, adding three days to the time period for service through the mail. The Benefits Review Board affirmed Judge Berlin both by panel and en banc opinions, and Winter then moved for reconsideration before the BRB, now asserting a *Lucia* argument that Judge Berlin was not duly appointed pursuant to the Appointments Clause of the Constitution. The BRB denied the reconsideration motion, and the Ninth Circuit agreed, holding that Winter had forfeited the claim under the Appointments Clause by raising it to the Board for the first time in a motion for reconsideration. The Ninth Circuit also agreed that the time to file the motion for reconsideration with Judge Berlin was ten days, not thirteen days.

From the federal district courts:

Death claim of shipyard worker for asbestos exposure against one product defendant was dismissed for failure to show exposure to the defendant's products, and the claim against another defendant was dismissed as untimely because it was filed more than three years from the diagnosis but less than three years from the worker's death; *Deem v. Air & Liquid Systems Corp.*, No. C17-5965, 2019 U.S. Dist. Lexis 203608 (W.D. Wash. Nov. 22, 2019), 2019 U.S. Dist. Lexis 210779 (W.D. Wash. Dec. 6, 2019) (Settle).

Opinion Clever-Brooks

Opinion Statute of Limitations

The first opinion addresses the claims arising from the death of Thomas Deem, who served as a machinist at the Puget Sound Naval Shipyard, based on exposure to asbestos from the products of defendant Cleaver-Brooks Inc. Co-workers testified that the machinists were exposed to asbestos on a number of ships, and the plaintiffs engaged Captain Arnold Moore as an expert in maintenance practices and conditions on Navy ships as well as work practices in naval shipyards to confirm that the ships on which Deem worked contained equipment manufactured by Cleaver-Brooks and it was likely that those products contained asbestos. The plaintiffs' medical expert then testified that Deem's exposure to asbestos was the cause of his mesothelioma. Applying the general maritime law rule that the worker must have been exposed to asbestos-containing products of the defendant, and that such exposure was a substantial contributing factor in causing the worker's disease, Judge Settle granted the defendant's motion for summary judgment. The evidence did not establish that Clever-Brooks's products were present in Deem's workplace or that he was exposed to asbestos from any of the defendant's products. The second opinion addressed the motion to dismiss filed by Crosby Valve based on the maritime statute of limitations of three years. Deem was diagnosed with mesothelioma on February 20, 2015, and died from that illness on July 3, 2015. The complaint against Crosby was filed on June 28, 2018. As the complaint was filed more than three years from the diagnosis but less than three years from his death, the question was presented whether the diagnosis or death triggered the running of the statute of limitations. Unaware of any precedent that a new claim arose on his death that could not have been pursued before his death with the knowledge of his fatal prognosis, Judge Settle held that the running of the statute of limitations began at the time of knowledge of the injury and not at the time of his death. Therefore, the claims were barred by the maritime statute of limitations.

Marine expert Gregory C. Daley allowed to testify from his experience and based on the opinions of an expert meteorologist and on contested facts; Dr. Todd Cowen allowed to testify to future medical requirements in his life care plan that were not predicated on the opinions of the plaintiff's treating physicians; *Durr v. GOL, LLC*, No. 18-3742, 2019 U.S. Dist. Lexis 207080 (E.D. La. Dec. 2, 2019) (Ashe).

Opinion

The suit (*see* July 2019 Update) was brought by Terry Durr, an employee of Linear Controls who was injured in a personnel-basket transfer from a vessel to a platform on the outer Continental Shelf, offshore Louisiana. Durr alleged that the master lost control of the vessel due to rough seas, that the deckhand failed to hold the basket's tagline, and the platform crane operator failed to abort the lift. The vessel's owner and operator, REC, objected to Durr's maritime expert, Gregory C. Daley, testifying about the weather and sea conditions at the time on the ground that he lacked expertise in meteorology and oceanography. REC also objected to Daley's opinion about the movement of the vessel on the ground that it relied on disputed facts and constituted a legal conclusion. REC also objected to his testimony about use of a dynamic positioning system on the ground that it was not based on industry standards. Judge Ashe rejected REC's contentions and held that there was testimony in the record to support his expert opinion and that his opinion

was not about the weather conditions but how captains account for weather conditions in their operation of vessels, relying on the testimony of the expert meteorologist. Judge Ashe also allowed Daley to testify about use of a dynamic positioning system as it was based on his experience as captain and was relevant in light of the lack of industry standards and regulations regarding use of such equipment. REC objected to the opinion of Durr's life care planner, Dr. Todd Cowen, on the ground that there was no testimony from a treating physician to support certain charges in the plan. Judge Ashe noted the precedent that allows life care planners to testify about future healthcare needs predicated upon the testimony of treating physicians as to the reasonable need for such care; however, as Dr. Cowen is both a doctor and life care planner, Judge Ashe held that Dr. Cowen could bypass the usual requirement for support from the treating physician and opine directly about the plaintiff's future healthcare needs.

Employee of contractor of shipbuilder injured during sea trials was not a seaman, and his remedies were those of a longshoreman, not under the Jones Act or state law; *White v. Fincantieri Bay Shipbuilding*, No. 1:19-cv-946, 2019 U.S. Dist. Lexis 217259 (E.D. Wis. Dec. 18, 2019) (Griesbach).

Opinion

Rodney White was injured during sea trials of the M/V MILLVILLE on Lake Michigan while working as a technician for Engine Motor, a subcontractor of Fincantieri Bay Shipbuilding that was engaged to install the steering system on the vessel. White brought suit against the shipbuilder and the owner and operator of the vessel based on the LHWCA, Jones Act, general maritime law, and state law. The shipbuilder moved to dismiss the Jones Act and state law claims. Judge Griesbach began by noting that, although White asserted a Jones Act claim, he did not allege facts to support his status as a seaman. In the absence of such assertions, Judge Griesbach held that White was a longshoreman, not a seaman, as a matter of law. This conclusion obviated the necessity of determining whether the MILLVILLE (undergoing sea trials) was a vessel that owed him a warranty of seaworthiness as he was not a seaman entitled to that warranty. Judge Griesbach then turned to White's actions under Wisconsin law for negligence and punitive damages. Concluding that federal maritime law and not state law applied to White's claims, Judge Griesbach dismissed the claims under state law. However, Judge Griesbach did hold that punitive damages might be available to Griesbach under the general maritime law, so he did not dismiss the claim for punitive damages to the extent they are available under the general maritime law.

Although holding that there may only be one employer for a seaman's Jones Act claim, the court found sufficient evidence of a web of relationships between the defendant companies to deny summary judgment on employer and vessel owner status; *Saltzman v. Whisper Yacht, Ltd.*, No. 19-463, 2019 U.S. Dist. Lexis 218088 (D.R.I. Dec. 19, 2019) (Sullivan).

Opinion

Robert Saltzman was injured on the recreational sailing yacht, S/Y WHISPER, when his arms were sucked in by the furling of the head sail. The registered owner of the yacht is Whisper Ltd., but invoices for maintenance work on the vessel were paid by Whisper USA.

Both entities share an address in Minnesota with Charter Yacht Partners, which holds itself out as managing a fleet of charter yachts and crews. Saltzman brought this action against all of these parties for negligence under the Jones Act and general maritime law, unseaworthiness, maintenance and cure, and wages. Whisper USA and Charter Yacht Partners moved for summary judgment that they were not the owner of the yacht or the employer of Saltzman and that there can only be one Jones Act employer. Saltzman argued that all of these entities were responsible for crewing and operating the yacht and that there can be more than one Jones Act employer. Magistrate Judge Sullivan reviewed the conflicting authorities on this issue and agreed that only one employer can be held liable under the Jones Act. However, Saltzman proffered evidence of a web of relationships between the defendants to support an inference of ownership pro hac vice by either Whisper USA or Charter Yacht Partners. Therefore, Magistrate Judge Sullivan denied their motions for summary judgment.

Longshore worker injured on barge during cargo operations on the Mississippi River could not bring seaman's claims against the stevedoring company, but his claim against the barge owner under Section 905(b) survived summary judgment; *Johnson v. American Commercial Barge Line, LLC*, No. 18-7888, 2019 U.S. Dist. Lexis 218991 (E.D. La. Dec. 20, 2019) (Zainey).

Opinion

Alikea Johnson was injured while operating a forklift inside the hold of a hopper barge that was moored to an ocean-going bulk carrier in the Mississippi River during cargo operations. Johnson brought suit against his employer, Associated Terminals, and the owner of the vessel, American Commercial Barge Line ("ACBL"), under the Jones Act and general maritime law. Alternatively, he brought a Section 905(b) negligence action against both parties as the owner and owner pro hac vice of the barge. Judge Zainey initially dismissed Johnson's seaman's claims, concluding that he was a longshore worker subject to the LHWCA. He then addressed Johnson's argument that Associated was liable under Section 905(b) for negligence in the capacity as owner pro hac vice of the barge because only Associated's employees were on the barge once it was delivered alongside the bulk carrier for loading. Noting that the role of Associated's employees during stevedoring operations was limited to what was necessary to carry out cargo operations, Judge Zainey held that Associated lacked the control necessary to be a bareboat charterer and dismissed the negligence claim against Associated. With respect to the barge owner, ACBL, Johnson asserted claims of breach of the turnover duty and breach of the duty to intervene. The accident happened when the forklift Johnson was operating fell over onto Johnson's leg because of an indentation in the surface of the barge. As ACBL lacked personnel aboard the barge who could have intervened in the operations, Judge Zainey dismissed the claim that ACBL violated the duty to intervene. With respect to the turnover duty, ACBL argued that the condition was open and obvious and that Johnson was fully aware of the indentation. Consequently, there was no violation of the duty to warn aspect of the turnover duty. However, the duty is to turn the ship over in such a condition that an expert stevedore can carry out the stevedoring operations with reasonable safety. Thus, although the condition was open and obvious, there was a fact question whether the stevedoring company could carry out its operations with reasonable safety with the uneven surface.

From the state courts:

Shipyard engaged to construct naval vessel held to be the statutory employer of its subcontractor's employee under the Mississippi Workers' Compensation Act; *Hibbler v. Ingalls Shipbuilding Shipyard*, No. 2018-CA-01240-COA, 2019 Miss. App. Lexis 616 (Miss. App. Dec. 17, 2019) (Wilson).

Opinion

John Hibbler was injured while working for Avaya Government Solutions on a contract with Ingalls to install telecommunications infrastructure on a ship that Ingalls was building for the United States Navy. Hibbler installed cables under the floor in a section of the communications room during the day, and a painting crew followed at night to paint the cables and replace the decking when they were finished. On occasion, the decking was not replaced, which necessitated that Hibbler walk on the steel floor framing. Hibbler was injured when he stepped on an unsecured deck plate that gave way, causing him to fall into a hole that was about three feet deep. Ingalls required that Avaya carry both LHWCA and Mississippi Workers' Compensation insurance, and Avaya's insurer paid benefits first under the Mississippi act and then under the LHWCA. Hibbler brought suit in Mississippi state court against Ingalls, asserting it was negligent in failing to secure the flooring of the ship. Ingalls asserted that Hibbler's sole and exclusive remedy was under the applicable workers' compensation statutes. Ingalls then moved for summary judgment on the ground that Ingalls was Hibbler's statutory employer under the Mississippi act, and the Mississippi Court of Appeals agreed that Ingalls was immune from suit in accordance with the Mississippi statute. Judge Wilson distinguished cases involving attempts of site owners to invoke the statutory employer defense, reasoning that Ingalls was a contractor as contemplated by the Mississippi act and therefore entitled to immunity from the claims of employees of its subcontractors. Judge Wilson did not address any effect of the LHWCA.

And on the Maritime Front . . .

From the federal appellate courts:

Ninth Circuit denied jurisdiction for limitation of liability in connection with drowning of paddleboat renter; *In re Blue Water Boating, Inc.*, No. 18-55575 (9th Cir. Dec. 4, 2019) (per curiam).

Opinion

Davies Kabogoza, who could not swim, fell off a stand-up paddleboard and drowned in Santa Barbara Harbor. His beneficiaries brought suit against the owners of the paddleboard, and the owners brought this action seeking to limit their liability to the value of the board, $450. The district court dismissed the case for lack of subject matter jurisdiction, holding that the board was not a vessel and that the incident lacked a substantial relationship to traditional maritime activity, failing the second prong of the *Executive Jet* test for admiralty tort jurisdiction. The Ninth Circuit agreed that the tort failed the nexus test for admiralty jurisdiction. The court noted that traditional maritime activity is usually associated with vessels, but that the nexus test does not expressly

require the involvement of a vessel. Instead, the court must focus on the underlying activity at issue. In this case, the underlying activity was the rental of the paddleboard. Noting the language in *Executive Jet* that maritime activity generally relates to maritime liens, general average, capture, prizes, limitation of liability, cargo damage, and claims for salvage, as well as navigation, storage, and maintenance of traditional vessels [that left out a great many activities and objects that have been held to be maritime but, interestingly, not limitation of liability], the court held that the alleged negligence of the owners (failing to require renters to demonstrate their swimming skills and failing to train on the use of life jackets and vests for renters) lacked maritime flavor. As an alternative argument, the owners argued that the Limitation of Liability Act provides its own basis of admiralty jurisdiction [based on the Supreme Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911)]. However, as the Ninth Circuit does not follow the holding from *Richardson* [*see Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 772-73 (9th Cir. 1995)], the court rejected the owners' alternative argument and upheld the dismissal of the limitation action for lack of subject matter jurisdiction. [Thanks to Lisa Reeves with Reeves McEwing LLP in Philadelphia for sending us this case]. [In considering the validity of the Ninth Circuit's decision, compare its reasoning with the quote from Justice Powell at the end of this Update].

Second Circuit reviewed findings of successor judge based on clear error, not de novo; policy was not voided based on uberrimae fidei; insurer failed to prove the barge was unseaworthy; 4- to 6-foot waves were a peril of the sea; withheld contract payments for damage to the dock were covered under the P&I policy; *Atlantic Specialty Insurance Co. v. Coastal Environmental Group Inc.*, No. 18-3236, 2019 U.S. App. Lexis 36859 (2d Cir. Dec. 13, 2019) (Droney).

Opinion

After Coney Island's Steeplechase Pier was damaged by Hurricane Sandy, the City of New York contracted to have the damage repaired, and Coastal subcontracted to perform the repairs. Coastal then chartered a spud barge, the MIKE B, to serve as the base for a crane to work on the pier. Coastal had a hull and P&I policy with Atlantic, so it sought to add the MIKE B to the policy. Coastal's broker emailed the job site address, and Atlantic agreed to bind coverage for the barge. Three days later, Coastal's marine surveyor conducted an in-water survey of the barge for "Insurance Underwriting Purposes," and valued the vessel at $400,000, finding the condition of the vessel to be "fair for age and past services" and "in satisfactory condition for operation in inland waters." The surveyor asked if the barge would be working in protected waters at Coney Island, not on the ocean side, and Coastal responded that it would be in protected waters and not in the ocean. The survey and question (but not answer) were ultimately forwarded to Atlantic. After commencing work on the ocean side of the pier, the barge spudded in place and later encountered ocean waves that were higher than expected. Coastal had pre-arranged to have a tug available to tow it to safety, but the tug was late getting to the site and one of the spuds was bent, the barge struck the pier, the crane was removed, and the barge was allowed to sink to the sea floor because of the danger to the pier and the cost of unsuccessful pumping. Eventually the barge was removed and sold for scrap. Atlantic brought this action seeking a declaration that the policy was void and that it owed nothing under the hull or P&I provisions. The case was tried to Judge Wexler, but he died before issuing his decision. The case was transferred to Judge Azrack, who then entered findings

of fact and conclusions of law, awarding damages to Coastal against Atlantic. The first issue on appeal was whether the review of the findings of a successor judge, who decided the case on a written record and not on live testimony, is de novo or based on clear error. Rejecting Atlantic's argument that no special deference was due to Judge Azrack's findings as she had not presided over the trial, the Second Circuit proceeded to review the findings for clear error. Judge Droney found no clear error in Judge Azrack's findings. Atlantic argued that Coastal breached the duty of uberrimae fidei because it knew the barge would operate on the ocean side of Coney Island, but Judge Droney rejected the argument because the policy covered coastal and inland waters of the United States in and around Brooklyn. As the navigation limit did encompass the job site at the Pier, and the barge operated within that limit, there was no risk that Coastal should have disclosed to Atlantic to comply with uberrimae fidei. Judge Droney next addressed Atlantic's argument that the barge was unseaworthy. He first rejected Atlantic's argument that Coastal had the burden to prove the barge was seaworthy. Judge Droney noted that the standard for unseaworthiness is not perfection but reasonableness, and Judge Azrack had credited Coastal's experts over Atlantic's. Addtionally, Coastal had a plan to have a tug move the barge if the weather exceeded the capability of the barge. It was only the delay in the arrival of the tug that prevented that plan from working. Under the clear error standard, Judge Droney found no basis to reverse the seaworthiness finding of Judge Azrack. Judge Droney then turned to the question whether there was coverage for damage caused by a peril of the sea, noting that such perils must be "of an extraordinary nature or arise from irresistible force or overwhelming power." The question was whether the 4- to 6-foot waves were sufficient. Agreeing with the district court that it was the unexpected conditions of the sea and not the frailty of the barge that caused the loss, Judge Droney affirmed the finding that the loss was a covered peril. Finally, Atlantic cited its policy exclusion of contractual liability to argue that the repairs to the dock, the cost of which was withheld from payment to Coastal, could not be recovered under the policy. Judge Droney rejected that argument, stating that the challenge was to the form in which Coastal paid for the repairs, not to the fact that the damage to the dock was covered under the policy.

Violation of cruising limits in policy barred coverage for damage to sailboat; *Geico Marine Insurance Co. v. Shackleford*, No. 18-12105 (11th Cir. Dec. 17, 2019) (William Pryor).

Opinion

James Shackleford purchased the 65-foot sailboat SEA THE WORLD in 2009 with the plan to sail the vessel around the world. After damage to the vessel and litigation with a yacht yard over repairs, Shackleford had to insure the vessel in order to have the vessel hauled ashore for inspection. He obtained a liability policy from Geico in March 2016 that contained a cruising limit that boat must be north of Cape Hatteras, North Carolina from June 1 to November 1 annually while afloat. The day after the policy was issued, Shackleford asked Geico to change the policy to Port Risk Ashore, which provided no coverage for navigation and only contained coverage while the vessel was out of the water. Consequently, the cruising limits were removed. After the inspection, Shackleford planned to sail the vessel to Fort Lauderdale to undergo extensive repairs. He contacted Geico in May 2016 to remove the Port Risk Ashore restriction so that he could sail the vessel to Fort Lauderdale and confirmed that the policy contained hull coverage for the

vessel for the voyage. On May 27, 2016, Geico confirmed that it removed the Port Risk Ashore restriction and included an updated declarations page that reinstated the original cruising limit that required the vessel to be north of Cape Hatteras from June 1 to November 1 annually while afloat. The vessel arrived in Fort Lauderdale by June 1 and was anchored in nearby Lake Sylvia. In June 2016, a storm caused damage to the vessel which brought a claim against Geico under the policy. Geico denied the claim based on the violation of the cruising limits and on the ground that the policy was void under uberrimae fidei, and the district court disagreed with Geico on both grounds. The Eleventh Circuit did not have to reach the uberrimae fidei issue, as it held that there was no coverage because of the breach of the policy's cruising limits. Shackleford presented three arguments why the breach of the cruising limits did not bar coverage. First, he argued that the policy was ambiguous whether there was a navigational limit. Applying Florida law in the absence of an established maritime rule (under *Wilburn Boat*), Judge Pryor noted that the declarations page contained the express cruising limits, but there was a subsequent endorsement containing a section titled "Navigation Area" that was left blank. The district court considered the policy to be ambiguous because there must be no navigational limit as a result of the blank in the endorsement. Judge Pryor rejected that argument because the endorsement stated that it did not alter any provision or condition of the policy other than as stated above, and the blank for the Navigation Area, which was below that language, could not alter the cruising limit provided on the declarations page. Second, Judge Pryor concluded that the district court committed legal error when it held that Geico had implicitly waived the cruising limits because it knew on May 27, when it removed the Port Risk Ashore restriction, that the vessel would be sailed to Fort Lauderdale for repairs (an area that would be outside the cruising limits on June 1). Applying Florida law in the absence of an established rule of maritime law on the issue of waiver of a navigational limit, Judge Pryor noted that the vessel could have been sailed to Fort Lauderdale and removed from the water by June 1 and actually arrived there by June 1. Shackleford intended to haul the vessel ashore but did not. The only way that Geico could have waived the limitation was if it were impossible to complete the voyage and haul the vessel out of the water by June 1, but that was not the case. Finally, Shackleford argued that Geico had contracted out of the maritime law's strict enforcement of express warranties in marine insurance policies and instead selected Florida's more forgiving rule. This argument was based on the Conformity to Law provision in the policy that conforms any illegal policy terms to Florida law. The problem with that argument is that there is a maritime rule that strictly enforces warranties, so state law did not apply under *Wilburn Boat*. There was nothing illegal about the warranty under the applicable maritime law. The Conformity to Law provision is not a choice-of-law clause, and the parties did not contract out of maritime law. Therefore, Judge Pryor applied maritime law and held that there was no coverage for the loss that occurred while the vessel was outside of the cruising limits when the loss occurred.

From the federal district and bankruptcy courts:

Court bifurcated trial for the collision of the U.S.S. JOHN S. MCCAIN and the M/V ALNIC MC with liability and limitation tried to the court in phase one along with the property damage claims and the injury and death claims tried in phase two with the court to determine whether a jury will be used for phase two; *In re Energetic Tank, Inc.*, No. 1:18-cv-1359, 2019 U.S. Dist. Lexis 204657 (S.D.N.Y. Nov. 22, 2019) (Crotty).

Opinion

The collision between the destroyer U.S.S. JOHN S. MCCAIN and the merchant vessel M/V ALNIC MC resulted in the deaths of ten sailors and injuries to more than 40 others. Judge Crotty, who was presented with the limitation action, the damage claims of each ship, and the injury and death claims, had to decide how to try the various claims, resulting in this order. He bifurcated the case and held that phase one will be tried to the court. That phase will determine whether there was negligence by the owner of the ALNIC and whether that negligence occurred with the privity or knowledge of its owner. Phase one will then apportion fault as between the owner of the ALNIC and the United States. As the parties agreed that the property damages should be tried in that phase, Judge Crotty included the property damage claims within the first phase. However, Judge Crotty believed that the submissions of the injury and death claimants would substantially interfere with an orderly adjudication of the liability issues. Therefore, he ruled that the injury and wrongful death claims would be tried in the second phase of the trial, but he declined to rule at this time whether the second phase would be tried to a jury or to the court.

Prior owner of vessel did not have standing to seek limitation of liability; admiralty jurisdiction did not extend to Table Rock Lake, resulting in denial of limitation of liability for owner of STRETCH DUCK 07, even though the lake crosses state lines; *In re Branson Duck Vehicles, LLC*, Nos. 6:18-cv-3339, 6:19-cv-5006, 2019 U.S. Dist. Lexis 205731 (W.D. Mo. Nov. 27, 2019) (Harpool).

Opinion

This litigation arises from the tragic sinking of the duck boat, STRETCH DUCK 07 on Table Rock Lake near Branson, Missouri that resulted in 17 deaths. The owner, owner pro hac vice, and former owner of the duck boat sought limitation of liability. Judge Harpool began by dismissing the action brought by the former owner of the duck boat because its investment in the duck boat prior to selling it before the accident was insufficient to give it standing to bring a limitation action. Judge Harpool then dismissed the action on behalf of the current owner/operator of the duck boat for lack of admiralty jurisdiction. This case presented the well-known circuit split between the two great maritime circuits of the interior waters, the Eight Circuit and the Sixth Circuit. Table Rock Lake is a recreational lake used for fishing and water sports that crosses the state lines of Missouri and Arkansas. Applying the test for admiralty jurisdiction from the Sixth Circuit, the lake would be considered navigable waters because it is capable or susceptible of use as an interstate highway of commerce. However, the Eight Circuit (whose law is applicable in this case) has held that admiralty jurisdiction turns on contemporary navigability in fact. As Table Rock Lake is not currently used as a highway for interstate trade or transportation of people or goods (no tugs, barges, or ferries operate on the lake), Judge Harpool followed the rule in the Eighth Circuit and held that the lake did not satisfy the definition for navigable waters. Therefore, as there was no admiralty jurisdiction, Judge Harpool dismissed the limitation action for lack of jurisdiction. Note: unlike the Ninth Circuit's decision a week later in *Blue Water Boating*, Judge Harpool did not address in this opinion the issue whether admiralty jurisdiction is necessary for there to be federal

jurisdiction over a limitation of liability action. The owner/operator already filed their notice of appeal of Judge Harpool's ruling.

Watercraft exclusions precluded coverage for injury to switch paddler of canoe team who was injured by the propeller of an escort boat; *United States Fire Insurance Co. v. Hawaiian Canoe Racing Associations*, No. 18-212, 2019 U.S. Dist. Lexis 207564 (D. Haw. Nov. 27, 2019) (Kobayashi).

Opinion

Faith Ann Kalei-Imaizumi was a switch paddler for a team entered in the 2016 Pailolo Challenge Outrigger Canoe Race in Hawaii, sponsored and hosted by Hawaii Canoe Racing Associations. Kalei-Imaizumi and her team swam to the escort motorboat OHANA, which was owned and captained by Mark David Stevens. Kalei-Imaizumi successfully boarded the boat before the captain's hat blew into the water. She then re-entered the water to retrieve the hat, but when she attempted to re-board the vessel, she was struck by one of the outboard motors. She brought suit against HCRA, but HCRA's insurer, US Fire, denied coverage to HCRA based on the watercraft exclusion in the policy (injury arising out of the ownership, maintenance, use, or entrustment to others of any watercraft owned or operated by or rented or loaned or chartered to any insured). As the insured had contracted with Stevens to secure his operation of the vessel as an escort boat in the race, the only issue was whether Kalei-Imaizumi's injuries arose out of the use of the OHANA. As her complaint alleged that the vessel reversed and the unguarded propeller struck her, Judge Kobayashi concluded that her injuries arose out of the use of the vessel and there was no coverage under the policy.

Court awarded $20,305,762.03 for past economic and non-economic damages and future non-economic damages and $2,912,344.63 in future economic damages (to be discounted to present value) for injuries in tubing accident on Lake Tahoe from contact with vessel's propellers, including partial amputation of one leg; *Palla v. L M Sports, Inc.*, No. 2:16-cv-2865, 2019 U.S. Dist. Lexis 207457 (E.D. Cal. Dec. 2, 2019) (Mendez).

Opinion

Manisha Palla and a group of co-workers went to Lake Tahoe where they rented a boat and inner tube from L M Sports. After Palla took her turn at tubing on the Lake, she swam back to the boat, and, when she was re-boarding the boat, her legs were struck by the boat's propellers, resulting in a partial amputation of one leg. Palla brought suit against L M Sports and the member of her group who was operating the boat, Paul Garcia. Judge Mendez held a ten-day bench trial in which he found Garcia to be 80% at fault for Palla's injury and L M Sports to be 20% at fault (with liability being joint and several). He also held that L M Sports failed to carry its burden to establish that it lacked knowledge of the negligent conditions that gave rise to Palla's injuries, resulting in a denial of limitation of liability. Judge Mendez then conducted a nine-day trial on damages and entered his findings. Palla was 22 years old at the time of her accident. She did not seek past loss of earnings or income, and Judge Mendez awarded her $305,762.03 for past medical costs. After reviewing the competing life care plans, Judge Mendez credited parts of each and awarded $2,912,344.63 in future economic damages. He noted that the parties had not

presented economic testimony as to the present value of the future losses, so he ordered the parties to file supplemental reports calculating the present value of the award of future economic damages. With respect to non-economic damages, Judge Mendez awarded $8 million for Palla's pain and suffering through trial and $12 million for future pain and suffering (with no mention of any discount to present value).

Court dismissed vessel owner's tort indemnity and contribution claims against charterer in connection with injury to deckhand on vessel; *Wilson v. Florida Marine Transporters, LLC*, No. 18-13952, 2019 U.S. Dist. Lexis 207081 (E.D. La. Dec. 2, 2019) (Ashe).

Opinion

Warren Paving and Florida Marine entered into a fully-found charter party under which Warren Paving chartered vessels from Florida Marine, including the SAMUEL J. The charter party included indemnity and additional insurance provisions, and Florida Marine had Warren Paving named as an additional insured on its policies with Continental Underwriters with a waiver of subrogation for liability arising out of operations performed by Florida Marine for Warren Paving. Richie Wilson, a deckhand employed by PBC Management, was assigned as a member of the crew of the SAMUEL J. Wilson was injured at Warren Paving's loading dock on the Cumberland River near Salem, Kentucky, while helping a Warren Paving employee free a cable on a barge. Wilson brought this suit against Warren Paving and Florida Marine, and the parties brought third-party and cross-claims against each other. After Warren Paving filed a motion for summary judgment seeking to dismiss Wilson's claims against it, Wilson abandoned his claims against Warren Paving, and Judge Ashe dismissed those claims. In this decision, Judge Ashe addressed Warren Paving's motion to dismiss the tort indemnity and contribution claims brought by Florida Marine against Warren Paving. The basis of the motion was that Warren Paving was an additional insured on Florida Marine's policies and is the beneficiary of a waiver of subrogation. Thus, as Florida Marine's insurers are barred from subrogating against Warren Paving, they should not be allowed to use Florida Marine's claims as the cat's paw to effectively present a subrogation claim. Judge Ashe first dismissed the tort indemnity claim on the ground that the maritime law does not afford any tort indemnity in this case. Instead, the claim was actually for contribution based on comparative fault of the parties. In this case, Wilson abandoned his claims against Warren Paving, and they were dismissed with prejudice. Judge Ashe held that the dismissal acted as a full release of Warren Paving for its liabilities to Wilson, and that precluded Florida Marine from seeking contribution. Moreover, if Warren Paving were found at fault, the anti-subrogation rule would prohibit the insurer from seeking to recoup from Warren Paving any amounts it paid. Consequently, Florida Marine's claims against Warren Paving were dismissed with prejudice.

Vessel owner granted summary judgment on passenger's claim of failure to warn of danger of high seas when passenger posted his concerns on Facebook, but other negligence claims survived the motion for summary judgment; *Urrutia-Velez v. FRS-Fast Reliable Seaways LLC*, No. 18-25212, 2019 U.S. Dist. Lexis 208101 (S.D. Fla. Dec. 2, 2109) (Smith).

Opinion

Juan Carlos Urrutia-Velez, a passenger on defendant's vessel SAN GWANN from Miami to Bimini in the Bahamas, injured his ankle in a fall. The passenger asserted that he was told by crewmember Christian Quaranto that passengers were vomiting the day before with waves that were one meter high, and that the ride would be rough because the waves were two meters high. There was a dispute about whether he told the passenger to move to the back if the waves got too rough or whether he told him to sit in the back because of the weather, but Urrutia-Velez sat in the front (business class) because it was roomier. Quaranto stated that there were several announcements about the weather and that passengers should stay in their seats. Before getting up to go to the back, Urrutia-Velez took a video using his cell phone and made a post on Facebook that he had taken 3 Dramamines and was concerned about waves of 2 meters. When he got up to move to the back, he fell, believing that it was a wave that caused him to fall. While trying to get up, Urrutia-Velez asserted that the vessel was hit by a wave that lifted him airborne, causing him to fracture his ankle when he landed. The vessel owner moved for summary judgment that it had no notice of the dangerous condition because no passenger had ever fallen on the trip between Miami and Bimini as a result of weather conditions. In view of the warnings that the defendant alleged its crew had made of the weather, Judge Smith considered the defendant to have been on notice of the danger from the weather. The vessel owner also argued that the danger from the high seas was open and obvious, relieving it of a duty to warn. Considering the Facebook post and pictures taken by the passenger, Judge Smith agreed that there was no question that the passenger recognized the roughness of the seas and the danger thereof. Therefore, he held that the vessel owner had no duty to warn of the dangerous condition, and granted summary judgment on the duty-to-warn claim, while denying summary judgment on the passenger's other negligence claims.

Summary judgments granted on BELO claims from Macondo/Deepwater Horizon cleanup in the absence of expert opinions to support causation; *Williams v. BP Exploration & Production, Inc.*, No. 18-9753, 2019 U.S. Dist. Lexis 209494 (E.D. La. Dec. 5, 2019) (Morgan); *Escobar v. BP Exploration & Production, Inc.*, No. 18-9170, 2019 U.S. Dist. Lexis 216539 (E.D. La. Dec. 17, 2019) (Morgan); *Turner v. BP Exploration & Production, Inc.*, No. 18-9897, 2019 U.S. Dist. Lexis 220176 (E.D. La. Dec. 18, 2019) (Fallon); *Amacker v. BP Exploration & Production, Inc.*, No. 18-9653, 2019 U.S. Dist. Lexis 218066 (E.D. La. Dec. 19, 2019) (Ashe); *Barthe v. BP Exploration & Production, Inc.*, No. 18-10973, 2019 U.S. Dist. Lexis 218068 (E.D. La. Dec. 19, 2019) (Ashe); *Soniat v. BP Exploration & Production, Inc.*, No. 18-10585, 2019 U.S. Dist. Lexis 218071 (E.D. La. Dec. 19, 2019) (Ashe); *Bradford v. BP Exploration & Production, Inc.*, No. 18-9880, 2019 U.S. Dist. Lexis 218073 (E.D. La. Dec. 19, 2019) (Ashe).

Opinion Williams

Opinion Escobar

Opinion Turner

Opinion Amacker

Opinion Barthe

Opinion Soniat

Opinion Bradford

Benjamin Williams, Guillermo Escobar, Winfred Javon Turner, Craig Leighton Amacker, Perry Joseph Barthe, Joy Chantreal Soniat, and William Jabus Bradford brought these Back-End Litigation Option actions against BP pursuant to the Medical Benefits Class Action Settlement Agreement, seeking to recover for medical conditions that they claim were caused by their exposure to oil and chemicals during their response activities after the Macondo blowout. As part of the agreement, the workers were required to establish that their conditions were caused by exposure to the oil and chemicals. In these cases, the workers failed to carry their burden for similar reasons. Some failed to designate an expert, others failed to produce an expert report. Williams disclosed Dr. Scott A. Haydel as a medical expert, but his report made no attempt to set forth the specific substances to which Williams was exposed, their concentration, the frequency and duration of the exposure, and his work history with respect to exposure to toxic substances in any other contexts. Without any expert evidence to support causation of the workers' conditions from the oil and chemicals, Judges Morgan, Fallon, and Ashe granted summary judgment to BP on the workers' claims.

Right to lift the limitation stay and proceed in state court does not last forever; *In re Fire Island Ferries, Inc.*, No. 11-cv-3475, 2019 U.S. Dist. Lexis 210760 (E.D.N.Y. Dec. 6, 2019) (Hurley).

Opinion

This is a limitation action brought by the owner of a water taxi that collided with another vessel, resulting in numerous claims. The court held a non-jury trial in which limitation was denied, and the court gave the claimants the right to lift the stay and proceed in state court with their damage claims. Claimant Kevin Diaz declined to proceed in state court, even after all the other claimants settled, leaving him the single remaining claimant in federal court, where he elected to proceed without a jury. Three days before the trial was scheduled to begin, Diaz filed a letter with the court requesting the stay be dissolved so he could pursue his claim in state court before a jury. Judge Hurley adjourned the damages trial to give the parties the opportunity to present argument and authorities. In this opinion, Judge Hurley agreed that Diaz had the right to proceed in state court following the denial of limitation. However, that right is not unfettered. Noting that Diaz was not the only participant in this proceeding and that his adversary had lost thousands in expert fees due to the last-minute change of heart, Judge Hurley held that it would serve the interests of judicial economy and fairness to retain the case, "consistent with Diaz's earlier unequivocal elections."

Owner breached charter party by providing vessel that could not transport the charterer's cargo of diesel fuel to Puerto Rico; *Reel Pipe, LLC v. USA Comserv, Inc.*, No. 18-6646, 2019 U.S. Dist. Lexis 211271 (E.D. La. Dec. 9, 2019) (Fallon).

Opinion

After Hurricane Maria struck Puerto Rico in September 2017, USA Comserv agreed to perform repairs and provide fuel for generators for cell phone towers in Puerto Rico. Therefore, USA Comserv contracted with Reel Pipe to charter its vessel M/V CAROL CHOUEST to transport equipment and 850,000 gallons of diesel fuel to Puerto Rico. However, as Reel Pipe had not obtained certificates to unload fuel and had not obtained permission to transport fuel in its liquid mud tanks, the fuel could not be delivered and had to be sold offshore at a loss. USA Comserv did not pay the charter hire; Reel Pipe brought this suit to collect the charter hire; and USA Comserv counterclaimed for damages for breach of the charter party. As the charter party did not specifically identify what cargo was to be transported, Judge Fallon considered extrinsic evidence and held that Reel Pipe delivered a vessel to USA Comserv that it should have known could not perform pursuant to the expectations of the parties. Therefore, he held that Reel Pipe materially breached the charter party (although he found against USA Comserv on its claim of negligent misrepresentation under Louisiana law on the ground that USA Comserv did not justifiably rely on Reel Pipe's misrepresentations). Judge Fallon then awarded damages to USA Comserv for the losses with respect to the diesel fuel.

Signs and cones established notice of condition to defeat cruise line's motion for summary judgment on duty to warn; participation in or approval of design of entranceway to vessel defeated cruise line's motion for summary judgment on negligent design; *Fylling v. Royal Caribbean Cruises, Ltd.*, No. 10-cv-21953, 2019 U.S. Dist. Lexis 213880 (S.D. Fla. Dec. 10, 2019) (Otazo-Reyes).

Opinion

Carelyn Fylling fell while boarding the HARMONY OF THE SEAS through the entranceway on Deck 5. The cruise line moved for summary judgment on the basis that it had no notice of a dangerous condition as there was no history of falls at the entranceway to the ship. However, there were signs and cones on either side of the doorway saying, "caution, watch your step." As the Eleventh Circuit has explained that signs warning about a condition establish notice to the cruise line, Magistrate Judge Otazo-Reyes recommended that the summary judgment be denied on the defense of lack of notice. Asserting that third parties were responsible for the primary design of the entranceway, the cruise line moved for summary judgment on the passenger's negligent design theory. However, there was evidence that the cruise line was involved in the design and approval of the design of the entranceway. Therefore, Magistrate Judge Otazo-Reyes recommended that the cruise line's motion for summary judgment be denied with respect to negligent design.

Passenger's claim for failure to warn of the poor condition of the pathway on which he fell, which was added to his pending action for failure to provide adequate medical care after the time to sue had passed, was untimely; *Oro v. Norwegian Cruise Line Holdings Ltd.*, No. 1:19-cv-20964, 2019 U.S. Dist. Lexis 213733 (S.D. Fla. Dec. 11, 2019) (Moore).

Opinion

Manuel Asuncion Oro, a passenger on the NORWEGIAN JADE, fell while walking on a pathway from the vessel to a tour bus for a shore excursion in Panama. After the

excursion, he reported to the ship's medical center where he was diagnosed with a fractured rib. Although he returned to the medical center the next day, he was informed that there was no further treatment for him. At the end of the cruise, eight days later, he reported to the hospital in Miami and was admitted into the intensive care unit with multiple fractured ribs. Oro originally brought suit against the cruise line for providing negligent medical care, and his first amended complaint continued to seek recovery on that basis. Later, Oro moved for leave to file a second amended complaint that alleged failure to warn that the pathway to the bus was filled with divots, potholes, uneven surfaces, and debris. The cruise line moved to dismiss the second amended complaint on the ground that it was filed after the time limit to file suit contained in the passenger's ticket and the amendment did not relate back to the date on which the original complaint was filed. Noting that nothing in the allegations of inadequate medical care in the first two complaints put the cruise line on notice of a claim for negligent failure to warn of the condition of the pathway, Judge Moore dismissed the count alleging failure to warn.

Personal jurisdiction and maritime cross-claim upheld against foreign manufacturer of engine on offshore crewboat; *Boat Service of Galveston, Inc. v. NRE Power Systems, Inc.*, No. 17-7210, 2019 U.S. Dist. Lexis 212335 (E.D. La. Dec. 10, 2019) (Barbier).

Opinion

Boat Service of Galveston sustained damage to its vessel M/V TRISHA GAY, an offshore crewboat, due to a failure in its #2 port inboard engine. Boat Service brought suit against NRE, a diesel engine company located in Belle Chase, Louisiana, which ordered the engine from Scania USA, the United States distributor for the manufacturer, Scania AB, a Swedish company. NRE brought claims against Scania AB under the maritime law as well as under Texas and Louisiana state law, and Scania AB moved to dismiss the claims for lack of jurisdiction and for failure to state a claim. Reviewing the stream of commerce jurisprudence from the Supreme Court and Fifth Circuit, Judge Barbier concluded that the minimum contacts necessary to support personal jurisdiction were satisfied if the defendant delivered the product into the stream of commerce with the expectation that it would be purchased or used by consumers in the forum state, even in the case of a single stream of commerce sale. In this case, Judge Barbier found that Scania AB had actual knowledge and expectation that its engines were being delivered to Louisiana. Therefore, Scania AB could reasonably anticipate being haled into court in Louisiana even though it may not have purposefully directed its activities to Louisiana. Turning to the merits, Judge Barbier held that maritime products liability principles applied to NRE's claims against the manufacturer, and he noted that maritime products liability claims are governed by the principle of comparative fault. Consequently, he declined to dismiss NRE's contribution claim against Scania AB. Judge Barbier therefore dismissed NRE's claims under Texas law based on the application of maritime law, but he dismissed NRE's redhibition claim under Louisiana law on the ground that Boat Service had not asserted a redhibition claim against NRE.

Value of fishing permits not included in the value of the vessel for limitation of liability; *In re B&C Seafood, LLC*, No. 18-1560, 2019 U.S. Dist. Lexis 213254 (D.N.J. Dec. 11, 2019) (Schneider).

Opinion

After the collision of the F/V TOOTS II and the M/V OLEANDER off the coast of New Jersey, the owner of the TOOTS II filed this action for limitation of liability. Surveys were completed, and the owner of the TOOTS II abandoned the vessel to its underwriters who sold the vessel for scrap for $40,000. The owner earned $20,717.85 on the voyage, and the court approved security of $60,967.85. The claimants in the limitation proceeding sought to increase the security by the value of the fishing permits assigned to the TOOTS II, which were valued at $1,370,000, raising the question whether a fishing permit is an appurtenance of the vessel for purposes of the Limitation Act. Noting that the permits are intangible objects that were not on board the vessel at the time of the collision, Magistrate Judge Schneider analogized the case to ship's stores. If they are on the vessel, they are included, but if they are kept on shore, they are not. Magistrate Judge Schneider declined to follow cases holding that fishing permits should be included as an appurtenance of the vessel for maritime liens, as the purpose of maritime liens is to promote commerce by allowing suppliers to freely extend credit to ships as opposed to the purpose of limitation, which is to prevent exposure to unlimited liability. Finally, Magistrate Judge Schneider found it significant that in the 168 years since the Limitation Act was enacted there was not a single case including fishing permits in the limitation fund. He declined to increase the security from the original amount of $60,967.85.

Federal court declined to arrest vessel when the state court already had jurisdiction over the matter; *Barclay v. Clemons*, No. 3:19-cv-2688, 2019 U.S. Dist. Lexis 213382 (N.D. Ohio Dec. 11, 2019) (Helmick).

Opinion

This case involves a boat that was originally owned by Michael Hasenmeier, who stored the boat at a facility owned by the Durham family. Hasenmeier eventually agreed to sign the boat over to Thomas Durham in lieu of paying storage fees. Pro se plaintiff Shawn David Barclay, who was homeless in 2016, occupied the boat until he was discovered by Durham. Durham told him he could not live on the boat, but he could have it if he could remove it from the lot. He could not remove it without repairs, so he started making repairs with the permission of Durham. Barclay worked on and off on the repairs over a lengthy period of time, but eventually the property was sold to Jason Clemons along with the boat. Clemons made the same offer to transfer the title to Barclay if he would remove the vessel from the property. Unable to move the boat and fearful that Clemons would scrap it, Barclay brought suit in state court claiming ownership in the boat pursuant to the contract with Durham and seeking an injunction to prevent Clemons from destroying the boat while Barclay made arrangements to remove it. When the state court denied the motion on the ground that Barclay was not the owner and lacked standing, Barclay filed this action in federal court, pro se and in forma pauperis, against Clemons and Durham, asserting a maritime lien on the vessel and requesting the vessel be arrested so that he could obtain title to the boat. Judge Helmick dismissed the federal claim, citing collateral estoppel because Barclay had first gone to state court asserting that the was the owner and now claimed that he was asserting a lien based on repairs conducted at the behest of the owner for which he was to be paid by granting him ownership of the boat. Even if the federal suit to enforce a maritime lien were not barred by collateral estoppel, Judge Helmick stated that he would not interfere with the state proceeding that was based

primarily on state law. The federal lien claim involved the same issues that were raised in the state case, and Judge Helmick stated that the parties were the same in both actions [that is not quite accurate as the federal action sought an arrest of the vessel that would bring the vessel before the court as a party]. Judge Helmick then certified that an appeal from his decision would not be taken in good faith in accordance with 28 U.S.C. § 1915(a)(3), preventing an appeal from being taken in forma pauperis.

Family members of passenger who died on cruise ship were permitted to bring their own claims for intentional infliction of emotional distress that were not barred by the Death on the High Seas Act; *Eisenman v. Carnival Corp.*, No. 1:19-cv-22431, 2019 U.S. Dist. Lexis 213725 (S.D. Fla. Dec. 11, 2019) (King).

Opinion

Jeffrey Eisenman, his wife Linda, and their children were on Carnival's cruise ship SUNSHINE that was docked in Grand Turk when Jeffrey became ill and was taken to the ship's medical center. He was diagnosed as having suffered a major heart attack and told that he needed to be flown to Miami for lack of adequate facilities in Grand Turk. The Eisenmans had purchased insurance to cover air evacuation for this type of situation. Nonetheless, Jeffrey was not evacuated because someone else had to be medically disembarked first. Even though the Passenger Bill of Rights provided that they had the right to disembark for medical care that could not be adequately provided onboard, Carnival refused to let the Eisenmans off the ship and set sail for San Juan, Puerto Rico, 21 hours away. Jeffrey died before the ship reached Puerto Rico. Linda and her daughter left the ship in Puerto Rico, and Jeffrey's son stayed on the ship with his father's body as Carnival finished the 11-day cruise. The suit by Jeffrey's family included claims for intentional infliction of emotional distress in their individual capacities, and Carnival moved to dismiss those claims on the ground that they were preempted by the Death on the High Seas Act (which allows recover of pecuniary loss for wrongful death) and because Carnival's conduct was not sufficiently outrageous to state such a claim. Judge King declined to dismiss the intentional infliction claims, noting that the family members were suing for their own distress of being confined on the ship against their will, not the anguish from the loss of Jeffrey. Judge King also ruled that the complaint adequately pleaded extreme and outrageous conduct so as to allow recovery of punitive damages: despite the fact that the doctor opined that Jeffrey needed to be flown to Miami and that time was of the essence, the vessel "'left Grand Turk with Jeffrey [] and his family confined onboard against their will' as the ship sailed farther away from help, forcing them to 'watch on in agony as [Jeffrey] slowly slipped away.'"

Carrier not liable for looted cargo in Honduras; *Distribuidora N.Y. S De R.L v. Great White Fleet Liner Services, Ltd.*, No. 0:18-cv-60673, 2019 U.S. Dist. Lexis 215532 (S.D. Fla. Dec. 13, 2019) (Dimitrouleas).

Opinion

Distribuidora arranged with its local customs broker to ship bales of used clothing from Freeport, Texas to Honduras with ultimate ground delivery to San Pedro Sula, Honduras. The goods were shipped in four containers on Great White Fleet's vessel and arrived safely in Puerto Cortes. The customs broker was notified that it could arrange for additional

security for the ground transportation, and that the carrier would not be responsible if additional security were not provided. Although there were protesters and some road blockages after a recent election, there was no showing of any potential danger to the cargo, and neither Distribuidora nor its broker ordered extra security. While the trucks were stopped at a roadblock, the cargo was looted. The bill of lading contained a Clause Paramount that extended the Carriage of Goods by Sea Act to the ground transportation portion of the voyage. As COGSA exculpates the carrier for loss resulting from riots and civil commotions (Section 1304(2)(k)), Judge Dimitrouleas held that Great White Fleet was not liable under COGSA. He also addressed the fact that, although COGSA was contractually incorporated into the contract of carriage, the Harter Act is statutorily applicable to the custody of the goods after discharge from the ship, and the Harter Act generally prohibits clauses exculpating the carrier from negligence. However, Judge Dimitrouleas found that the carrier was not negligent, so there was no basis for liability. Alternatively, Judge Dimitrouleas held that, if the carrier were not exonerated, its liability would be limited to $500 per container in accordance with COGSA's package limitation.

Death claim on behalf of merchant seaman dismissed against supplier of asbestos containing products for failure to establish a sufficient connection to defendant's products; *Klopman-Baerselman v. Air & Liquid Systems Corp.*, No. 3:18-cv-5536, 2019 U.S. Dist. Lexis 215890 (W.D. Wash. Dec. 16, 2019) (Bryan).

Opinion

Rudie Klopman-Baerselman's beneficiaries asserted that he died from exposure to asbestos containing products while serving as a boiler oilman/stoker on several vessels as an employee of Royal Dutch Lloyd. One of the defendants, Foster Wheeler moved for summary judgment based on application of Dutch law, but, applying Washington state law to the actions brought by the beneficiaries under Washington law, Judge Bryan held that the defendant was entitled to summary judgment because the beneficiaries had not established a reasonable connection between the decedent's death and products manufactured, sold, or supplied by Foster Wheeler.

Third-party complaint under Rule 14(c) denied because plaintiff did not intend to designate Rule 9(h) even though alleging both diversity and admiralty; *Indelpro S.A. de C.V. v. Valero Marketing & Supply Co.*, No. H-19-4115, 2019 U.S. Dist. Lexis 219083 (S.D. Tex. Dec. 18, 2019) (Rosenthal).

Opinion

Indelpro brought this suit against Valero for supplying contaminated fuel to one if its ships, asserting state-law claims for breach of contract, breach of warranties, negligence, and product liability. The suit was based on diversity jurisdiction and, as an independent basis of jurisdiction, admiralty and maritime jurisdiction. Valero answered and brought a third-party claim against Trafigura Trading, which supplied the fuel, pursuant to Fed. R. Civ. P. 14(a). After Trafigura asserted a forum selection clause for New York and arbitration pursuant to its contract with Valero, Valero moved to amend its third-party claim to base it on Rule 14(c) (so that Trafigura would be liable directly to Indelpro). In order to invoke Rule 14(c), however, the case would have to be brought as an admiralty case pursuant to Rule 9(h). Judge Rosenthal concluded that Indelpro had not intended to

designate Rule 9(h) and therefore declined to allow the amendment to add the Rule 14(c) claim. Indelpro demanded a jury and stated at an initial conference that it was not proceeding under Rule 9(h) even though it had a maritime claim. Although Valero argued that the reference to admiralty and maritime jurisdiction was sufficient to constitute a "Rule 9(h) designation that would permit its amendment, Judge Rosenthal found that the totality of circumstances indicated that Indelpro had not made a Rule 9(h) designation [*compare T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir. 1983) in which the Fifth Circuit held that a suit brought in diversity that also alleged that the suit was for breach of a maritime contract and maritime tort designated Rule 9(h) even though the plaintiff sought a jury trial].

Fact questions prevented removal of case based on improper joinder of the Jones Act claim; *Mills v. Bo-Mac Contractors, Ltd.*, No. 19-11893, 2019 U.S. Dist. Lexis 218356 (E.D. La. Dec. 18, 2019) (Milazzo).

Opinion

Mills worked for the defendant as a welder/pile driver and was injured on a crane barge. When Mills brought a seaman's action against the defendant in the Civil District Court of Orleans Parish, the defendant removed the case to federal court based on diversity jurisdiction, asserting improper joinder of the Jones Act case. Mills and his employer presented starkly contrasting versions of the facts of Mills' employment with respect to the claim that the Jones Act count was improperly joined. Therefore, even though Judge Milazzo did not describe the process in the context used by the Fifth Circuit ("a summary judgment-like procedure"), she found contradictory facts that precluded a finding of improper joinder (she used the phrase "fraudulently pleaded" instead of the term used by the en banc Fifth Circuit, improper joinder). Consequently, she remanded the case to state court.

Passenger's claims for injury on shore excursion for misleading advertising, negligent misrepresentation, negligent selection, and negligent failure to warn were held sufficient to avoid dismissal, but the claims based on joint venture and third-party beneficiary were dismissed based on the terms of the contract between the cruise line and the excursion company; *Kreyer v. Carnival Corp.*, No. 19-20398, 2019 U.S. Dist. Lexis 218666 (S.D. Fla. Dec. 19, 2019) (Williams).

Opinion

Mary Kreyer, a passenger on a Carnival cruise ship, was injured when she fell on a catamaran during a shore excursion operated by Chukka Caribbean Adventures. She brought this suit against Carnival, asserting misleading advertising, negligent misrepresentation, negligent selection of the excursion contractor, failure to warn, negligence of a joint venture between Carnival and Chukka, and third-party beneficiary status to the contract between Carnival and Chukka. Carnival moved to dismiss the claims, and Judge Williams held that the heightened pleading standard of Rule 9(b) was satisfied for the fraud and negligent misrepresentation allegations as the pleading provided the specific sources of the materials that were allegedly fraudulent and misleading. Judge Williams also ruled that Kreyer had alleged sufficient notice to Carnival

of prior incidents involving Carnival passengers injured during Chukka excursions so that the claims of negligent selection and negligent failure to warn were sufficiently pleaded. However, as the contract between Carnival and Chukka expressly denied any intent to be a joint venture or to permit third-party beneficiary status to passengers, Judge Williams dismissed the claims based on a joint venture or third-party beneficiary status.

Contribution and indemnity claim does not create a multiple claimant situation, and the limitation stay was lifted without stipulations from the contribution/indemnity claimant; *In re Freedom Unlimited*, No. 19-61655, 2019 U.S. Dist. Lexis 218776 (S.D. Fla. Dec. 19, 2019) (Hunt).

Opinion

After Joshua Bonn filed a Jones Act suit against Freedom Unlimited and Taylor Lane Yacht & Ship in the Circuit Court of Broward County, Florida, Freedom Unlimited brought this action seeking to limit its liability to the value of its vessel. Bonn filed a claim in the limitation action along with Taylor Lane, which brought a claim for contribution and indemnity. Bonn then moved to lift the stay so that he could proceed with his action in state court, filing the standard stipulations of a single claimant situation. Freedom Unlimited objected as claimant Taylor Lane did not file stipulations. Following the decisions that indemnity and contribution claims based on negligence theories are derivative of the plaintiff's claim and do not create a multiple-claims-inadequate fund situation, Magistrate Judge Hunt recommended that Taylor Lane need not file stipulations to create a single claimant situation and that the stay be lifted.

Mississippi River bridge built more than 100 years ago with narrow passageway for vessel traffic held not comparatively at fault in allision between barge and bridge because the cost of replacing the bridge outweighed the benefit in preventing allisions; *Dakota, Minnesota & Eastern Railroad Corp. v. Ingram Barge Co.*, No. 2:15-cv-1038, 2019 U.S. Dist. Lexis 218194 (N.D. Iowa Dec. 19, 2019) (Strand).

Opinion

This case involves an allision between Ingram's barge and a bridge over the Mississippi River near Sabula, Iowa. Chief Judge Strand originally held the barge solely at fault and did not find fault on the bridge after concluding that Ingram had failed to rebut the presumption of fault from the *Oregon* Rule (presumption of negligence when a moving vessel allides with a fixed object or stationary vessel). The Eight Circuit reversed (April 2019 Update) and remanded the case for a finding whether there was comparative negligence of the bridge. The bridge, which dates back to 1880, has an east channel that is only 154-feet wide, leaving only 25 feet of clearance on each side for a standard tow that is three barges wide. It is one of only eight bridges designated by the Coast Guard as unreasonably obstructive under the Truman-Hobbs Act, but that designation does not require the bridge be replaced. In determining whether there was fault for failing to replace the bridge, Chief Judge Strand engaged in the balancing test proposed by Judge Learned Hand that looks to the likelihood of an injury, the gravity of the harm if there is an accident, and the burden of precautions that would prevent the accident. Balancing

those factors, Chief Judge Strand concluded that the risk of an accident was small compared to the cost of replacing the bridge. As the cost of replacement outweighed the benefit that would result from replacement, Chief Judge Strand declined to find the bridge negligent.

Limitation of liability held to apply to pleasure craft, and the presence of the owner on the vessel was not dispositive of privity or knowledge; *Garb v. Garb*, No. 18-11769, 2019 U.S. Dist. Lexis 218134 (D.N.J. Dec. 19, 2019) (Wolfson).

Opinion

Mindy Garb was injured on her brother's 18-foot vessel on Barnegat Bay in New Jersey. After Mindy Garb brought suit in state court, her brother, Lawrence Garb, filed this action seeking to limit liability. Mindy then moved to dismiss the limitation action on the ground that in a case where the limitation petitioner is the sole owner and operator of the pleasure boat, the court may address the issue of privity or knowledge without first determining negligence as it is clear that the owner will have privity or knowledge. Additionally, Mindy asserted that the Limitation Act was not intended to apply to individual operators of their own pleasure craft. Noting that the Supreme Court had treated pleasure craft as being within the scope of the Limitation Act, Chief Judge Wolfson rejected the second contention and found no distinction between pleasure craft and commercial vessels. As to the first issue, Chief Judge Wolfson noted a difference in authority and agreed with the cases holding that the presence of the owner on the vessel at the time of the incident is not germane to the issue of whether he may maintain the limitation action. Denying limitation at this stage would excuse the claimant from carrying the initial burden of demonstrating what acts of negligence caused the accident.

Bad faith defense did not extinguish maritime lien for bunkers delivered to defendants' vessels; *ING Bank N.V. v. M/V TEMARA*, No. 16 Civ. 95, 16 Civ. 2051, 16 Civ. 6453, 2019 U.S. Dist. Lexis 220114 (S.D.N.Y. Dec. 20, 2019) (Stanton).

Opinion

ING Bank asserted liens on the defendants' vessels, as assignee of O.W. Bunker group, for fuel delivered to the vessels by subcontractors of O.W. Bunker. The issue presented in this opinion is the validity of the defense raised by the vessel owners that the O.W. Bunker entities knew that their fuel-providing subcontractors would probably never be paid, so O.W. Bunker lacked the good faith necessary for a maritime lien. Judge Stanton found no basis for the defense in the Maritime Lien Act and reasoned that the fuel was delivered to the defendants' vessels, and the materialmen' assignee therefore had liens on the vessels regardless of the morality of the suppliers' conduct with their subcontractors. Therefore, he struck "the vessel owners' imagined application of a theory of bad faith."

Recruiting seaman from Tennessee and paying for her travel to Tennessee and medical treatment in Tennessee was insufficient to establish in personam jurisdiction in Tennessee against cruise line whose principal place of business was in Washington; *Branstetter v. Holland American Line N.V.*, No. 19-cv-2596, 2019 U.S. Dist. Lexis 219085 (W.D. Tenn. Dec. 20, 2019) (Mays).

Opinion

Kelsie Branstetter was employed as an Image Creator (photographer) on defendant's cruise ship MS NOORDAM. She claimed that she was injured while descending a staircase in the dining room of the vessel and that she was further injured after working long hours on the vessel a few days later. She did not specify where the vessel was located when the injuries occurred, but Holland American Line cruises through international waters and not in Tennessee where she brought the suit. After the accident, Branstetter was sent home to Tennessee, where she received medical treatment that was paid by Holland America Line. Holland American Line, which is organized under the laws of Curacao with its principal place of business in Washington, moved to dismiss the case for lack of personal jurisdiction. Judge Mays easily found that there was insufficient contact between Tennessee and the incidents that gave rise to her Jones Act and unseaworthiness claims. With respect to the failure to pay maintenance and cure in Tennessee, Judge Mays cited cases holding that the failure to pay maintenance and cure in the forum state is not sufficient to establish specific jurisdiction and held that the court lacked personal jurisdiction over that claim as well. As the district court in Washington would have jurisdiction over the defendant, Judge Mays transferred the case to the Western District of Washington.

Seaman's Jones Act and general maritime law claims were barred because he ignored the defendant's bankruptcy action and filed a separate suit; *In re Seadrill Ltd.*, No. 17-60079, 2019 Bankr. Lexis 3846 (S.D. Tex. Br. Dec. 19, 2019) (Jones).

Opinion

Chevy Thornton sustained a back injury while working for Seadrill on March 1, 2017. A third-party medical claims administrator paid maintenance and cure at the address on his employment records (the parsonage of a church where his father was a minister). Nine months later, Seadrill filed this bankruptcy proceeding, and notice of the proceeding was sent to Thornton at the address from his employment records. Seadrill's discharge plan was confirmed by the bankruptcy court in April 2018, and all pre-bankruptcy claims were discharged with an injunction prohibiting further litigation of those claims. In November 2018, Thornton filed a lawsuit under the Jones Act against Seadrill in federal court in Louisiana, and Seadrill filed a motion in the bankruptcy court to enforce its injunction and discharge order. Although Thornton admitted that he had received the bankruptcy notice prior to the confirmation order (but after the bar date), he claimed excusable neglect on the basis of his failure to send a change of address to his employer. Bankruptcy Judge Jones denied that argument as it was not causally related to the failure to file a proof of claim (he did have actual notice) and because Thornton ignored the bankruptcy process for over a year and simply proceeded as though no bankruptcy case existed. Consequently, Bankruptcy Judge Jones enforced the confirmation order and denied Thornton leave to file a proof of claim.

Filing a copy of the plaintiff's complaint for maintenance and cure in the defendant's Chapter 13 bankruptcy does not constitute an objection to discharge of the debt and provides no basis for appeal of the discharge order; *Barnes v. Henry*, Nos. 19-cv-212, 19-215, 19-213, 2019 U.S. Dist. Lexis 219634 (D. Haw. Dec. 23, 2019) (Watson).

Opinion

Chad Barry Barnes returns, again (July, September, and November 2019 Updates), to the Update. This opinion involves his appeals of the orders of the bankruptcy court denying his motion to stay the discharge of his maintenance and cure claim by the bankruptcy court with respect to the Chapter 13 bankruptcy of Kristin Kimo Henry. Barnes argued that his claim of willful and intentional denial of maintenance and cure was exempt from discharge; however, the bankruptcy judge found that the exception did not apply because Barnes had not filed a complaint for a determination of a debt in the bankruptcy proceeding. Barnes had filed a copy of the complaint from his admiralty suit, but that was insufficient to request a determination from the bankruptcy court. Judge Wilson did note that the discharge only pertained to pre-petition matters. Therefore, any conduct after the bankruptcy was filed would not be discharged. Consequently, we can look forward to more decisions in future Updates.

Yacht owner recovered for a fire on the yacht caused by the company that designed and installed an air conditioning system on the yacht based on breach of contract and breach of the warranty of workmanlike performance but not based on the Magnuson-Moss Warranty Act; *Bloch v. Beard Marine Air Conditioning & Refrigeration, Inc.*, No. 18-61821, 2019 U.S. Dist. Lexis 220496 (S.D. Fla. Dec. 23, 2019) (Dimitrouleas).

Opinion

Larry Bloch bought the M/Y TIVOLI and contracted with Beard Marine to supply, design, and install a new air conditioning system on the vessel, with a warranty for one year and a guaranty that the system would function in a safe and reliable manner. Three months after the installation, while the vessel was undergoing an extensive refit, a fire broke out on the vessel, causing damage for which Bloch sought recovery from Beard Marine. The primary factual dispute was whether the fire was caused by Beard Marine's improper placement of a temperature sensor inside the control box of a cabinet in the crew quarters or from unauthorized welding that was taking place on the day of the fire. Finding the testimony of Bloch's fire origin expert, Dennis Kerr, to be credible, Judge Dimitrouleas found that the fire originated inside the control box and that the welding probably did not contribute to the fire. Averaging the selling prices of 15- to 20-year old yachts similar to the TIVOLI, Judge Dimitrouleas found that the fair market value of the yacht on the day of the fire was $3,113,250, and that the cost to restore the yacht to that condition was $2,332,216.25. Judge Dimitrouleas added $96,896.19 for storage costs to the repair figure. These damages were awarded for breach of the express warranty in the parties' contract as well as for breach of the warranty of workmanlike performance under the general maritime law. No damages were awarded under the Magnuson-Moss Warranty Act (including attorney's fees) as the warranty was for the service of installation of the air conditioning system, and not for a warranty connected to a consumer product.

From the state courts:

Thailand rig operator not subject to personal jurisdiction in Texas in suit by Mississippi resident injured on rig in the Gulf of Thailand; *Chevron Thailand*

Exploration & Production, Ltd. v. Taylor, No. 14-18-00540-CV (Tex. App.—Houston [14th Dist.] Dec. 3, 2019) (Zimmerer).

Opinion

Jaime Taylor, a resident of Mississippi, was a Chevron employee on loan to Chevron Thailand when he was injured on an offshore drilling rig in the Gulf of Thailand. Chevron Thailand is a Bermuda company with its principal place of business in Thailand. It has no offices in Texas, conducts no operations in Texas, and has no accounts or property in Texas. However, it did purchase goods and services from 22 companies with connections to Texas for use in its Thailand operations, made payments to Texas bank accounts for these companies of more than $49 million in 2015, and paid for travel of 249 people to Texas between 2012 and 2015. Taylor brought suit in Texas against Chevron Thailand, Chevron USA, and Rig QA, a safety consultant for the rig. When Chevron Thailand objected to personal jurisdiction in Texas, Taylor responded by bringing a new claim for negligently hiring and supervising Rig QA. Rig QA's consultant, who worked in Thailand, signed Rig QA's agreement with Chevron Thailand in Thailand, but the contract was primarily negotiated by Rig QA's vice president in Texas, who traveled to Thailand several times each year for contract discussions with Chevron Thailand. The district court denied Chevron Thailand's special appearance, and Chevron Thailand filed this interlocutory appeal. The appellate court reversed. Justice Zimmerer cited the commercial interactions between Chevron Thailand and Texas but concluded that there was no evidence connecting any of those contacts with the operative facts in the case. Taylor emphasized the contacts of Rig QA, a Texas company, with Texas, but that placed the emphasis on a party that was not filing the special exception. With respect to the allegations of negligent hiring and supervising Rig QA, Judge Zimmerer pointed out that there was no evidence that its investigation into Rig QA's fitness as a safety contractor or its supervision of Rig QA occurred in Texas. He concluded that Chevron Thailand's contacts with Texas related to this suit were "tenuous at best" and insufficient to require Chevron Thailand to defend this suit in Texas.

State court cannot apply state causation standard for Jones Act and unseaworthiness claims; *Shaffer v. A.W. Chesterton Co.*, 2019-Ohio-5022, 2019 Ohio App. Lexis 5097 (Ohio App. 9th Dist. Dec. 9, 2019) (Callahan).

Opinion

Edward Shaffer served in the engine room and boiler room of vessels owned and operated by United States Steel that sailed on the Great Lakes. He brought this suit against U.S. Steel and various product defendants, asserting that he was exposed to asbestos while working on the vessels. After he died from mesothelioma, his widow continued the suit. The judge of the Loraine County Court of Common Pleas granted summary judgment for U.S. Steel on the ground that Ms. Shaffer had failed to establish causation on the Jones Act and unseaworthiness grounds, citing the Ohio state standard. The Ohio Court of Appeals reversed. Judge Callahan noted that there are different causation standards for Jones Act and unseaworthiness claims, and both are different from the Ohio standard. With respect to the Jones Act claim, the plaintiff need only establish that the employer's negligence played any part, no matter how slight, in producing the injury. Therefore, the summary judgment on the Jones Act claim had to be reversed. The unseaworthiness

standard is one of proximate causation, that the unseaworthiness was a substantial factor in causing the injury. The lower court did apply a substantial factor test, but it applied the Ohio version of that test, focusing on the manner, proximity, frequency and length factors attendant to the seaman's employment. As that contradicted the maritime standard that the injury must either be a direct result of or a reasonably probably consequence of the unseaworthiness, Judge Callahan held that the summary judgment on the unseaworthiness claim must also be reversed.

Court upheld jury verdict awarding seaman future economic loss but no future pain and suffering; *Harlan v. Hampton Roads Leasing, Inc.*, No. CL18-5309, 2019 Va. Cir. Lexis 1176 (Norfolk, Va. Cir. Ct. Dec. 11, 2019) (Lannetti).

Opinion

Thomas K. Harlan was injured while serving as a crewmember on the Tug CAPT WOODY when he stepped backwards and fell through an opening on the pedestal of the crane and landed five feet below on the deck of a barge. The jury in his Jones Act case apportioned liability 40% to Harlan and 60% to his employer and awarded him damages for past lost earnings, past pain and suffering, and future lost earnings, but "$0.00" for future pain and suffering. Harland filed a motion seeking an additur for future pain and suffering on the ground that by awarding future lost earnings but no associated future and suffering, the jury improperly awarded only special damages and therefore failed to adequately consider all of the damage elements in the jury instruction. Judge Lannetti distinguished Virginia cases in which the jury failed to take into consideration all of the proper elements of damages. Judge Lannetti noted that the jury had awarded damages for past pain and suffering and had clearly considered how much should be awarded for future pain and suffering by entering a finding of zero dollars. Moreover, that finding was supported by the evidence. The claim of future pain and suffering was supported by the testimony of Harlan as to his pain and the testimony of his experts based on his subjective, self-reported pain. However, Harlan's credibility had been called into question with evidence that he had presented both false information and inconsistent and exaggerated information. Therefore, it was reasonable for the jury to disbelieve that Harlan would experience future pain and suffering. Judge Lannetti declined to grant an additur or a new trial on damages.

Vessel owner entitled to indemnity from NVOCC for following its instructions in placing a hold on cargo; *ZIM American Integrated Shipping Services, Co. v. GES Logistics, Inc.* No. B292259, 2019 Cal. App. Unpub. Lexis 8246 (Cal App. 2d Dist. Dec. 11, 2019) (Bigelow).

Opinion

GES is a Non-Vessel Operating Common Carrier that had a contract with ZIM American to ship goods on ZIM's vessels. Export Shipping is a booking agent that booked cargo on ZIM's vessels based on GES's contract with ZIM. Bridget Ehiemenonye hired Export Shipping to ship several vehicles to Nigeria, and Export Shipping used GES's contract to book shipment on ZIM's vessel. There was a dispute over billing between Ehiemenonye and Export Shipping, and Export Shipping sought to place a hold on the shipments. As Export Shipping was not the contracting party, ZIM notified Export Shipping that the

hold would have to come from GES. GES then requested the hold, which resulted in Ehiemononye filing suit against ZIM, GES, and Export Shipping. Eventually all of the claims were dismissed, but ZIM sought its attorneys' fees from GES pursuant to the clause in their agreement that GES would indemnify ZIM from acting in accordance with GES's instructions and information. Concluding that the indemnity applied to the allegations in the lawsuit that ZIM improperly placed holds on the shipments (at the instruction of GES), Judge Bigelow held GES must indemnify ZIM for its legal fees.

Illinois Supreme Court joined the majority of federal appellate courts in holding that the defendant in an FELA (or Jones Act) case may counterclaim against the injured worker based on negligence for property damage suffered by the defendant in the accident in which the plaintiff was injured; *Ammons v. Canadian National Railway Co.*, 2019 IL 124454 (Ill. Dec. 19, 2019) (Garman).

Opinion

Melvin Ammons and Darrin Riley filed lawsuits against their employer, Wisconsin Central, for injuries they sustained when the train they were operating struck another train that was stationary on the same track. Wisconsin Central counterclaimed against the plaintiffs for the cost of repair, environmental cleanup, and remediation, in excess of $1 million. The workers moved to dismiss the counterclaims as prohibited by the FELA, but the Illinois Supreme Court disagreed. Citing the majority of federal appellate cases interpreting both the FELA and the Jones Act, Justice Garman held that Section 55 of the FELA (prohibiting "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability"' did not prevent the employer from seeking property damage from the plaintiffs caused by their negligence. Similarly, Justice Garman held that the counterclaims were not prohibited by Section 60 of the FELA, which voids "[a]ny contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest as to the facts incident to the injury or death of any employee."

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The limited grounds set forth for the Ninth Circuit's decision above in *In re Blue Water Boating, Inc.*, No. 18-55575 (9th Cir. Dec. 4, 2019), bring to mind the quotation from Justice Powell that follows.

Quote:

Oral argument in this case revealed the degree to which the Court's decision displaces state authority. The Court posed a hypothetical in which children, for their own amusement, used rowboats to net crawfish from a stream. Two of the boats collide and sink near the water's edge, forcing the children to wade ashore. Counsel for respondents replied that this accident *would* fall within the admiralty jurisdiction of the federal courts, provided that the waterway was navigable. . . . Today the Court agrees.

Foremost Insurance Co. v. Richardson, 457 U.S. 668, 678 (1982) (Powell, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.).

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