March 2020 Longshore/Maritime Update (No. 250)

Notes from your Updater:

The fact that this is our 250th edition of the Update calls for thanks to all those who have made the Update possible, particularly its founder, Tom Langan, and to those he termed our long-suffering readers.

On February 14, 2020, the Texas Supreme Court granted a petition for review and will hear oral argument in *W&T Offshore, Inc. v. Fredieu* (No. 18-1134). Wesley Fredieu was injured on W&T Offshore's platform on the outer Continental Shelf while nominally employed by The Wood Group. The primary defense for W&T was whether Fredieu was a borrowed servant of W&T Offshore so that W&T Offshore could assert the exclusive remedy provision in the LHWCA. The issue was submitted to the jury, which found that Fredieu was not a borrowed servant. W&T argued that the issue of borrowed servant status was a question of law, and the district judge agreed, holding that Fredieu was a borrowed servant of W&T and that his exclusive remedy was under the LHWCA. The Texas Court of Appeals for the Fourteenth District reversed, 584 S.W.3d 200, and remanded for entry of judgment in conformity with the jury verdict (July 2018 and November 2018 Updates). The Texas Supreme Court will hear argument on March 25, 2020, to decide whether the jury or judge applies the *Ruiz* factors to determine borrowed servant status under the LHWCA.

The protracted litigation in England and the United States (judgment in England in 2009) by which d'Amico Dry d.a.c. has sought to recover against Primera Maritime (Hellas) Ltd. took one more step toward conclusion when the Second Circuit affirmed the judgment in favor of d'Amico in the amount of $3,162,552.18 plus an additional $898,807.14 in attorneys' fees and costs. *D'Amico Dry d.a.c. v. Sonic Finance, Inc.*, Nos. 19-cv-163, 19-cv-1472, 2020 U.S. App. Lexis 5176 (2d Cir. Feb. 18, 2020 (per curiam).

On the LHWCA Front . . .

From the federal appellate courts:

Affirmance of ALJ's decision to defer a ruling on claimant's attorney's fees until after the appeal on the merits of her compensation award was not subject to appellate review or mandamus; *Zaradnik v. Dutra Group*, No. 18-72307 (9th Cir. Feb. 6, 2020) (per curiam).

Opinion

Kelley Zaradnik sought compensation for an aggravation of her pre-existing conditions by cumulative trauma during her 48 days of employment by Dutra Group. Administrative Law Judge Dorsey awarded her benefits, then modified his decision on reconsideration, and Dutra Group appealed the award to the Benefits Review Board. The BRB remanded the case for further consideration, and that decision was appealed to the Ninth Circuit. In the meantime, claimant's counsel filed a petition for fees and costs before the Office of Administrative Law Judges, but Judge Dorsey retired. Judge Gee then ruled that it would be premature to rule on the fee petition while the case was still on appeal, and the claimant appealed that decision to the BRB, which affirmed Judge Gee's ruling. As the ruling merely deferred a decision on the merits of the fee petition, the Ninth Circuit held that it was not conclusive and not subject to appeal or a writ of mandamus (there was no irreparable injury that could not be corrected by appeal of a final action on the fee petition). The Ninth Circuit reasoned that the claimant had not identified any provision in the LHWCA that requires fee petitions be adjudicated within a certain time frame. Therefore, the petition for review and petition for a writ of mandamus were denied.

Ninth Circuit left it up to the ALJ and BRB to determine the relevant community to ascertain the rate for claimant's attorney's fees, and they may rely on evidence from other cases in that market when the evidence submitted is insufficient; *Orpilla v. Hawaii Stevedores, Inc.*, No. 18-72606 (9th Cir. Feb. 6, 2020) (per curiam).

Opinion

This decision arises from a hearing loss claim of a claimant who was employed in Hawaii, but whose attorney has offices in San Rafael, California, and Honolulu, Hawaii. The attorney sought fees based on his home market of San Francisco, rather than the market in Honolulu. Administrative Law Judge Larsen rejected an hourly rate of $525 for the San Francisco market and instead followed Judge Gee's market analysis for the Honolulu market, awarding a rate of $350 per hour. The BRB affirmed the award, and the Ninth Circuit agreed. With respect to the dispute over the applicable market for the hourly rate, the Ninth Circuit noted that the court leaves it up to the BRB, ALJs, and District Directors to determine the relevant community. As to the rate for legal services in Hawaii, claimant's counsel had not submitted evidence of the prevailing rates in that market, so Judge Larsen was allowed to rely on other cases to determine the applicable rate.

Worker's suicide after discovering that his wife was having an affair and seeking a divorce and that his daughter was using illegal drugs was compensable under the DBA because the work-related separation from his family significantly intensified the dysfunction in his marriage; *Service Employees International, Inc. v. Director, OWCP*, No. 18-73247 (9th Cir. Feb. 14, 2020) (per curiam).

Opinion

Wade Dill began working in Iraq for Service Employees International, Inc. (SEII) in 2004 as a pest control specialist. When he returned home in June 2006, he discovered that his wife, Barbara Dill, was having an affair and was seeking a divorce and that his daughter was using illegal drugs. On July 16, 2006, Wade shot and killed himself at a hotel, leaving suicide notes blaming Barbara for his action. As the divorce had not been completed, Barbara brought this death claim as Wade's widow pursuant to the Defense Base Act. Wade had not been examined by a psychiatrist during his lifetime, so both Barbara and SEII presented opinions of psychiatrists who assessed Wade's psychological condition by way of a "psychological autopsy." Dr. Seaman opined that the decedent had a pre-existing adjustment disorder and that the work-related separation from his family "significantly intensified the dysfunction in his marriage." Therefore, he concluded that the combination of his stress from working in Iraq and his marital separation resulted in his suicide. Dr. Whyman agreed that Wade had pre-existing psychological conditions, but opined that Wade's employment in Iraq did not affect his underlying condition and that his suicide was the culmination of all the things that had gone wrong in his life. Administrative Law Judge Berlin credited the opinion of Dr. Seaman, concluding that it was more congruent with the circumstances of Wade's employment and home life and that it was supported by an Army study addressing suicides by Army personnel. Judge Berlin therefore ruled that Barbara had established a direct, natural, and unbroken chain of causation between Wade's employment in Iraq and his suicide. As it was within the prerogative of the ALJ to credit the testimony of one witness over another, the Benefits Review Board and the Ninth Circuit affirmed Judge Berlin's finding. SEII also argued that its due process rights were violated when Judge Berlin admitted a supplement to Barbara's expert report without notice. However, the Ninth Circuit held that there was no violation of due process because Judge Berlin provided each party an opportunity to brief the value of the supplemental report; SEII provided a copy of the report to its expert; and SEII's expert report addressed the supplemental report.

Fifth Circuit affirmed ALJ's decision to deny that the claimant suffered a new injury, disbelieving claimant and his treating physician; *Sea-Land Services, Inc. v. Director, OWCP*, No. 18-60698 (5th Cir. Feb. 14, 2020) (Smith).

Opinion

Clarence Ceasar injured his back and neck while working for Sea-Land in 1997. Thirteen years later, after Ceasar had undergone multiple surgeries, he entered into a settlement of his compensation claim but left his medical benefits open. As soon as the ink dried on his settlement, his physician, Dr. Dan Eidman, released Ceasar to return to work, and Ceasar went to work for Universal Maritime Service (UMS) where he complained of a new injury to his back, neck, and shoulder. Ceasar and Sea-Land argued that Ceasar had sustained a new injury or aggravation of his prior disability in the incident with UMS, and UMS argued that Ceasar's claim was a natural progression of his prior disability arising from his injury with Sea-Land. The dispute was tried before Administrative Law Judge Rosenow, who found that Ceasar had established a prima facie case with his testimony and that of Dr. Eidman and that UMS had rebutted the presumption with the testimony of Doctors David Vanderweide and Robert Kagan, who had reviewed Ceasar's records,

and Dr. Stephen Brown, who had examined Ceasar. Judge Rosenow then weighed the evidence and, giving more weight to the defense physicians and giving little weight to Ceasar's testimony (Ceasar contradicted his medical records and had a motive to ascribe his injury to UMS so that he could receive compensation), held that Ceasar's injuries were the result of a natural progression of his pre-existing condition. The Benefits Review Board and the Fifth Circuit affirmed the decision. Judge Smith explained that the ALJ was entitled to give less weight to the opinion of the treating physician when there was good cause, and there was good cause in this case as much of Dr. Eidman's testimony was inconsistent with that of Caesar, his testimony was at times internally inconsistent, and his conclusions were undermined by the well-reasoned opinions of the examining physicians.

ALJ's selection of geographic area to determine the rate for an award of attorney's fees was reviewed for abuse of discretion; it was unreasonable to conclude that lack of notice and the opportunity to respond on the community chosen by the ALJ would have resulted in a different award; *Aguilar v. Navy Exchange Service Command*, No. 19-70397 (9th Cir. Feb. 18, 2020) (per curiam).

Opinion

This is another case arising from an injury to a claimant who was employed in Hawaii, but whose attorney has offices in San Rafael, California, and Honolulu, Hawaii. After Administrative Law Judge Gee awarded medical benefits to Angela Aguilar under the LHWCA, her attorney filed his fee petition seeking an award at a rate of $525 per hour based on awards from the San Francisco Bay area. ALJ Gee then issued a lengthy opinion finding the relevant community in this case to be Hawaii and awarded fees at the rate of $350 per hour. Aguilar's attorney appealed, and the Benefits Review Board and the Ninth Circuit affirmed Judge Gee's award. The Ninth Circuit rejected the challenge to the relevant community to determine the rate for fees, noting that the Ninth Circuit has explicitly left that determination to the ALJ and BRB to make on an individualized basis. The appellate review of the decision on the relevant community is based on abuse of discretion and that decision is not overturned if it is "adequately justified and supported by substantial evidence." Here, the decision was supported by the fact that the hearing was in Honolulu at Aguilar's request, and counsel maintained an office in that venue. Additionally, the Ninth Circuit rejected counsel's argument that he did not have notice of the relevant community that was used by Judge Gee. Even though he sought fees based on awards in California, ALJ Gee issued her award based on the Hawaii market after doing extensive research on that market without giving notice to the parties that she was going to award fees based on that market. The Ninth Circuit responded that even if the ALJ erred by raising concerns on the relevant community without giving notice to the parties, the court could only overturn that decision "if it reasonably can be concluded that absent such error there would have been a contrary result." The appellate court then determined that it was "unreasonable to conclude that with notice and the opportunity to respond, the ultimate fee award would have been different."

Aggravation of a prior condition does not occur every time an employee experiences pain at work; *Calabrese v. BAE Systems Hawaii Shipyards*, Nos. 18-72644, 18-0155 (9th Cir. Feb. 18, 2020) (per curiam).

Opinion

Michael Calabrese worked for BAE Systems at its Pearl Harbor facility as an electrician and then Product Support/Maintenance Foreman. He brought this claim that his frequent climbing of stairs and ladders caused an aggravation of the avascular necrosis in his hip. ALJ Larsen credited the testimony of the employer's medical expert, Dr. Lau, over that of the claimant's medical expert, Dr. Soma, and held that claimant had not shown by a preponderance of the evidence that he suffered from a work-related aggravation of his avascular necrosis. The Ninth Circuit found substantial evidence to support that finding based on the testimony of Dr. Lau that claimant did not sustain an aggravation because he would experience pain regardless of his activity, whether at work or lying in a bed. Claimant then presented the legal argument that case law holds that an aggravation occurs whenever the employee experiences pain at work. However, the Ninth Circuit did not agree that the case law in the Ninth Circuit or other circuits stood for the proposition that instances of pain necessarily equate to an aggravation of an earlier injury or condition. As the evidence presented from Dr. Lau was sufficient to rebut the presumption (and presumably to constitute substantial evidence that claimant was not entitled to benefits, but claimant waived that argument), the Ninth Circuit affirmed ALJ Larsen's decision denying benefits.

From the federal district courts:

Scuba diver engaged in cleaning hull of yacht was covered under the LHWCA, and the vessel owner owed the diver no duty when he failed to notify the vessel of his presence; marina that granted access to the diver also owed him no duty; *In re Brizo, LLC*, No. 18-cv-80855, 2020 U.S. Dist. Lexis 17744 (S.D. Fla. Jan. 31, 2020) (Rosenberg).

Opinion

Brizo, LLC, owner of a 164-foot yacht, contracted with Eastern Marine Services, a commercial diver company, to clean the hull of its yacht. Eastern sent an email to the crew of the yacht that the cleaning would occur around June 26, 2017, but no precise date or time was provided to the crew. On June 27, 2017, Eastern sent Luis Gorgonio-Ixba to clean the hull of the yacht. He was allowed entrance to the marina where the yacht was moored and entered the water without notifying anyone on the yacht of his presence. Ixba did not use a diver flag to mark his presence in the water. Shortly thereafter, a crew member of the yacht began the process of activating a thruster on the yacht. He looked into the water and saw no bubbles and then activated the thruster, killing Ixba. Ixba's estate filed suit against the vessel owner in state court, and the owner filed this limitation action in federal court. Brizo then filed a third-party complaint in the limitation action against several defendants, including the marina owner/operator and marina's owners' association. The vessel owner, marina owner/operator, and marina's owners' association filed motions for summary judgment, and Judge Rosenberg began her analysis of the motions by determining whether Ixba was covered under the LHWCA--as it provides the exclusive remedy against the vessel in Section 905(b) for workers covered under the Act. Although Judge Rosenberg considered hull-scrubbing scuba divers to fall within the coverage of the Act, Ixba's estate argued that there was an exemption in the Act for

recreational vessels. However, that exemption only applies when the worker is covered by a state workers' compensation statute. As the Florida workers' compensation act provides that benefits are not payable for workers covered under the LHWCA, Judge Rosenberg held that the state act was not applicable and that the LHWCA was applicable. Applying maritime law to the accident, Judge Rosenberg cited the Pennsylvania Rule (a party who violates a safety regulation has the burden of proving that his fault in violating the regulation could not have been a cause of the accident). As Ixba failed to comply with regulations requiring that a diver flag his location, Judge Rosenberg concluded that the vessel owner was entitled to summary judgment. Although acknowledging that the decision of the Supreme Court in *Scindia* was applicable in this case, Judge Rosenberg held that the vessel owner owed Ixba no duty. The turnover duty and the duty to intervene are only triggered when the vessel has been turned over to the workers, but there was no turnover of the vessel in this case. Second, the premise of all of the *Scindia* duties is that the vessel crew is aware of the workers on the vessel, but Ixba was "invisible to the crew." Judge Rosenberg concluded that the vessel owner owed no duty to an unannounced, invisible worker. Finally, the owner/operator of the marina and the marina's owners' association were granted summary judgment. Although Ixba was allowed access to the vessel, the marina owner/operator and marina's owners' association had no duty to protect him from the vessel merely for granting access.

Contractor on offshore drilling rig owed no duty to employee of another contractor when it had no oversight over the employee's work and was not even present at the time of the accident; *Chiasson v. Brand Energy Solutions, LLC*, No. 6:16-cv-968, 2020 U.S. Dist. Lexis 24163 (W.D. La. Feb. 11, 2020) (Summerhays).

Opinion

Seadrill chartered its semi-submersible drilling vessel WEST CAPRICORN to BP Exploration & Production, and BP hired M-I to provide drilling fluids to support the drilling operations. At the end of the charter, Seadrill prepared to stack the vessel. BP hired Ecoserv to clean out the vessel's eight mud tanks, and M-I and Seadrill then inspected the tanks to confirm that they were clean before sealing the tanks. Seadrill contracted with M&M Industrial Services to provide scaffold builders to assist with maintenance work on the mud tanks, and M&M subcontracted with Brand Energy to erect the scaffolding. Before conducting the maintenance work on the tanks, Seadrill inspected all of the tanks and found some mud in one of the tanks, No. 7. All of the tanks were reopened and re-inspected, and the other seven tanks were found to be clean and then re-sealed. The only way for mud to re-enter the tank would be for Seadrill personnel to open a valve to the tank. Blaine Chiasson was employed by Brand Energy to erect the scaffolding in the mud tanks, and he immediately noted that there was mud in the tank in which he was working. He requested and received rubber boots from Seadrill to perform the work. At the Job Safety Analysis meeting before work on the second day, Chiasson was notified that the tanks were slippery. Chiasson worked for about nine hours that day, climbing in and out of Tank 5 approximately six times without incident. However, on his last trip into the tank, he slipped and fell in drilling mud. Chiasson received benefits under the LHWCA and brought this suit against M-I and others, asserting that M-I was liable for failing to remove the drilling mud from Tank 5. M-I argued that it owed no duty to employees of a third-party performing work on the tanks more than a month after M-I completed its work, and Judge Summerhays agreed.

Applying the general maritime law, Judge Summerhays held that an independent contractor owes no duty to employees of a fellow independent contractor unless it exercised operational control over the work the employee performed. As M-I had no oversight over Brand Energy employees and was not even present at the time of the accident, M-I owed no duty to Brand Energy's employee that would encompass the risk that the employee would injure himself by performing an unsafe action that he undertook without any direction from M-I. Even if M-I did owe a duty to Chiasson, Judge Summerhays ruled that the duty was not breached as the evidence demonstrated that Tank 5 was clean and dry when M-I left the vessel, and Chiasson could not point to any evidence otherwise. Finally, Judge Summerhays found insufficient evidence of a causal connection between any breach of duty and Chiasson's injury. Both Chiasson and his supervisor were aware of the slippery conditions in the tank, and Chiasson took extra precautions due to the slippery conditions. Thus, M-I had no duty to warn him of what he already knew.

Union and stevedoring companies did not discriminate against longshoreman when he was fired for bringing a seat cushion to a vehicle; *Barneman v. International Longshoremen's Association, Local 1423*, No. 2:17-cv-51, 2020 U.S. Dist. Lexis 24638 (S.D. Ga. Feb. 12, 2020) (Baker).

Opinion

Rayfield L. Barneman, a 68-year old longshoreman, suffers from a chronic back condition that is aggravated by sitting. As a result, he carried a seat cushion with him to work when he sat in new automobiles and shuttle vans. He was discharged for violating the "no personal items" policy when he tried to bring a cushion into a vehicle in violation of the policy. He then brought claims against the Longshoremen's Union and his stevedoring employers for age and disability discrimination. Finding legitimate, non-discriminatory reasons for his termination and reasonable efforts to accommodate his disability, Judge Baker dismissed the claims.

Longshore worker may not recover in his third-party action his past medical expenses that were billed but not paid by the LHWCA carrier, but the worker can recover the full amount of future medical expenses until the credit for his recovery is exhausted; *Padgett v. Fieldwood Energy, LLC*, No. 6:18-cv-632, 2020 U.S. Dist. Lexis 25706 (W.D. La. Feb. 13, 2020) (Doughty).

Opinion

Richard Padgett was injured while working as a pipe fitter on Fieldwood Energy's platform on the outer Continental Shelf. He was paid medical and compensation benefits under the LHWCA and brought this lawsuit seeking to recover from Fieldwood Energy and its contractor, Facilities Consulting Group (FCG). FCG filed a motion to exclude evidence of medical charges that were in excess of the fee schedule under the LHWCA as they were not actually paid for treatment. Bound by the *DePerrodil* decision from the Fifth Circuit, Judge Doughty held that Padgett could not recover for medical expenses that were billed but not paid. However, Padgett argued that future medical expenses should be treated differently as the LHWCA carrier would not be required to provide future medical care until the net credit from Padgett's recovery (in excess of the

employer/carrier recovery of past compensation and medical payments) was exhausted. As the employee would not receive the benefit of the LHWCA fee schedule until he exhausted the credit, Judge Doughty ruled that Padgett should not be prohibited from presenting evidence of the undiscounted amount of his future medical expenses.

And on the Maritime Front . . .

From the federal appellate courts:

Subsidiary of contracting party was required to be named as an additional insured because of interchangeable references to the contracting party and its subsidiaries in the master service agreement; *Mays v. C-Dive, L.L.C.*, No. 19-30106 (5th Cir. Feb. 5, 2020) (Costa).

Opinion

Four divers employed by C-Dive in the decommissioning of a pipeline in the Gulf of Mexico, offshore Louisiana, were injured in an explosion and brought this suit against C-Dive and the owner of the pipeline, Gulf South Pipeline Company. Gulf South is a subsidiary of Boardwalk Pipelines, LP, which entered into a master service agreement with C-Dive. Gulf South sought additional insured coverage on C-Dive's insurance policies in accordance with the provision of the master service agreement that stated: "All [of C-Dive's insurance] policies . . . shall be endorsed to include Boardwalk Pipelines, LP as an additional insured and these policies will respond as primary to any other insurance available to Boardwalk." The agreement also stated that "[r]eference to Boardwalk shall also include its subsidiaries and . . . affiliates of Boardwalk, including . . . Gulf South." Judge Milazzo previously concluded that the master service agreement was maritime, so there was no problem with the anti-indemnity and anti-insurance provisions of the Louisiana Oilfield Indemnity Act. She then held that Gulf South was an additional insured on C-Dive's liability policies, which led to this appeal. The insurers argued that the specific reference in the additional insured provision only to Boardwalk Pipelines, LP, compared to the use of Boardwalk (which included subsidiaries) elsewhere in the agreement, reflected a specific intent to differentiate these parties such that only Boardwalk Pipelines, LP, and not its subsidiary Gulf South, was afforded additional insured coverage. Writing for the Fifth Circuit, Judge Costa concluded that the reference to Boardwalk Pipelines, LP in the additional insured provision encompassed Gulf South. He noted that the agreement used Boardwalk Pipelines, LP and Boardwalk interchangeably throughout the document. That was demonstrated by the provision that Boardwalk Pipelines was referred to as Boardwalk but then stated that reference to Boardwalk would include its subsidiaries, including Gulf South. Thus, when the additional insured provision named Boardwalk Pipelines, LP, it referred to Boardwalk, which referred to Gulf South. Even the additional insured provision used the terms interchangeably when it provided for the naming of Boardwalk Pipelines, LP and then provided that the policies would be primary to any other insurance available to Boardwalk. Judge Costa reasoned that it would make no sense to require the policies to name only the parent company when the policies were primary to the coverage of the subsidiaries. Judge Costa therefore held that Judge Milazzo correctly ruled that C-Dive's insurance policies unambiguously included Gulf South as an additional insured.

Failure to respond and inadequate response to pre-trial order in the DEEPWATER HORIZON litigation resulted in dismissal of claims; *In re DEEPWATER HORIZON*, No. 18-31292 c/w No. 18-30001 (5th Cir. Feb. 13, 2020) (per curiam).

Opinion

Park National Corp. and Destin Development, L.L.C. brought claims for economic loss and property damage in the litigation arising out of the DEEPWATER HORIZON/Macondo blowout. As many claims were settled with the Deepwater Horizon Economic and Property Damage Settlement Agreement, Judge Barbier issued Pre-Trial Order 65, which required remaining property damage/economic loss claimants to answer four questions by April 11, 2018. On May 25, 2018, Judge Barbier issued a Show Cause Order that required any plaintiff who failed to file a PTO 65 submission to show cause by June 15, 2018, why that plaintiff's claims should not be dismissed with prejudice. The Show Cause Order listed both Park National and Destin Development as having failed to file the required submission. Destin filed a response on June 15, 2018, stating that its attorney had not been served with or seen PTO 65. Park National did not respond to the Show Cause Order. Judge Barbier then dismissed their claims with prejudice. The Fifth Circuit held that there was sufficient contumacious conduct to support the dismissal. That was easy for Destin Development, which failed to respond. With respect to Park National, its counsel had failed to sign up for electronic service as required by a previous order. The failure to comply with multiple orders demonstrated the requisite contumacious conduct.

Fifth Circuit reversed expert, liability, and indemnity decisions of the district judge in a "byzantine dispute arising out a catastrophic oil well blowout" on a vessel in the Gulf of Mexico; *Certain Underwriters at Lloyd's London v. Axon Pressure Products Inc.*, No. 18-20453 (5th Cir. Feb. 21, 2020) (Duncan).

Opinion

In 2010, Axon was hired by Seahawk Drilling to work on equipment on the HERCULES 265 drilling vessel, including refurbishing equipment designed to prevent blowouts. That contract was later assigned to Hercules Drilling, which became owner of the vessel and entered into a drilling contract with Walter Oil & Gas. In 2013, a blowout occurred, and Walter incurred over $70 million in expenses. Its insurers, Certain Underwriters at Lloyd's, paid Walter over $48 million, and Walter and its insurers brought this action against Axon, asserting products liability claims related to parts on which Axon had worked that allegedly caused the blowout. Axon filed a counterclaim against Walter for indemnity in the capacity as a third-party beneficiary of the drilling contract and brought a third-party claim against Hercules Drilling. Hercules Drilling then sought indemnity from Walter. District Judge Hoyt ruled that Axon was entitled to indemnity from Hercules Drilling and Walter for the claims brought against Axon by Walter, and he also held that Hercules was entitled to indemnity from Walter for the claims brought by Axon against Hercules. After striking the opinions of a number of experts, Judge Hoyt then ruled that Walter and the underwriters failed to prove causation and failed to show that Axon's products were defective. The Fifth Circuit disagreed with most of Judge Hoyt's rulings. Judge Duncan agreed with Judge Hoyt that it was the contract between Seahawk and Axon that governed between those parties, and that contract provided for Hercules, which

assumed the contract, to defend and indemnify Axon for the claims brought by Walter against Axon in this suit. Judge Duncan disagreed, however, that Walter was required to indemnify Axon as a third-party beneficiary of the drilling contract between Hercules Drilling and Walter. The drilling contract required that Walter indemnify Hercules Drilling for some risks and that it indemnify Hercules Drilling and its contractors and suppliers for other risks. As the damages sought in the suit were allocated to Walter only with respect to the claims of Hercules, Walter was not required to indemnify Axon in this case. Although the drilling contract required Walter to indemnify Hercules for the damages sought in the suit, Walter did not bring an action against Hercules directly. Axon was entitled to indemnity from Hercules, and Hercules sought to pass that obligation to Walter. However, the drilling contract provided that the allocation provisions did not apply to actions that arose solely by reason of an indemnity agreement. Consequently, Judge Duncan held that Hercules could not obtain indemnity from Walter for Hercules' obligation to indemnify Axon. Turning to the products liability claims brought by Walter and the underwriters against Axon, Judge Hoyt struck the expert testimony of Simon Bellemare but failed to explain why. As the appellate court had no way of knowing whether Judge Hoyt performed his gatekeeping responsibility properly, Judge Duncan reversed the judgment in favor of Axon and held that Judge Hoyt should "examine afresh the admissibility of Bellemare's expert testimony and give reasons for [his] decision." Judge Duncan also reversed Judge Hoyt's decision to strike supplemental expert reports from Sones, Bourgoyne, Williams, Rusnak, Bellemare, and Adair (for being submitted untimely) as Judge Hoyt's cryptic order had not examined the factors necessary for the sanction of excluding evidence in violation of a scheduling order. Finally, Judge Duncan reversed Judge Hoyt's grant of summary judgment that Walter and the underwriters failed to show a question of material fact on causation and the unreasonably dangerous nature of the equipment on which Axon had worked. Judge Hoyt focused on the conclusion of Walter's investigation that by the time Walter attempted to close the rams, the well was flowing at a pressure exceeding the blowout preventer's capabilities. However, Judge Duncan did not find that admission dispositive as there was evidence that a defect in the rams prevented the flow from stopping after they had been activated. Moreover, Judge Hoyt's ruling that there was not a question of fact on the issue of an unreasonably dangerous condition was "pithy to the point of being incomplete"—a single sentence.

Fifth Circuit clarified shipyard's right to removal of asbestos case under the Federal Officer Removal Statute; *Latiolais v. Huntington Ingalls, Inc.*, No. 18-30652 (5th Cir. Feb. 24, 2020) (en banc) (Jones).

Opinion

After struggles of the courts within and without the Fifth Circuit over the standard for removal of suits under the Federal Officer Removal Statute, including this case (April and June 2019 Updates), the full Fifth Circuit clarified when shipyards can remove claims of asbestos exposure from state to federal court. Latiolais was exposed to asbestos while serving as a machinist on the USS TAPPAHANNOCK when it underwent refurbishing at Avondale. He brought this suit in Louisiana state court against Avondale for causing him to contract mesothelioma by failing to provide adequate safety equipment and failing to warn him about the hazards of asbestos. He only brought negligence claims as the courts had held that strict liability claims were removable. Avondale removed the case to federal

court pursuant to the Federal Officer Removal Statute, and the district judge and the original panel of the Fifth Circuit sided with Latiolais' beneficiaries, who pursued the case after his death. The original panel ordered that the case should be remanded to state court, but the full Fifth Circuit unanimously held that the removal was proper. The statute permits an officer of the United States, or anyone acting under that officer, to remove a case, if it acted pursuant to the federal officer's directions and asserts a colorable federal defense. As Avondale was working under its federal contract with the Navy for repairs to the TAPPAHANNOCK, it satisfied the requirement that it be a person acting under a federal officer. The question was whether Avondale asserted a colorable federal defense. Judge Jones noted that no federal question need be raised in the well-pleaded complaint as long as the defendant asserted a federal defense in its response. Some case law had required that the defendant establish a direct causal nexus test between the defendant's actions performed under color of federal office and the plaintiff's claims. Following that authority, the panel of the Fifth Circuit had originally ruled that the negligence claims, such as failure to warn, failed the causal nexus requirement. The full Fifth Circuit held that all that was necessary was that the action be connected with or associated with an act under color of federal office. As the allegations were that Avondale was negligent in the installation of asbestos and failing to warn about its dangers, that negligence was associated with the performance of Avondale's work and sufficiently related to an act under color of federal office. Finally, Judge Jones held that Avondale had sufficiently asserted the federal defense outlined in *Boyle v. United Technologies Corp.*, extending federal immunity to contractors in the performance of discretionary duties when the contractor establishes that the United States approved reasonably precise specifications, the equipment conformed to those specifications, and the supplier warned the United States about the dangers of use of the equipment that were unknown to the United States. In this case, the Navy required Avondale to install asbestos and to comply with certain related safety practices, and Avondale complied with those specifications. Finally, Avondale established that the United States knew more about the hazards of asbestos than Avondale did, so Avondale did not fail to warn the United States of dangers about which the United States was unaware. Therefore, Avondale pled a colorable federal defense and satisfied all of the requirements for removal.

Fifth Circuit affirmed district court's decision to deny attorney's fees to both parties when both were the "prevailing party" on breach of maritime contract claims; *Genesis Marine, L.L.C. of Delaware v. Hornbeck Offshore Services, L.L.C.*, No. 19-30313 (5th Cir. Feb. 26, 2020) (Ho).

Opinion

This litigation arose out of the sale of nine vessels from Hornbeck to Genesis. As Hornbeck already had charter agreements for the vessels in place, Hornbeck and Genesis entered into contracts to provide for continuing service to existing customers--a crew management agreement, a ship management agreement, and a set of back-to-back agreements. The dispute in this case involved existing customer Anadarko Petroleum and the back-to-back agreement involving Anadarko that made the agreement subject to the Master Time Charter with Anadarko. The Master Time Charter provided for the recovery of attorney's fees by the prevailing party in a dispute involving that agreement. This litigation followed a dispute between Hornbeck and Genesis, and district judge Lemelle awarded $722,346.35 to Genesis and $117,284.54 to Hornbeck. Both parties sought

attorney's fees as the prevailing party, and Judge Lemelle held that because both parties prevailed, neither should be awarded attorney's fees. Writing for the Fifth Circuit, Judge Ho first had to determine who is a prevailing party in a maritime contract dispute. As neither the Supreme Court nor the Fifth Circuit had addressed that question, Judge Ho looked to the decisions interpreting who is a prevailing party in non-maritime contexts. Adopting the test to determine who is a prevailing party used by the Fifth Circuit in civil rights cases brought under 42 U.S.C. § 1988 (whether there has been "a material alteration of the legal relationship" between the parties), Judge Ho agreed that both parties had prevailed. Genesis prevailed because it obtained a judgment for $722,346.35 that placed Hornbeck in Genesis's debt. Hornbeck prevailed because it obtained a $117,284.54 judgment that forced Genesis to pay an amount that it would otherwise not have paid. Given the "considerable discretion" of the district court "to make an assessment as to the reasonableness of awarding fees to both parties or, conversely, neither," Judge Ho affirmed Judge Lemelle's decision to award fees to neither party.

From the federal district courts:

Summary judgment granted on BELO claim from Macondo/DEEPWATER HORIZON cleanup in the absence of expert opinion to support causation; *Garcia-Maradiaga v. BP Exploration & Production Inc.*, No. 18-11850, 2020 U.S. Dist. Lexis 15673 (E.D. La. Jan. 30, 2020) (Ashe).

Opinion

Denis Garcia-Maradiaga brought this Back-End Litigation Option suit pursuant to the Deepwater Horizon Medical Benefits Class Action Settlement Agreement as a clean-up worker who was exposed to oil, dispersants, and other harmful chemicals and who suffered later-manifested physical conditions. As such, Garcia-Maradiaga was required to prove that his medical conditions were legally caused by his exposure to substances related to the DEEPWATER HORIZON/Macondo oil spill. When the deadline passed for designation of expert witnesses without Garcia-Maradiaga submitting an expert report, BP filed a motion for summary judgment. Holding that expert testimony was required to establish causation in toxic-tort exposure cases, Judge Ashe held that the failure to produce an expert report was fatal to Garcia-Maradiaga's case and granted summary judgment to BP.

Summary judgment on contractual liability claim for defense and indemnity was held to be premature when Louisiana law was claimed to be applicable to the contract; *Peters v. Oceaneering International, Inc.*, No. 18-7235, 2020 U.S. Dist. Lexis 15665 (E.D. La. Jan. 30, 2020) (Guidry).

Opinion

Carl Peters brought this action against Oceaneering seeking to recover for an injury on a semi-submersible floating production system, Delta House, located on the outer Continental Shelf in Mississippi Canyon Block 254. Oceaneering brought a third-party claim against Peters' employer, GIS, seeking contractual defense and indemnity and moved for summary judgment that it was entitled to defense and indemnity. GIS responded that the contractual defense and indemnity was void under the Louisiana

Oilfield Indemnity Act (LOIA), which GIS asserted was applicable under the Outer Continental Shelf Lands Act. Oceaneering answered that the LOIA was not applicable because Mississippi Canyon Block 254 and Delta House are located adjacent to the states of Alabama and Mississippi and not Louisiana. Additionally, Oceaneering argued that, if Louisiana law was applicable, it was premature to determine whether Oceaneering was entitled to recover under the contract as there was no determination that it was at fault so as to trigger the anti-indemnity provisions of the LOIA. Noting the cases that have held that summary judgment on the merits of an LOIA defense is premature before fault has been assessed, Judge Guidry punted on the issue whether Louisiana law was applicable and held that it was premature to rule on GIS's motion for summary judgment.

United States, and not its agent or its agent's affiliate, is liable for injuries suffered by a seaman on a Ready Reserve Force vessel owned by the United States and operated by its agent; *Shaw v. United States*, No. 18-cv-6243, 2020 U.S. Dist. Lexis 16405 (N.D. Cal. Jan. 30, 2020) (Hamilton).

Opinion

Damar Shaw was employed as a crew member of the ALGOL, a vessel in the Ready Reserve Fleet owned by the United States and operated by Ocean Duchess, Inc. Shaw was injured when he was struck by a mooring line while the vessel was being moved back to the pier in San Francisco following a Turbo Activation exercise. He brought this suit against the United States and Ocean Duchess and a sister company under the Jones Act and general maritime law (unseaworthiness, maintenance and cure, and wages). He also asserted claims of gross negligence against Ocean Duchess and its sister company. The United States moved for summary judgment on behalf of Ocean Duchess and its sister company—for Ocean Duchess on the ground that the exclusive remedy for the seaman under the Suits in Admiralty Act was against the United States and not its agent, Ocean Duchess, and for the sister company on the ground that the sister company was not involved in the operation of the ALGOL. Shaw responded that Ocean Duchess was individually liable because it was grossly negligent and acted outside the scope of its Ship Manager Contract with the United States. That contract required the United States to indemnify Ocean Duchess for negligence but not gross negligence. However, Judge Hamilton answered that the indemnity agreement did not alter the fact that Ocean Duchess was acting as an agent of the United States. As the Agreement did not carve out any exception to the agency of Ocean Duchess for gross negligence, Ocean Duchess was an agent of the United States and was entitled to summary judgment. Although the sister company was not acting as an agent for the United States, it did not have any role in managing or operating the ALGOL. Therefore, Judge Hamilton granted summary judgment in favor of the sister company and dismissed Shaw's claims against it as well.

Passenger suit against cruise line was transferred to federal court in Miami despite arguments that the forum-selection clause in the ticket was not reasonably communicated to the passenger and that the Miami forum was inconvenient due to the health and age of the passenger; *La Huff-Berry v. Royal Caribbean Cruises Ltd.*, No. 19-cv-7946, 2020 U.S. Dist. Lexis 17935 (D.N.J. Jan. 30, 2020) (Cecchi).

Opinion

After Sherry La Huff-Berry was injured on a Royal Caribbean cruise ship, she brought this action against the cruise line in federal court in New Jersey. The cruise line moved to dismiss the case or transfer it to the federal court in Miami pursuant to a forum-selection clause in the Guest Ticket Booklet. The passenger did not dispute the existence of the clause, but claimed it was unenforceable for two reasons. First, the passenger asserted that the clause was only provided to her on the purchased ticket, not before purchase, and that the clause was unable to be viewed unless the passenger knew to specifically view that section of the online ticket. However, forum-selection clauses have been upheld even though the contract was not available online prior to purchase. In this case, the ticket used by the passenger to board the vessel contained bold capital letters directing the passenger to pay attention to the section of the ticket containing the forum selection clause. Consequently, Judge Cecchi held that the clause had been reasonably communicated. Judge Cecchi also rejected the passenger's arguments that her health and age prevented her from traveling to Miami, as technology can eliminate the need for the passenger to travel to the forum. Balancing the private and public interest factors, Judge Cecchi held that the weight of the factors favored transfer, and she transferred the case to the Southern District of Florida.

Strict products liability held not applicable to passenger's claim against cruise ship for an injury sustained on the FlowRider surfing simulator on the ship; *Brennan v. Royal Caribbean Cruises, Ltd.*, No. 19-21478, 2020 U.S. Dist. Lexis 17037 (S.D. Fla. Jan. 31, 2020) (Martinez).

Opinion

Scott Brennan was injured while using the FlowRider surfing simulator on Royal Caribbean's cruise ship. His complaint against the cruise line alleged two causes of action, negligence and strict products liability. The one count of negligence contained approximately 36 theories of liability, and Judge Martinez dismissed that count without prejudice as a shotgun pleading under the "one-claim-per-count rule." The second count asserted a claim for strict products liability for negligent design, installation, and utilization of the surfing simulator. As a strict liability claim applies to sellers of products and not services, Judge Martinez held that the passenger had not established any basis to support a strict liability claim with respect to the surfing simulator, and he dismissed that count with prejudice.

Court determined value of unique sailing vessel for which there is no active market; *In re Manhattan By Sail, Inc.*, No. 12-cv-8182, 2020 U.S. Dist. Lexis 16978 (S.D.N.Y. Jan. 31, 2020) (Caproni).

Opinion

Charis Tagle, a customer aboard the SHEARWATER, was injured on April 30, 2011, and the vessel owner brought this action seeking limitation of liability. That required Judge Caproni to determine the value of the vessel, an 82-foot sailing vessel built in 1929 from native hardwoods. The owner purchased the vessel and its previous owner's business (overnight travel) in 2001 for $525,000. The vessel was severely damaged a year or two later, requiring reconstruction costing approximately $700,000. That increased the

vessel's useful life, but it did not include any upgrades unrelated to the repairs. The vessel was insured for an agreed value of $800,000. The prior owner did not generate any significant profit, but after changing the use of the vessel to harbor cruises, the new owner was able to generate net income of $124,722 in 2011. The owner and claimant each engaged experts, and they opined that the vessel was worth $300,000 and $750,000 to $800,000, respectively. Judge Caproni did not find either expert or the valuation methods presented to be "particularly credible." As there was no active market for the SHEARWATER, the comparable sales approach could not reliably estimate its value in 2011. The income approach could not generate a reliable value as there was no evidence as to how the value could be calculated using annual profits. A cost-plus depreciation approach could not be used based on the construction of the vessel in 1929, but a modified approach based on the reconstruction of vessel in 2006 was an alternative. The fact that the owner spent approximately $700,000 for the reconstruction, including $225,000 from its insurance carrier, indicated that the vessel was worth at least $475,000 to its owner. The owner, however, had a specific interest in historic, wooden sailing vessels and was willing to pay more than its market vessel to restore it, despite its being a business asset that generated a profit. Giving consideration to the owner's being willing to spend more than the value of the vessel and to insure the vessel for more than its value in order to prevent the insurer from declaring the vessel to be a total loss in the event of major damage, Judge Caproni held that the value of the SHEARWATER was $450,000 on April 30, 2011.

Wind on the deck of a cruise ship is not so open and obvious a danger as to require dismissal of a passenger's suit before discovery; *Marabella v. NCL (Bahamas), Ltd.*, No. 19-cv-25185 (S.D. Fla. Feb. 3, 2020) (Bloom).

Opinion

Barbara Marabella, a passenger on the NORWEGIAN PEARL, was injured while walking on the ship's exterior deck when a strong wind twisted her body around and caused her to fall. She brought this suit alleging that the cruise line was negligent for failing to restrict passenger access to the deck due to high winds and failing to give warnings about the high winds to the passengers exiting onto the deck. The cruise line responded with a motion to dismiss, arguing that wind on the outer deck of a cruise ship is an open and obvious condition. Although most of the judges in the Southern District of Florida require a factual record in order to determine whether a condition was open and obvious, the cruise line argued that wind is a naturally occurring condition that is open and obvious as a matter of law. Concluding that there was no binding or persuasive case law to establish that point, Judge Bloom declined to dismiss the complaint on that ground before discovery had been undertaken.

Agreement to share boats at construction site was insufficient to allow non-owner that was operating the vessel at the time of the accident to seek limitation of liability as operator; *In re CF, LLC*, No. 2:19-cv-154, 2020 U.S. Dist. Lexis 21876 (W.D. La. Feb. 3, 2020) (Cain).

Opinion

CF and LeBlanc Marine worked together on construction projects, including work at the Rockefeller Wildlife Refuge in Southeast Louisiana. CF and LeBlanc Marine had an oral agreement to share each other's boats and equipment at the construction site. Each provided two boats, and they split the profits from the job (theoretically splitting the expenses). Durward LeBleu, an employee of Sitech, sustained injuries while riding on the LISA ANN, a boat owned by LeBlanc Marine, but which was being used by CF, whose employees were driving the boat and arranged for the transportation of LeBleu. CF filed this action seeking limitation of liability, asserting that it exercised such dominion and control over the vessel that it should be entitled to the protections of the Shipowners' Limitation of Liability Act. CF based this argument on the fact that it provided the operators for the vessel, navigated it, shared fuel costs for it, and generally managed the operation of it. However, Judge Cain pointed out that CF did not provide insurance for the vessel, was not responsible for its repair and maintenance unless a CF employee caused the damage, and was not making payments for the use of the vessel. Thus, even though CF was operating the vessel at the time of the accident, Judge Cain did not find a sufficient transfer of ownership responsibilities to CF to allow it to seek limitation.

District court again dismissed complaint of passenger on cruise ship who suffered a stroke in the Bahamas, but the judge provided additional guidance on repleading proper causes of action; *McFee v. Carnival Corp.*, No. 19-22917, 2020 U.S. Dist. Lexis 21062 (S.D. Fla. Feb. 3, 2020) (Lenard).

Opinion

The case of Robert McFee returns to the Update (October 2019 Update). McFee had suffered strokes in the past, so when his family was booking a cruise over the phone with Carnival, they asked if Carnival would fly McFee back to the United States if he suffered another stroke. Carnival's agent allegedly responded by offering a travel insurance policy that would ensure that McFee would be adequately treated and flown back to the United States if he suffered a stroke. The family booked the cruise and purchased the policy. McFee did suffer a stroke on an excursion in the Bahamas and was taken back to the ship. The ship's physician advised that he would have to disembark and seek medical attention at a medical facility in the Bahamas, requiring a CT scan and assessment by a neurologist. However, the medical facility did not have a neurologist, equipment for a CT scan, or medicine that McFee needed. McFee could not return to the ship as it was leaving, so his family had to book a commercial flight to the United States, allegedly resulting in aggravation of his condition. Judge Lenard initially dismissed McFee's claim that the cruise line owed him a non-delegable duty to provide reasonable medical care, but allowed him to plead a fraudulent inducement claim. McFee filed an amended complaint, asserting 19 causes of action, and Judge Lenard addressed the seven counts specifically challenged by the cruise line. The first count alleged negligent hiring and/or retention under an assumption of duty theory. The second count alleged negligent supervision and/or training under an assumption of duty theory. Aside from being verbose, confusing, and failing to allege sufficient facts, these counts were impermissible shotgun pleadings because they asserted two causes of action. Therefore, Judge Lenard dismissed these counts with instructions on how to replead those claims. The cruise line objected to the third count, negligent failure to warn under an assumption of duty theory, arguing that the maritime law does not contain authority for the proposition that staffing the ship with incompetent medical staff is acceptable as long as passengers are sufficiently warned.

McFee narrowed his argument to assert that the failure to warn was that the ship did not have sufficient medicine to treat passengers suffering from a stroke. However, that is not what the pleading alleged. Judge Lenard was not prepared to conclude that the cruise line could never voluntarily assume a duty to warn passengers of insufficiency in the medicines available to treat passengers suffering from a stroke and allowed McFee to replead this count. The fourth count asserted that the cruise line breached its duty to warn McFee that its medical personnel did not have proper licenses. Judge Lenard recognized that the cruise line owed McFee a duty to hire competent and qualified medical personnel, and that if it breached that duty the cruise line would be liable for negligent hiring. However, Judge Lenard found it absurd to argue that the cruise line had a duty to warn that it negligently hired its medical staff. Therefore, Judge Lenard dismissed this count. Count five alleged negligent failure to warn under an assumption of duty theory in four ways: that the cruise line was unable to ensure that McFee would be promptly taken care of if he suffered another stroke, that it was unable to ensure that it would fly him back to the United States if he could not be treated on the ship, that he would be at the mercy of a medical facility in the closest port-of-call, and that it could not ensure that he would receive the medical treatment he needed at such medical facility. Although this was a shotgun pleading, Judge Lenard addressed the four allegations and found that the first three were not imposed by the general maritime law. With respect to the fourth duty, the complaint did not allege that the cruise line knew or should have known that Freeport, Bahamas, had substandard medical facilities. Therefore, the count was dismissed for repleading. Count six alleged that the cruise line assumed a duty to follow up with McFee to be sure he was receiving adequate medical care ashore and that it breached that duty when the ship left port without following up on his treatment. Judge Lenard found no authority that the cruise line that directs a passenger to treatment ashore has any duty to ensure that he received adequate medical care ashore. However, even if such a duty existed, the complaint did not allege sufficient facts to support the theory. Noting that a shipowner incurs no liability when it leaves a passenger in the care of a local facility, Judge Lenard dismissed this count (without prejudice) for failure to state a claim. Finally, Judge Lenard addressed the count alleging that the cruise line fraudulently induced McFee to go on the cruise by falsely representing that if he purchased a traveler's insurance policy he would be flown back to the United States if he could not be treated on the ship. Judge Lenard was convinced that the allegations were sufficient with respect to content and the manner of misleading McFee; however, they were insufficient with respect to the time and place of the statements and the person responsible for making them. Therefore, Judge Lenard required the count be repleaded.

Evidence that seaman's PTSD was permanent was held to be insufficient to terminate maintenance and cure; *In re B&C Seafood LLC*, No. 18-1560, 2020 U.S. Dist. Lexis 18067 (D.N.J. Feb. 4, 2020) (Kugler).

Opinion

After a collision between the M/V OLEANDER, a container ship, and the fishing vessel F/V TOOTS II, two crew members of the fishing vessel, twin brothers Jesse and Kirk Sullivan were treated for post-traumatic stress. When their doctors opined that the seamen's condition was permanent and that it would permanently prevent them from ever returning to work as commercial fishermen, their employer brought a motion in the limitation of liability action to terminate their maintenance and cure. The seamen

responded that they still required long-term treatment for chronic PTSD due to the beneficial effects of the treatment. Judge Kugler cited the governing case law that the issue is whether the treatment will be curative (will improve their condition) or be palliative (alleviate their symptoms but not improve their condition). Judge Kugler did not consider the evidence that the condition was permanent to be sufficiently unequivocal to terminate maintenance and cure because the doctors did not state whether the treatment was truly curative or merely palliative. Consequently, Judge Kugler denied the motion at this stage of the proceedings.

Cruise line had sufficient notice of injuries to passengers during Ripcord by iFly activity to allow passenger's suit to survive a motion for summary judgment; *Taylor v. Royal Caribbean Cruises Ltd.*, No. 18-cv-24093, 2020 U.S. Dist. Lexis 17551 (S.D. Fla. Feb. 4, 2020) (Gayles).

Opinion

Pamela L. Taylor was injured while participating in the Ripcord by iFly acitivity on the ANTHEM OF THE SEAS. During the activity, the passenger floats, with the assistance of an instructor in a skydiving position in a large clear tube with recirculating wind. Taylor had to sign a waiver, watch an instructional video, and receive additional instruction from her instructor, Renato Xerez. A few seconds into her one-minute flight, she felt pulling and bending of her left arm. Taylor felt some discomfort in her arm after the flight, but the pain increased a few hours later and she sought medical attention and was diagnosed with a shoulder dislocation. She brought this suit against the cruise line for using unnecessary force during the activity, and the cruise line moved for summary judgment on the grounds that it did not have notice of the risk-creating condition and that the danger was open and obvious. The cruise line presented evidence that more than 300,000 passengers have booked the iFly activity on its ships, and only three have claimed to suffer shoulder injuries. None of those had ever pursued a claim against the cruise line, and only one had involved instructor Xerez. It did not matter to Judge Gayles that none of the prior incidents had ever involved a passenger pursuing a claim. The fact that there were three prior incidents involving claims of a shoulder injury out of 300,000 bookings was sufficient notice to create a fact question whether the cruise line had constructive notice of the risk-creating condition. Judge Gayles also held that there was a fact question on the open-and-obvious defense. While the risk of being touched by an instructor or falling in the tube might be open and obvious, Judge Gayles found that there was a genuine issue of material fact whether the manner and force used by Xerez to pull the passenger's arm were unreasonable or unforeseeable.

Claims of passenger against cruise line for reasonable care and highest care, with eight pages of legal argument, were dismissed by the court sua sponte as an improper pleading; *Reese v. Carnival Corp.*, No., 20-20475, 2020 U.S. Dist. Lexis 20155 (S.D. Fla. Feb. 6, 2020) (Scola).

Opinion

Kelley Reese slipped and fell while a passenger on a Carnival cruise ship. She brought this action asserting two counts against Carnival as the owner of the ship and two as the operator of the ship. Each pair of claims alleged that Carnival owed Reese the duty of

reasonable care and the duty of highest care. Each count alleged at least fifteen ways by which Carnival breached the standard of care, cramming multiple, distinct theories of liability into one claim. Additionally, Reese's complaint contained eight pages of legal argument. Without waiting for a motion to dismiss, Judge Scola engaged in an independent review of the pleading and struck the complaint as a shotgun pleading. In so doing, he noted that the paragraphs of legal argument have no basis in the complaint and that they could be addressed if Carnival files a motion to dismiss or motion for summary judgment.

After discovery of deterioration to the insured vessel, the insurer could have unilaterally cancelled its policy on the vessel but the insurer could not, under Kentucky law, confine the vessel to port risk; *Geico Marine Insurance Co. v. Monette*, No. 5:19-cv-44, 2020 U.S. Dist. Lexis 20345 (E.D. Kent. Feb. 6, 2020) (Hood).

Opinion

Geico issued a marine insurance policy on Charles Monette's sailboat for the period from June 30, 2018, to June 30, 2019. After Monette filed a claim for water damage to the vessel in August 2018, Geico's surveyor reported that the damage was caused by deterioration, found the boat to be in poor condition, and concluded that the boat was over-insured at $90,000. Geico then issued an endorsement on September 20, 2018, effective on October 5, 2018, amending the cruising limits of the vessel to Port Risk Ashore. That restriction provided that coverage would only apply to the vessel while it was out of the water. On October 10, 2018, the boat was damaged by Hurricane Michael while afloat in its slip in Panama City, Florida. Geico paid to have the vessel removed from the water but denied coverage for property damage as the vessel was in the water at the time of the loss in violation of the Port Risk Ashore endorsement. Geico brought this declaratory judgment action seeking a declaration that the vessel was not covered for the hurricane loss, and Monette counterclaimed that the Port Risk Ashore endorsement was void under Kentucky law (applicable under *Wilburn Boat*). Monette did not dispute that Geico had the right under Kentucky law to unilaterally cancel the policy by sending notice of cancellation in accordance with the cancellation provision of the policy. However, the policy did not contain a provision allowing Geico to modify the policy. Judge Hood noted that, under Kentucky contract law, the parties could have modified the contract by mutual assent, or Geico could have modified it if there was a provision in the policy permitting modification. However, in the absence of a provision allowing modification, Geico could not unilaterally endorse the policy for Port Risk. Therefore, the endorsement was void. Geico also argued that the policy was void for misrepresentations by Monette as to the seaworthiness of the vessel and that some of the damage was due to deterioration and not to the hurricane. Judge Hood held that there were fact questions on these issues that precluded summary judgment to either party.

Police officer was granted qualified immunity for maritime tort, but city was not; *Glover v. Hryniewich*, No. 2:17-cv-109, 2:17-cv-110, 2020 U.S. Dist. Lexis 21971 (E.D. Va. Feb. 7, 2020) (Morgan).

Opinion

The immunity issues arising from the capsizing of the City of Norfolk's SAFE BOAT during sea trials continue. Upon completion of modification and repair of the vessel by contractor Willard Marine, the vessel was undergoing sea trials with Norfolk police officer Richard J. Hryniewich at the helm. The boat capsized during a high-speed turn, injuring two employees of Willard. They brought suit against officer Hryniewich and the City, and both the officer and City invoked the doctrine of qualified immunity under the general maritime law as a defense. As to the officer, Judge Morgan held that qualified immunity is appropriate when a city employee commits a maritime tort while performing a discretionary function in the course of his employment. However, that was not an adjudication that the officer did not commit a negligent action for which the City of Norfolk was not liable under the principle of respondeat superior. Although sovereign immunity under the Eleventh Amendment extends to the states, the Supreme Court has not extended that immunity to municipalities unless they are functioning as an arm of the state. The City of Norfolk argued that it was entitled to sovereign immunity in this case because it should be treated the same as its federal and state counterparts in performing the task of providing security to the port. Although Judge Morgan found merit in that argument, he did not believe that he was in a position to abandon the precedents of the Supreme Court. Therefore, he denied the City's motion for summary judgment, but stayed the case pending the City's appeal.

Judge Barbier adopted a zone-of-danger test for maritime claims of negligent infliction of emotional distress and held that some fishermen near the DEEPWATER HORIZON might satisfy the test but some did not; *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-2179, 2020 U.S. Dist. Lexis 23130 (E.D. La. Feb. 11, 2020) (Barbier).

Opinion

This opinion involves claims of fishermen seeking to recover for negligent infliction of emotional distress because they were near the DEEPWATER HORIZON at the time of the explosion that destroyed the rig. The Andry plaintiffs were fishing from a 26-foot boat under the lip of the DEEPWATER HORIZON when liquid began raining down on them, causing their eyes to burn. The heard a loud hissing sound and quickly left the scene, getting about 50 yards away before the rig exploded. The Shivers plaintiffs were located miles from the DEEPWATER HORIZON, fishing from a 31-foot boat when a distant light caught their attention. They heard and felt a sonic boom explosion and then motored to the scene where they helped search for missing persons but found no one. They heard rumbling sounds coming from below the water and were frightened but continued searching. Both sets of plaintiffs brought suit against BP, Transocean, and others for negligent infliction of emotional distress, and the Shivers plaintiffs added a count for intentional infliction of emotional distress. The general maritime law allows a plaintiff who meets the physical injury or impact rule to recover for negligent infliction of emotional distress, but the Fifth Circuit has not ruled whether NIED claims may be brought under the general maritime law for those who are in the zone of danger. As the Fifth Circuit has applied the zone-of-danger test for NIED claims brought under the Jones Act, and as other circuit courts have applied the zone-of-danger test in maritime claims, Judge Barbier concluded that the zone-of-danger test applied to NIED claims under the general maritime law. Judge Barbier then applied the test, requiring that the plaintiff objectively be in immediate risk of physical harm and subjectively believe that he is in

immediate risk of physical harm. Hearing and feeling the explosion was not sufficient to allow the Shivers plaintiffs, who were miles away, to recover. However, the record was not sufficient for Judge Barbier to rule on whether the Andry plaintiffs faced immediate risk of physical harm. He left the issue open to be revisited upon further development of the factual record. Judge Barbier dismissed the Shivers plaintiffs' claim of intentional infliction of emotional distress because their conclusions, couched as factual allegations, did not suffice to establish that the defendants intended to inflict severe emotional distress on the plaintiffs or that the defendants knew that severe emotional distress would be certain or substantially certain to result from their conduct.

Master who was not rehired after a collision was allowed to pursue maritime claim for tortious interference with contractual relations but not defamation or intentional infliction of emotional distress based on request from his former employer to his new employer that he not work on jobs involving his former employer; *Sangha v. Navig8 Ship Management Pte Ltd.*, No. 18-131, 2020 U.S. Dist. Lexis 23926 (S.D. Ala. Feb. 11, 2020) (DuBose).

Opinion

Manjit Sangha was employed as a ship master on Navig8's vessel MISS CLAUDIA when the vessel was involved in a collision with the EURONIKE during a ship-to-ship operation. After the collision, Sangha's contract on the MISS CLAUDIA was completed and he was not offered another contract on that vessel (although he was offered a contract on another vessel and did not accept it). Instead, he went to work for Marine Consultancy as mooring master on its SONGA PEARL. When the SONGA PEARL was assigned to conduct ship-to-ship operations with the MISS CLAUDIA, Navig8 advised Marine Consultancy that Navig8 would not like to have the SONGA PEARL maneuvering alongside the MISS CLAUDIA with Sangha in charge, directly or indirectly, because of the collision in which he was involved on the MISS CLAUDIA. After Sangha was terminated by Marine Consultancy, he brought this action for tortious interference with contractual relations, defamation, and intentional infliction of emotional distress against Navig8. Navig8 filed a motion for summary judgment, and Chief Judge DuBose noted that Sangha's claims were governed by general maritime law. Guided by the principles in the Restatement (Second) of Torts, Chief Judge DuBose found evidence to support the contention of Navig8 that its motivation was to manage its risk that warranted its objection to Sangha acting as mooring master in operations with its vessel, but she also found evidence to support the contention that Navig8 acted with vindictiveness for Sangha's leaving Navig8's employment. Therefore, Chief Judge DuBose could not grant summary judgment on the tortious interference claim. With respect to the defamation claim, Sangha asserted that the communications from Navig8 implied that Sangha had caused the collision that entangled Navig8 in costly litigation. However, Chief Judge DuBose found no such implication and granted summary judgment for lack of a false or defamatory statement. Finally, Chief Judge DuBose could not find that Navig8's correspondence was so outrageous or extreme as to go beyond all bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. Therefore, she granted summary judgment on the claim of intentional infliction of emotional distress.

Marine salvor hired by the owner of a damaged oil rig was permitted to bring a pollution salvage claim against the owner's insurance broker who failed to

procure a pollution policy but was not permitted to bring extra-contractual claims under state law; *Blake Marine Group, LLC v. Frenkel & Co.*, No. 18-cv-10759, 2020 U.S. Dist. Lexis 24257 (S.D.N.Y Feb. 11, 2020) (Torres).

Opinion

Blake Marine was hired by Forward Marine to perform salvage operations on an oil rig owned by Forward Marine that received storm and hurricane damage (the Coast Guard ordered Forward Marine to remove or make the rig seaworthy and to remove waste oil onboard the rig). Forward Marine's insurance broker, Frenkel & Co. had represented that insurance covering pollution was in place, but it had failed to place the policy. Blake Marine performed the pollution removal for Forward Marine, and Forward Marine assigned its rights of recovery against Frenkel to Blake Marine. Blake Marine then brought this action, on its own behalf and as assignee of Forward Marine, against Frenkel for the more than $1.2 million in services for the pollution removal. Frenkel argued first that suits for salvage that are brought in personam can only be brought against the vessel owner, but Judge Torres disagreed. She reasoned that a salvor may bring an in personam action against anyone who has a direct pecuniary interest in the preservation of the property, and insurers are considered parties with such a pecuniary interest. As a broker who negligently fails to procure a policy stands in the shoes of the insurer, and as the insurer would have had a directly pecuniary interest in the timely salvage of the rig, Judge Torres permitted Blake Marine to bring an in personam salvage action against Frenkel. Blake Marine also brought extra-contractual claims under Texas law (violations of the insurance code and deceptive trade practices statute) as the policy was issued to Texas resident Forward Marine. However, as Blake Marine is not a citizen of Texas, it was not entitled to recover on its own behalf on the extra-contractual claims under Texas law, and Texas law does not permit the assignment of the extra-contractual claims that were brought on behalf of Texas resident Forward Marine. Therefore, those claims were dismissed. Finally, Judge Torres dismissed Blake Marine's claims under New York's deceptive trade practices statute as that law requires a broad impact on consumers at large and Blake Marine only asserted an injury to itself.

Jury's award of future medical expenses was reconcilable with its award of nothing for future pain and suffering; evidence was sufficient to support jury's finding of 80% comparative fault to the seaman; *Vargas v. Manson Gulf, LLC*, No. 18-11536, 2020 U.S. Dist. Lexis 24982 (E.D, La. Feb. 13, 2020) (Ashe).

Opinion

Alex Vargas was employed as a welder and rigger on Manson Gulf's heavy lift derrick barge, E.P. PAUP. He injured his left knee when the ladder he was using to access his bunk shifted. Dr. David Vanderweide performed arthroscopic surgery on Vargas' knee and, after Vargas completed physical therapy, released him to full duty. Vargas brought this suit against Manson, and the jury found that Manson was negligent but that Vargas was 80% at fault. The jury awarded $19,000 in past general damages (including pain and suffering), $9,000 for past lost wages, and $21,000 for future medical expenses. The jury did not award anything for future general damages (including pain and suffering) or future loss of earning capacity. Vargas sought a new trial, arguing that the award of future medical expenses was irreconcilable with the award of nothing for future pain and

suffering. Judge Ashe held that the awards were reconcilable. The jury did not believe Vargas' life care planner, Todd Cowen, who testified that Vargas would need extensive future medical treatment, including steroid injections, MRI scans, and possibly a knee replacement, and instead believed Dr. Vanderweide's testimony that it was unlikely that Vargas would need extensive treatment. Thus, the jury's award of future medical expenses, which was about $50 per month for the rest of Vargas' life for over-the-counter medication, was reconcilable with the evidence that any future pain and suffering would be controlled by minimal measures and was too minor or brief to be compensable. Judge Ashe also rejected Vargas' argument that no jury could have found him to have been 80% at fault as there was evidence that Vargas did not use the ladder at all or used it improperly, causing it to shift.

Federal declaratory judgment action on maintenance and cure was allowed to proceed after the seaman filed suit in state court when the federal trial was only two months away; *Bisso Marine, LLC v. Wyble*, No. 18-1083, 2020 U.S. Dist. Lexis 24980 (E.D. La. Feb. 13, 2020) (Ashe).

Opinion

After Eric Wyble was injured on Bisso's vessel AHT WILLIAM BISSO on October 12, 2016, Bisso offered Wyble a light-duty job at his regular pay with free lodging, and he worked at that job until May 2017. Bisso then scheduled a medical examination for Wyble and sent an employee to take him to the appointment, but Wyble failed to attend and stopped communicating with Bisso. Bisso tried to communicated with Wyble, but finally brought this action on February 2, 2018, seeking a declaration that Wyble was not entitled to additional cure as he had failed to communicate with Bisso, failed to appear for his medical appointment, and failed to cooperate with Bisso in his treatment and the investigation of his medical condition. Finally, on October 11, 2019, Wyble brought a suit in Louisiana state court asserting Jones Act negligence and maintenance and cure claims. Wyble argued that the federal action should now be dismissed as the federal action would not resolve all of the issues that were brought in the state action and would be a backdoor removal of his seaman's action. Judge Ashe balanced the factors under the Fifth Circuit's *Trejo* case as to whether the federal court should retain its jurisdiction when there is a pending state lawsuit on the same subject matter and held that the balance favored retaining federal jurisdiction. Bisso did not engage in forum shopping to avoid a state suit, waiting 16 months from the accident to bring the federal action, and that action was brought to defend against a potential claim for wrongful failure to pay maintenance and cure because Bisso ceased paying maintenance and cure when it lost contact with Wyble. In contrast to the usual policy of favoring the state forum where all claims were pending on the basis of judicial economy, the federal case had been developed to the point that trial was only two months away, but the state action had only just begun.

Federal court lacked jurisdiction over Supplemental Rule D action for possession of vessel where the manufacturer did not deliver the vessel after the buyer paid the full purchase price for the vessel to the local dealer; *Turner v. One 2019 76 Foot Sunseeker Sport Yacht*, No. 19-62670, 2020 U.S. Dist. Lexis 26092 (S.D. Fla. Feb. 13, 2020) (Altonaga).

Opinion

Kevin Turner and his wife agreed to purchase a Sunseeker Sport Yacht from the local dealer, Rick Obey & Associates (ROAA), for Sunseeker International, the manufacturer of the yacht in the United Kingdom. Turner and his wife made all of the payments to ROAA, but ROAA only paid a small fraction of that amount to the United States subsidiary of Sunseeker International. As ROAA defaulted on its agreement with Sunseeker, Sunseeker sold the vessel to a new dealer and Turner and his wife filed this possessory/petitory action under Supplemental Rule D of the Federal Rules of Civil Procedure and arrested the vessel. The immediate problem with the Rule D action was that it requires admiralty jurisdiction, and a contract for the sale/construction of a vessel is not a maritime contract. The plaintiffs tried to circumvent that rule by arguing that they were merely seeking possession to the vessel as its owners. However, the agreement for the purchase of the vessel did not provide for transfer of title, ownership, or possession until the closing. As they had no right to possession before that time, the plaintiffs had no ownership interest to use as a basis to argue that they were wrongfully being denied possession of their property. In vacating the arrest and dismissing the federal action, Judge Altonaga stated that this was simply a case in which the plaintiffs were the victims of ROAA's wrongful breach of the purchase agreement.

Judge struck expert economist reports of Glenn Hebert and G. Randolph Rice based on improper calculation of earning capacity and declined to allow supplemental reports as the correct information was available to the experts; *Adriatic Marine, LLC v. Harrington*, No. 19-2440, 2020 U.S. Dist. Lexis 26514 (E.D. La. Feb. 14, 2020) (Vitter).

Opinion

After Roland Harrington claimed that he was injured in an unwitnessed accident on Adriatic Marine's M/V ADRIATIC, Atlantic Marine paid him maintenance and cure until its investigation caused Atlantic Marine to deny further maintenance and cure on the grounds that Harrington did not suffer an injury in service of the vessel and had willfully concealed preexisting medical conditions. Adriatic Marine then brought this action seeking a declaration that it was not liable for maintenance and cure, and Harrington brought a counterclaim seeking maintenance and cure, punitive damages for willful failure to pay maintenance and cure, and Jones Act negligence. After Harrington provided his expert reports, Adriatic Marine moved to strike the reports of Harrington's economists, Glenn Hebert and G. Randolph Rice. The reports were based on Harrington's pre-incident earning capacity of $84,684, but Harrington had only earned $9,080 while working for Adriatic Marine in 2017 and $15,990 in 2018, which, combined, would annualize to only $36,993 per year. His wages between 2014 and 2018 reflected annual earnings between $5,199 and $38,076. Harrington had to concede that Hebert and Rice had used the wrong basis for their calculations (inflating the wage loss claim by more than $1.1 million), but Harrington requested the opportunity to have his experts provide supplemental reports with corrected calculations. As the expert opinions relied on unsubstantiated factual bases, Judge Vitter held that the reports were inadmissible under *Daubert*. Additionally, she declined to allow Harrington to provide supplemental reports with corrected calculations based on Harrington's actual earnings. She noted that expert reports may only be supplemented in limited circumstances based on information that was not available at the time of the initial disclosure. As it was inappropriate for the

experts to supplement their reports based on miscalculations from evidence that was available to the experts, Judge Vitter held that supplementation was not appropriate. Additionally, Judge Vitter found that Harrington had not shown good cause to allow supplementation of the reports after the court's deadline for providing expert reports. Noting that Harrington had refused to acknowledge or accept any responsibility for the errors made by his experts or his failure to notice those errors, and finding that allowing the supplementation at the late stage of litigation on the eve of trial would substantially prejudice Adriatic Marine, Judge Vitter held that Harrington was not allowed to supplement the reports of Hebert and Rice.

Fourteen-month delay in securing release of arrested vessels was sufficient for order of interlocutory sale; *Prosperity Bank v. Tom's Marine & Salvage, LLC*, No. 18-9106, 2020 U.S. Dist. Lexis 26811 (E.D. La. Feb. 18, 2020) (Vitter).

Opinion

On October 2, 2018, Prosperity Bank brought this suit to enforce its first preferred ship mortgage on four vessels owned by Tom's Marine. The vessels were arrested on November 5, 2018, and, when the owner made no attempt to obtain their release, Prosperity Bank moved for an interlocutory sale six months later on May 6, 2019. Judge Vitter denied that motion without prejudice, and Prosperity Bank again sought an interlocutory sale on October 10, 2019. Tom's Marine opposed the interlocutory sale, arguing that it was actively pursuing courses of action designed to generate sufficient income to secure the release of the vessels. Noting that courts had considered three or four month periods to be a sufficient delay to order an interlocutory sale, Judge Vitter held that the fourteen month delay in this case was sufficient and ordered the interlocutory sale.

Claim for contractual attorney's fees does not create a multiple claimants/inadequate fund situation to avoid a single-claimant exception to the limitation stay; *In re Freedom Unlimited*, No. 19-61655, 2020 U.S. Dist. Lexis 27896 (S.D. Fla. Feb. 19, 2020) (Altman).

Opinion

Joshua Bonn was a deckhand on the M/Y FREEDOM, a yacht owned by Freedom Unlimited. Bonn was injured while the yacht was being repaired by Taylor Lane Yacht and Ship Repair at a facility near Dania Beach, Florida. Bonn was injured during the repair and brought an action in Florida state court against both Freedom and Taylor Lane. Freedom then filed this action for limitation of liability. There were two claimants in the limitation action, Bonn and Taylor Lane. Lane sought contractual indemnity, contractual contribution, and contractual attorney's fees. Seeking to lift the stay of the state-court litigation, Bonn stipulated that he would not seek to enforce any judgment rendered in any court against the owner or any other entity that would be entitled to seek indemnity or contribution from the owner that would expose the owner to liability in excess of the limitation fund until the federal court had adjudicated the owner's right to limitation of liability. Freedom argued that the stipulation failed to protect it against an excess judgment because it did not address contractual attorney's fees. Theoretically, the attorney's fees, when added to the state-court judgment, could exceed the value of the vessel. Freedom's argument, however, faltered on the personal contract doctrine—

limitation of liability does not apply to liability of the owner that is based on a personal contract. Holding that the claim for contractual attorney's fees was not subject to limitation, Judge Altman held that it did not create a multiple-claimants/inadequate-fund situation that required a stipulation from Bonn. Thus, Judge Altman lifted the stay and closed the limitation action, subject to that action being reopened after adjudication of the state litigation.

Colorless puddle of water in a dark area of the deck on a cruise ship was not open and obvious to passenger; however, as it was formed from a slow leak of water from an ice chest, the puddle was present long enough to provide constructive notice of its existence to the crew; *Williams v. Carnival Corp.*, No. 18-21654, 2020 U.S. Dist. Lexis 28620 (S.D. Fla. Feb. 20, 2020) (Torres).

Opinion

Sarah Williams, a passenger on Carnival's CARNIVAL LIBERTY, purchased a drink and burger from a food stand close to the Red Frog Rum Bar on the Lido Deck of the vessel and began walking toward a table. She slipped and fell and then noticed that she was sitting in a clear puddle of water (2 feet by 4 feet in size) formed from water that was slowly dripping from an ice chest adjacent to the puddle. Williams brought this suit against the cruise line, which moved for summary judgment on the grounds that the puddle was open and obvious and that the cruise line did not have constructive notice of its presence on the deck. Magistrate Judge Torres denied the motion on both grounds. It had not been raining; the puddle was not next to a pool or hot tub; the water was clear; and the puddle was located in a dark area. Although there were some discolorations in the deck in nearby areas, Magistrate Judge Torres concluded that, in these circumstances, the puddle may not have been clearly seen by a reasonably prudent person using ordinary senses. With respect to the crew's constructive notice of the puddle, Williams testified that the puddle was formed from a slow leak from the ice chest and that it would have taken between four to six hours to have formed the large puddle at that rate. She also testified that there was a crew member in the immediate vicinity. That was sufficient evidence to establish constructive notice on the part of the cruise line.

From the state and territorial courts:

Louisiana Supreme Court restored sense to Louisiana decisions on the status of workers on riverboat casinos; *Caldwell v. St. Charles Gaming Co.*, No. 2019-CC-1238, 2020 La. Lexis 222 (La. Jan. 29, 2020) (Boddie).

Opinion

Don Caldwell was employed as a technician on the GRAND PALAIS, a riverboat casino in Lake Charles. The GRAND PALAIS was built to be a riverboat casino, but it was moored in its current location in 2001 and has not moved since. It is attached to a hotel on land by a steel structure and receives all utilities (electricity, water, sewage, cable television, telephone, internet, and casino computer systems) from the land. Caldwell was injured when the gangway to the riverboat malfunctioned, and he brought this suit in state court seeking remedies as a seaman. The trial court granted summary judgment to the casino, and the Louisiana Court of Appeal, Third Circuit, sitting en banc, reversed. Justice

Saunders' majority decision declined to follow the decisions of that court or the federal Fifth Circuit, and held that frequency of a watercraft's navigation is not part of the equation in determining whether the structure was a vessel. The Louisiana Supreme Court disagreed and rendered judgment that Caldwell was not a seaman. Justice Boddie's opinion reasoned that the *Stewart* and *Lozman* decisions of the United States Supreme Court make it clear that a watercraft's use as a means of transportation on the water must be practical and not merely theoretical. In this case, the GRAND PALAIS was originally designed to transport people over water, but its function had changed over the fourteen years between its mooring in 2001 and Caldwell's accident in 2015. Although the GRAND PALAIS could be returned to service as a vessel, with modifications, it had been moored indefinitely for a decade and a half, providing its primary purpose of dockside gambling. Therefore, it was no longer used in maritime transportation.

Ferry boat captain who was discharged for failing to report an accident to the Coast Guard was a seaman and not subject to the wrongful discharge provisions of the Virgin Islands Code; *Douglas v. Transportation Services of St. John, Inc.*, No. ST-16-cv-712, 2020 V.I Lexis 10 (Super. Ct. V.I Feb. 4, 2020) (Carty).

Opinion

Teriano Douglas was employed by Transportation Services of St. John as a ferry boat captain. He received three warning citations before being fired after failing to report an injury to the Coast Guard (he did notify his employer, Transportation Services, but the owner, operator, and master all have a duty to notify the Coast Guard). Douglas brought this action for wrongful termination pursuant to Virgin Islands law, and he initially argued that he had not committed any violation of law because the law and regulations on reporting were ambiguous as to the time during which he had to report the accident. Although Judge Carty did not find any ambiguity, she also did not believe that this suit was the proper forum to challenge the validity of the Coast Guard's warning given to Douglas. Nonetheless, Judge Carty noted that the Virgin Island Wrongful Discharge Act exempts seamen from its application, and she found that Douglas was a seaman. Therefore, he was not subject to the Wrongful Discharge Act, and his case was dismissed.

Louisiana law, not California law, applied to the employment relationship of non-resident seamen who were employed by Louisiana entities to work on a vessel at sea in California waters and federal waters off the California coast; *Gulf Offshore Logistics, LLC v. Superior Court of Ventura County*, No. B298318, 2020 Cal. App. Lexis 120 (Cal. App. (2d Dist.) Feb. 18, 2020) (Yegan).

Opinion

The plaintiffs in this case are seamen who worked on the ADELE ELISE, a vessel that provided services to platforms located off the California coast. The defendants are Louisiana residents who owned and operated the vessel and employed the seamen. The seamen were residents of different states (but not California) who traveled to Louisiana to apply for their job and were trained in Louisiana. The defendants provided transportation for the workers to California, where they worked within California waters and outside California waters to service platforms off the California coast. As the seamen were entitled to overtime under California law (but not Louisiana law), they brought this

suit in California state court seeking to recover overtime under California law. The issue presented to the appellate court was whether California law or Louisiana law applied, and Justice Yegan ruled that Louisiana law applied. Although some of the work was performed in California waters, that work was performed on a boat at sea and every other aspect of their employment relationship occurred in Louisiana.

Cure was owed to a seaman for a subsequently diagnosed condition because it was supported by contemporaneous complaints; seaman's return to work on a full-duty release did not terminate his employer's obligation to pay cure; seaman's resumption of treatment reinstated his employer's cure obligation; jury findings of unreasonable and willful denial of cure were affirmed based on the failure to pay cure after subsequent diagnosis of the condition; finding of unseaworthiness for inadequate staffing was affirmed; *Noble Drilling (US) LLC v. Deaver*, No. 14-18-00880-CV (Tex. App—Houston [14th Dist.] Feb. 20, 2020) (Christopher).

Opinion

Nathan Deaver felt unbearable pain in his right foot while serving as a shaker hand on Noble Drilling's M/V NOBLE TOM MADDEN. He was examined and treated for plantar fasciitis, but discontinued treatment because he did not believe it was working. Noble Drilling terminated his maintenance and cure payments, but advised Deaver that the decision would be reconsidered if Deaver submitted evidence that medical treatment would improve his condition. He obtained a full release to work without restrictions and sought to return to work for Noble Drilling. When Noble Drilling advised that his position was no longer available, Deaver obtained a job with a different company. He also brought this suit in state court in Houston, Texas, under the Jones Act and general maritime law. After his deposition, Deaver visited orthopedic surgeon Dr. William Granberry, who diagnosed peroneal tendon subluxation related to Deaver's service on Noble Drilling's vessel and recommended surgery. Noble Drilling refused the claim on the ground that it was not related to the diagnosis of plantar fasciitis. Noble Drilling argued that the plantar fasciitis had resolved, and that the current peroneal tendon subluxation must have occurred after the resolution of the plantar fasciitis. The problem with that argument was that the records after the accident reflected complaints that were attributable to the subluxation and not to the fasciitis (as meticulously pointed out by Justice Christopher). This was not lost on the jury either, which held that Deaver was entitled to cure (awarding $30,000), that Noble Drilling was unreasonable in denying cure (awarding $125,000 for aggravating his condition), that Noble Drilling's failure to pay was willful or wanton (awarding $100,000 as attorneys' fees through trial and specified amounts for appeals), and that the vessel was unseaworthy (awarding $95,000 reduced by 10% for comparative fault). Justice Christopher had little trouble in finding sufficient evidence that the peroneal tendon subluxation was related to Deaver's work on the vessel in light of his complaints of symptoms that were attributable to this condition. She likewise rejected Noble Drilling's argument that Deaver's full-duty release and his return to work for another company terminated the obligation to pay cure for that condition as the cut-off for payment of cure is when the seaman reaches maximum cure, not when he has recovered sufficiently to return to his old job. She likewise rejected Noble Drilling's argument that the seaman's cessation of treatment after being declared fit for duty ended the obligation to pay cure as that obligation resumed when Dr. Granberry recommended

curative surgery. Thus, the finding that cure was owed was affirmed. Justice Christopher also affirmed the findings of unreasonable and willful failure to pay cure. Noble continued to maintain that the peroneal tendon subluxation was a new condition that arose after Deaver's service on the vessel. However, Noble Drilling's Risk and Claims Manager admitted that she did not read Dr. Granberry's report, did not conduct a formal investigation of the claim, and merely had Noble Drilling's counsel arrange for a defense examination that agreed with Dr. Granberry's diagnosis. The continued contention that the condition arose after the service on the ship, in the face of the complaints at the time of the treatment for the plantar fasciitis that occurred in the service of the ship, was sufficient to support the awards for unreasonable and willful failure to pay cure. Finally, Justice Christopher found sufficient evidence that Noble Drilling failed to adequately staff the shaker house with competent crew, and the finding of unseaworthiness was affirmed.

Seaman's expert was excluded from testifying as to matter of common sense; jury finding that seaman's employer was not responsible for his fall at a water park during a team-building activity was affirmed; *Thompson v. Transocean Offshore Deepwater Drilling, Inc.*, No. 2019 CA 0440, 2020 La. App. Lexis 272 (La. App. (1st Cir.) Feb. 21, 2020) (Whipple).

Opinion

Michael Thompson was employed by Transocean as a chief electronic technician on its vessel POLAR PIONEER, which was being retrofitted in Singapore for its next job in Alaska. Prior to leaving for Alaska, Transocean provided team-building activities that included taking crew members to a waterpark for recreational activities. One of those activities was a simulated wave-surfing water ride. On his fourth time on the ride, Thompson fell and was injured. Prior to trial, the district judge excluded the testimony of Thompson's expert, Captain Bret Gilliam, with respect to the safety and reasonableness of Transocean's programs and guidelines. The trial proceeded, and the jury found that Transocean was not negligent in causing the accident. On appeal, Thompson argued that the district judge erred in granting Transocean's *Daubert* challenge to Captain Gilliam's testimony. Chief Justice Whipple acknowledged that Captain Gilliam was an experienced maritime officer. His testimony regarding safety programs was based on safety programs that he had designed an implemented for other companies. However, those programs had not been peer reviewed or otherwise tested. In fact, Captain Gilliam admitted that there are no industry standards or guidelines for team-building activities. Therefore, the standard was one of common sense. As such, his testimony was neither necessary nor helpful to the jury, which was capable on its own of applying common sense to the team-building activities. Consequently, the *Daubert* exclusion was affirmed. Thompson objected to the introduction of long-term disability benefits that he was receiving. He initially argued that its admission violated the collateral source rule, but he later changed his argument to assert that its introduction was more prejudicial than probative. As Thompson was asserting a claim for future lost wages, Chief Justice Whipple held that the potential for a set off was an acceptable reason for introduction of the long-term disability payments. Finally, as the decision to participate in the wave-surfing ride was voluntary (less than half of the employees attempted it), Chief Justice Whipple found no manifest error in the jury's finding that Transocean did not cause the accident.

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

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Quote:

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .

Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

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