November 2019 Update (No. 246)

Notes from your Updater:

Our longstanding readers will note that this month's Update comes from a new provider and platform. Yahoo Groups will cease operations and can no longer host our group. The Longshore/Maritime Update has chosen a new service. The provider is Groups.io, so the Updates will be sent from LongshoreUpdate@groups.io. The Updates will continue in the same format as before, just from a new provider.

On October 7, 2019, Judge Martinez denied the motion to stay his remand order in *Board of County Commissioners of Boulder County v. Suncor Energy Inc.*, No. 18-cv-01672, 2019 U.S. Dist. Lexis 151578 (D. Colo. Sept. 5, 2019) (October Update), a Colorado climate-change suit that was removed on numerous grounds, including the jurisdiction of the Outer Continental Shelf Lands Act.

In our August 2019 Update, we discussed the decision of the Virginia Supreme Court in *Pridemore v. Hryniewich,* involving a police officer's suit against the City of Norfolk and the officer who was operating the vessel. The injured officer sought to recover for injuries he sustained when the City's vessel capsized during a sea trial. The court held that state sovereign immunity barred the officer's claims for negligence but remanded the case to determine whether federal qualified immunity immunized the City from the officer's gross negligence claim. On remand, the Circuit Court held that the remaining claim against the officer was barred by federal qualified immunity. *Pridemore v. Hryniewich*, Nos. CL16-3261-00/01, CL16-3262-00/01, 2019 Va. Cir. Lexis 467 (Va. Cir. Norfolk Oct. 9, 2019).

In our October 2019 Update, we discussed the decision of the Sixth Circuit in *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. Sept. 11, 2019) (holding that it was too late to raise a constitutional challenge to the authority of an Administrative Law Judge on reconsideration with the Benefits Review Board. The Sixth Circuit adhered to its decision in *Bryan* in *National Mines Corp. v. Conley*, No. 19-3139, 2019 U.S. App. Lexis 31764 (6th

Cir. Oct. 24, 2019), noting that the Benefits Review Board had the power to decide the Constitutional issue and to grant relief if the issue been timely submitted to the Board.

The Supreme Court has agreed to divided argument for the respondents (vessel owner and the Solicitor General of the United States) in *Citgo Asphalt Refining Co. v. Frescati Shipping Co*. on the issue whether a safe berth clause in a voyage charter party is a guarantee of a ship's safety or a duty of due diligence. The argument is scheduled for November 5, 2019.

On the LHWCA Front . . .

From the federal appellate courts:

Employer of worker retrieving damaged oil boom not liable in capacity as owner pro hac vice of vessel under section 905(b). *Payano v. Environmental Safety & Health Consulting Services, Inc.*, No. 18-31144 (5th Cir. Sept. 30, 2019) (per curiam).

Opinion

Georges Payano injured his bicep while conducting oil spill cleanup operations on a vessel chartered by his employer. He was paid benefits under the LHWCA and brought an action against his employer for vessel negligence under Section 905(b). The vessel owner's captain controlled the vessel during the operations, but he received instructions from Payano's supervisor on the positioning of the vessel to retrieve the damaged boom used in the cleanup. Payano's supervisor had him lie down on the bow, reach over the water, and manually pull up the damaged segments of the boom. Payano was injured when a wave jerked the bow of the vessel upward during this process, damaging his bicep. The court noted that LHWCA employers are immune from their negligence in the capacity as employer, but are subject to liability for negligence in the capacity as vessel owner, operator, or charterer. In this case, the court analyzed whether ES&H was liable in the capacity as owner, because Payano had not raised the argument of negligence in the capacity as time charterer of the vessel in its merits brief. Although ES&H did direct movements of the vessel, that was far short of the control necessary to convert ES&H to an owner pro hac vice. The movements of the vessel were incidental to its work in the cleanup operation, and were not the necessary unrestricted use of the vessel that would render ES&H liable in the capacity as an owner. All of the other acts of negligence alleged by Payano, including inadequately instructing him on retrieval of the boom and failing to train him, were acts in the capacity as employer and were immune from suit.

Ninth Circuit affirmed credibility choices of ALJ supporting decision that the claimant failed to prove that he sustained a work-related psychological injury. *Makhmoor v. Mission Essential Personnel*, No. 18-70723 (9th Cir. October 28, 2019) (per curiam).

Opinion

Hamidullah Makhmoor claimed that he sustained psychological injuries from working as a translator for a military contractor in Afghanistan. After hearing testimony from six witnesses, Administrative Law Judge Clark held that the employer had rebutted the Section 20(a) presumption by the opinions of Dr. Perry Maloff and Dr. Jared Maloff, who opined that the claimant had not sustained a workplace-related injury and was malingering. Once the presumption was removed, Judge Clark weighed the evidence and found that Makhmoor failed to meet his burden of proving a work-related injury by the preponderance of the evidence. On appeal, Makhmoor argued that the employer had not rebutted the presumption of causal connection because the opinions implied that he was not psychologically injured. However, the Ninth Circuit rejected that argument because the opinions were that no workplace-related harm had occurred to cause his alleged injury. The Ninth Circuit noted that Judge Clark's decision was based on credibility decisions, and that his determinations were thorough and set forth the reasons for his decisions with respect to each of the witnesses (for example, finding the opinions of Dr. Afshar and Ms. Phillips to be perfunctory and contradicted by other evidence and finding the opinions of Dr. Takamura to be based on Makhmoor's own self-reporting, even though Dr. Takamura had himself questioned Makhmoor's credibility). Simply put, the Ninth Circuit quoted Judge Clark: "being treated for PTSD and major depressive disorder does not proved Claimant actually suffers from these conditions."

From the federal district courts:

Waiver of subrogation for LHWCA benefits voided by LOIA when the employer undertook the defense of the indemnitee/defendant. *Hines v. Energy XXI Services, LLC*, No. H-17-1505, 2019 U.S. Dist. Lexis 169935 (S.D. Tex. Oct. 1, 2019) (Miller).

Opinion

This oilfield accident returns to our Update (September 2019 Update). Signal Mutual paid LHWCA benefits to and on behalf of Jermaine Hines in the amount of $225,106.35 after he was injured on an Energy XXI platform off the coast of Louisiana. Energy XXI tendered its defense in Hines' suit against Energy XXI to Hines' employer, Fab-Con, pursuant to a Master Service Agreement that provided for defense and indemnity and a waiver of subrogation in favor of Energy XXI. Fab-Con accepted the tender of defense and settled Hines' claims against Energy XXI. Signal Mutual sought to recover its LHWCA lien from the settlement, arguing that the Louisiana Oilfield Indemnity Act voided the waiver of subrogation. Citing the *Fontenot* decision from the Louisiana Supreme Court, Signal Mutual argued that a waiver of subrogation is void when the waiver is sought to be invoked in conjunction with the enforcement of an indemnity provision. As Fab-Con had undertaken the indemnification of Energy XXI and the waiver of subrogation was sought in connection with Fab-Con's indemnity of Energy XXI, the waiver of subrogation was invalid under the LOIA. Consequently, Judge Miller held that Signal Mutual was entitled to recover its lien.

Exclusive remedy against United States of nonappropriated fund employee of Marine Corps Exchange is the LHWCA. *Council v. United States Navy*, No. 5:19-cv-97, 2019 U.S. Dist. Lexis 176842 (E.D.N.C. Oct. 11, 2019) (Boyle).

Opinion

Willie Council brought this suit on behalf of his deceased wife, Jacqueline, who was allegedly exposed to contaminated water while employed by the Marine Corps Exchange, a nonappropriated fund instrumentality, at the Marine Corps Base at Camp Lejeune. He asserted that the United States was liable under the Federal Tort Claims Act for the contaminated water at Camp Lejeune, but the United States moved to dismiss on the ground that the LHWCA is the exclusive remedy for employees of nonappropriated fund instrumentalities. Agreeing with the United States, Chief Judge Boyle held that the LHWCA was the exclusive remedy and dismissed the case for lack of subject matter jurisdiction.

Finding in LHWCA claim that claimant did not sustain an injury resulted in dismissal of Section 905(b) claim based on issue preclusion. *Cannon v. United States*, No. 15-cv-2582, 2019 U.S. Dist. Lexis 186544 (S.D. Cal. Oct. 28, 2019) (Bencivengo).

Opinion

This cases arises from the alleged injury of William Cannon during sea trials of the USS CORONADO. Cannon brought this suit as a seaman and alternatively under Section 905(b) of the LHWCA. Judge Bencivengo dismissed Cannon's seamen's claims, leaving his Section 905(b) claim against the United States, and granted summary judgment that his remaining claims were time barred. That decision was reversed by the Ninth Circuit (July 2019 Update), and the case returned to the district judge to address the motion of the United States to dismiss the third-party claims based on issue preclusion from the intervening decision of the Administrative Law Judge hearing Cannon's LHWCA claim. ALJ Rosenow held that Cannon had failed to establish that he injured his back while working for the shipyard, and Cannon did not appeal the order. The United States then sought to preclude Cannon from arguing in his third-party case that he injured his back in the incident on the CORONADO, and Judge Bencivengo agreed. As the existence of an accident and injury (decided against Cannon by the ALJ) was the same question in the third-party litigation against the United States, Judge Bencivengo dismissed the suit against the United States with prejudice.

From the BRB/OALJ:

Judge identified and explained conflicts of interest and requirement of admission to practice while disqualifying suspended attorney. *Batts v. Bay Area Controls, Inc.*, Case Nos. 2015-LHC-614, 2019-LHC-900 (OALJ Oct. 15, 2019) (Berlin).

Opinion

The readers of this Update know that we do not usually review decisions from the Benefits Review Board or Administrative Law Judges. However, this decision is included because of the importance of the discussion of conflicts of interest and admission to practice. This decision arises from the claim for LHWCA death benefits of Shirley Batts, who claimed that exposure to asbestos caused or hastened the death of her husband. The case was assigned to Judge King, who observed an appearance that Batts' counsel, Messrs. Brayton and Wallace of the Brayton Purcell law firm, had a conflict in representing Batts because Batts and other clients of the firm had a colorable state-law claim for wrongful death against parties other than the decedent's employer. All potential heirs in that action would share in the proceeds, but, after receiving advice from Brayton Purcell, Batts did not pursue the state wrongful death claim, favoring the recovery of the other clients of the firm. Judge King awarded LHWCA benefits to Batts, but he withheld judgment on the award of fees to the firm to determine whether there was a conflict, whether it was disclosed, and whether consent was obtained. Judge King left the OALJ before deciding this issue, and the case was reassigned to Judge Berlin. At that stage, the employer/carrier filed a petition for modification to assert a Section 33(g) bar based on settlement of the third-party wrongful death claims without notice or approval of the employer/carrier. Attorney Joshua Gillelan then filed an appearance as co-counsel in the modification proceeding and as counsel for the firm on its fee petition. That raised a conflict of interest to Judge Berlin as Mr. Gillelan would have to advise Batts whether to file a malpractice action against the firm based on any greater recovery she might have achieved had she pursued both the LHWCA claim and the wrongful death claim. Mr. Gillelan would also have to advise Batts whether to sue other wrongful death claimants for breach of fiduciary duty for failing to join all eligible heirs in the litigation. This would present a conflict because those plaintiffs could have a malpractice action against the firm for not advising them of their fiduciary duty to join Batts. In order to determine the standard for Mr. Gillelan's conduct, Judge Berlin had to determine the jurisdiction(s) in which he is admitted to practice. Although Mr. Gillelan's office is in the District of Columbia, he is not listed as admitted in DC. However, Mr. Gillelan was admitted in Maryland, but he was suspended from practicing there 29 years ago in 1990. That 1990 order prohibited him from further practice of law in the state. Judge Berlin discussed the conflict of interest and concluded that Mr. Gillelan was required to disclose the conflict and receive informed consent, confirmed in writing. He did not do that. Judge Berlin concluded that this could be a basis, standing alone, to disqualify Mr. Gillelan. Instead, Judge Berlin found the lack of good standing in the Maryland bar to be a more pressing concern. Judge Berlin disqualified Mr. Gillelan in this case based on his lack of good standing as an attorney. As Mr. Gillellan advised that he was a member of the bar of the United States Supreme Court and most of the federal appellate courts, Judge Berlin advised that he would give notice of this order to those courts, together with the Benefits Review Board, the Chief Administrative Law Judge, the Maryland Court of Appeals, and ethics counsel at the Office of the Solicitor of Labor.

And on the Maritime Front . . .

From the federal appellate courts:

Must be an admiralty case for an interlocutory appeal pursuant to section 1292(a)(3). *United States v. M/Y GALACTICA STAR*, No. 18-20781 (5th Cir. Oct. 1, 2019) (per curiam).

Opinion

This is an appeal from a dismissal in an in rem civil forfeiture action against the M/Y GALACTICA STAR. LightRay filed a verified claim in the forfeiture action, and the district court granted the motion of the United States to strike LightRay from the action. LightRay filed a notice of appeal and asserted several bases for appellate jurisdiction, including that the dismissal was appealable pursuant to 28 U.S.C. § 1292(a)(3) as an interlocutory appeal in an admiralty case. The problem with the admiralty appeal was that the United States brought this action pursuant to the jurisdiction of the civil forfeiture statute and not pursuant to the district court's admiralty jurisdiction. As the case was not brought as an admiralty action, no interlocutory appeal was available under section 1292(a)(3) from an interlocutory decree "determining the rights and liabilities of the parties to admiralty cases."

Seaman's affidavit, contrary to his deposition testimony, held insufficient to create fact question of Jones Act negligence or unseaworthiness. *Brown v. Reinauer Transportation Cos., L.P.*, No. 18-3126-cv, 2019 U.S. App. Lexis 29843 (2d Cir. Oct. 4, 2019) (per curiam).

Opinion

Lucius Brown fell on the deck of the defendants' vessel during a snow storm. In his deposition, he testified that he did not see, know, or feel what caused him to slip. In opposition to the defendants' motion for summary judgment, Brown submitted an affidavit that contradicted his deposition testimony that he was unaware of the cause of his fall. The district court held that the affidavit was inadmissible and granted summary judgment to the defendants on the negligence and unseaworthiness claims, even with the relaxed evidentiary and causation standards under the Jones Act. The Second Circuit agreed and affirmed the dismissal of the Jones Act and unseaworthiness claims. Noting that a party may not create an issue of fact by submitting an affidavit in opposition to a motion for summary judgment that contradicts the affiant's previous deposition testimony (sham affidavit rule), the Second Circuit agreed with the district judge that Brown's affidavit contradicted his deposition testimony that he was unaware of the cause of his fall and was not admissible to create a fact question of negligence or unseaworthiness.

Puerto Rican property owners lacked standing to request an indefinite waiver of the cabotage provision of the Jones Act for Puerto Rico after Hurricane Maria. *Perez-Kudzma v. United States*, No. 18-2128 (1st Cir. Oct. 9, 2019) (Barron).

Opinion

After Hurricane Maria wrought destruction in Puerto Rico, the Secretary of the Department of Homeland Security issued a ten-day waiver of the cabotage provision of the Jones Act to facilitate movement of products to Puerto Rico from coastwise points in the United States. Owners of real estate in Puerto Rico brought suit to challenge the decision not to waive indefinitely the cabotage provision of the Jones Act for Puerto Rico, alleging violation of the Equal Protection Clause, the Due Process Clause, the Ninth Amendment, and what they described as the public trust doctrine. The plaintiffs asserted that they had standing to bring the action based on the increased shipping costs they would have from the decision and the adverse consequences the decision would have on them by hindering their ability to repair or rebuild their property in Puerto Rico. However, the First Circuit rejected the diffuse description of the asserted injuries that failed to set forth concrete and particularized harms. Therefore, the complaint was dismissed for lack of standing.

Eleventh Circuit confirmed decision in arbitration denying recovery to seaman under Panama law that deprived the seaman of a claimed statutory remedy under the Jones Act (vicarious liability of the employer for negligence of the treating physicians). *Cvoro v. Carnival Corp.*, No. 18-11815 (11th Cir. Oct. 17, 2019) (Hull).

Opinion

Sladjana Cvoro developed pain and swelling in her wrist while serving as an assistant waitress on the cruise ship CARNIVAL DREAM, which sails under a Panamanian flag. She was diagnosed by an orthopedic specialist in Cozumel, Mexico, with carpal tunnel syndrome. Cvoro requested to be repatriated to her home in Serbia, and physicians in Serbia, selected by the cruise line, performed surgery, which Cvoro claims resulted in horrific symptoms and permanent disability. Cvoro's seafarer's agreement with the cruise line provided for resolution of all legal disputes with the cruise line by arbitration in the closest of several locations to her home country (arbitration in Monaco). It also contained a choice-of-law provision for the law of the flag (Panama). Cvoro sought arbitration and asserted claims under United States law, mainly a claim under the Jones Act that the cruise line was vicariously liable for the negligence of the shoreside doctors (she dropped her maintenance and cure claim because the cruise line paid for all of her medical bills and her expenses for room and board). Cvoro sought the application of United States law because the cruise line's principal place of business is in Miami, but the arbitrator held that was insufficient and applied the law of Panama. Panama law affords several claims for injured seamen, including a tort cause of action for negligence that would encompass negligent hiring of the shoreside doctors, a labor claim akin to no-fault maintenance and cure, and a claim for disability compensation. However, it does not provide for vicarious liability of the employer for the negligence of treating shoreside physicians. During the arbitration, Cvoro asserted her claim of vicarious liability under United States law and did not pursue the claims under Panama law. Nonetheless, the arbitrator addressed each of the available remedies under Panama law and held that Cvoro was not entitled to recover. Cvoro then filed suit in federal court in Florida seeking to vacate the arbitration decision on the ground that the application of Panama law deprived her of the opportunity to assert the Jones Act claim of vicarious liability and was therefore a violation of the public policy

of the United States. The Eleventh Circuit disagreed with her argument and confirmed the decision in the arbitration. The theory of vicarious liability under the Jones Act is not a well-defined and dominant policy of the United States rooted in basic notions of morality and justice so as to satisfy the standard for overturning an arbitration award based on public policy. The remedies available under Panama law, although not successful for Cvoro in this case, were not so inadequate that enforcement of their application would be fundamentally unfair (courts may not invalidate choice-of-law clauses simply because the remedies are less favorable than those available in the United States).

United States cannot be sued for Coast Guard misrepresenting to buyer of yacht that there was no registered lien on the purchased vessel. *Evergreen Marine, Ltd. v. United States*, No. 19-11184 (11th Cir. Oct. 18, 2019) (per curiam).

Opinion

Before Evergreen Marine purchased a 60-foot yacht, MAKIN WAY, Evergreen contacted the Coast Guard's National Vessel Documentation Center to determine whether there was a ship mortgage or other lien on the vessel. A preferred ship mortgage had been recorded with the Coast Guard, but, by inadvertence, that mortgage had not been scanned into the electronic system when the Coast Guard migrated from a paper to an electronic system. The mortgagee then arrested the vessel, and Evergreen settled with the mortgagee to satisfy the mortgage. Evergreen brought this action against the United States under the Federal Tort Claims Act for negligently failing to record the mortgage or disclose it to the purchaser. In light of the FTCA's exception to the waiver of sovereign immunity for claims arising out of misrepresentation, Evergreen framed the complaint as alleging negligence distinct from the misrepresentation, such as failing to maintain an accurate index of mortgages. The court rejected Evergreen's attempts, however, concluding that Evergreen's injuries were based on communication or miscommunication of information. Therefore, dismissal of the complaint for lack of subject matter jurisdiction was affirmed.

Vessel insurer that paid policy limit to insured is not liable to salvor for rescue services. *Reliable Marine Towing & Salvage LLC v. Thomas*, No. 19-10503 (11th Cir. Oct. 21, 2019) (per curiam).

Opinion

John Thomas insured his vessel with State Farm with a policy limit under Coverage A for property damage of $6,750. Wreck removal was also covered but included within the Coverage A limit. The policy also provided additional coverage over the Coverage A limit of 5% ($337.50) plus an additional $500 for emergency services. Thomas's boat was damaged in a storm, and Reliable Marine provided rescue services that brought the boat to shore. State Farm paid Thomas the Coverage A limit for the damage, and two weeks later Reliable Marine sent State Farm an invoice for $3,109.84 for the rescue services. Classifying the services as both emergency services and wreck removal, State Farm paid Thomas the additional $337.50 under Coverage A plus $500 for emergency services. The payment was made to State Farm based on the policy requirement that State Farm was to

pay Thomas directly unless another party was legally entitled to receive payment. Reliable Marine then brought suit against both Thomas and State Farm for $3,109.84. Thomas consented to entry of judgment and assigned his claims against State Farm to Reliable Marine. Reliable Marine first argued that State Farm should have paid the $837.50 directly to Reliable Marine, but the Eleventh Circuit held that State Farm had properly followed the plain language of the policy by paying Thomas, and the assignment occurred after the payment had been made. Reliable Marine then argued that Thomas (whose claims were assigned to Reliable Marine) was entitled to recover the full amount of the rescue services because Florida law requires insurers to reimburse insureds for expenses that the insurer requires them to incur. In this case, the policy required Thomas to protect the property against further loss. The Eleventh Circuit held that the Florida rule was not applicable here where the policy unambiguously contained a limit that the insurer had paid. The court noted the difference between a sue-and-labor clause and the clause in this policy that required the insured to protect the property against further loss. The clause did not promise to reimburse Thomas for the cost to protect against further loss. As there was no ambiguity in the policy, Reliable Marine had no claim against State Farm standing in the shoes of Thomas.

Fact question presented whether chief stewardess's trip on vessel with her daughter and her daughter's friends was within the scope of her employment for Jones Act liability. *Herrera v. 7R Charter Ltd.*, No. 19-10605 (11th Cir. Oct. 22, 2019) (per curiam).

Opinion

Sara Herrera was employed as Chief Stewardess by 7R Charter along with Captain Bernard Calot, with whom she was romantically involved at the time and to whom she is now married. They were both on call 24/7 except when they were on vacation. 7R had purchased a tender for diving and fishing trips and had paid to have repairs, maintenance, and upgrades performed on the vessel. Herrera's daughter and two friends came to visit, and Calot, Herrera, her daughter, and the friends took the vessel out for a sea trial. The owner had not instructed Calot to conduct a sea trial, and Calot had not asked for permission to conduct the sea trial or to take guests on the vessel. During the trip, the wake of a passing vessel struck the vessel, and Herrera was injured. Concluding that the purpose of the trip was pleasure, the district court concluded that Herrera's presence on the vessel did not further 7R's interests and granted summary judgment to 7R on the ground that Herrera was not acting within the scope of her duties for 7R. Noting the testimony of both Calot and Herrera that they were conducting a sea trial on the day she was injured, the Eleventh Circuit held that their testimony had to be credited at the summary judgment stage even if their testimony was self-serving and subject to questions on its credibility. The evidence presented a fact question (whether Calot and Herrera were acting in the course of their employment) that had to be resolved by a fact finder.

To be awarded attorney's fees in a maintenance and cure case, the conduct must relate to the failure to pay maintenance and cure. *In re Sea Hawaii Rafting, LLC*, No. 18-16098 (9th Cir. Oct. 24, 2019) (per curiam).

Opinion

The litigation over Chad Barnes' seaman's claims continues (July and September Updates). This appeal arose from the sanctions order issued against attorney Jay Friedheim for violating the bankruptcy stay order by attempting to verify the amended complaint in Barnes' maritime action. The Ninth Circuit overturned the sanctions order as inapplicable to the maritime action, and Friedheim sought attorneys' fees from the bankruptcy trustee, citing *Vaughan v. Atkinson* (allowing attorneys' fees in maintenance and cure cases for willful failure to pay maintenance and cure). The question in this case was whether Friedheim could receive attorneys' fees for defending himself against sanctions, not whether his client, Barnes, could recover fees for his employer's failure to pay maintenance and cure. As the trustee's actions were not frivolous or in bad faith, the Ninth Circuit affirmed the denial of attorney's fees to Friedheim.

Judgment in favor of injured seaman affirmed by Fifth Circuit in cross-appeals filed by the employer (liability) and the seaman (damages). *Lomax v. Marquette Transportation Co. Gulf-Inland, L.L.C.*, No. 19-30070 (5th Cir. Oct. 28, 2019) (per curiam).

Opinion

Marcus Lomax was injured while working as a seaman on the M/V ROSS SALVAGGIO when he was struck in the face by a grinder while buffing the underside of an overhead deck. After a bench trial, Judge Milazzo found his employer 75% at fault and Lomax 25% at fault and awarded damages of $634,692.14. Both parties appealed. The defendant cited discrepancies in Lomax's credibility and argued that they undermined his credibility so severely that it was error to rely on his testimony without corroborating evidence. The Fifth Circuit rejected those arguments in light of the special deference afforded a district court's credibility determinations following a bench trial, noting that Judge Milazzo had taken account of Lomax's fault and the discrepancies in her findings. Lomax listed ten cases with awards greater than the amount found by Judge Milazzo and argued that the judgment was significantly below established awards in the Fifth Circuit for similar injuries. As that is not a basis for setting aside a damage award, the Fifth Circuit affirmed the judgment on damages.

From the federal district courts:

Court orders remand of Louisiana coastal erosion suit against oilfield defendants, but defendants will get appeal. *Parish of Cameron v. Auster Oil & Gas Inc.*, No. 2:18-cv-677, 2019 U.S. Dist. Lexis 170578 (E.D. La. Sept. 26, 2019) (Summerhays).

Opinion

This is one of 42 lawsuits filed by Louisiana parishes against oilfield-related defendants seeking recovery for coastal erosion and other damages allegedly resulting from dredging, drilling, and waste disposal in the coastal region. These cases were originally removed

based on admiralty jurisdiction, federal jurisdiction under the Outer Continental Shelf Lands Act, and federal question jurisdiction; however, the court remanded the cases. After the issuance of expert reports that clarified the allegations, the defendants removed the case a second time based on the Federal Officer Removal Statute and federal question jurisdiction. Judge Summerhays considered the second removal timely, but held that the case should be remanded. He noted that the defendants had the right to an immediate appeal of the remand order (based on the Federal Officer Removal Statute) and also certified for interlocutory appeal the federal question basis for removal.

Defense and indemnity claim based on pleadings held premature. *Wilson v. Florida Marine Transporters, LLC*, No. 18-13952, 2019 U.S. Dist. Lexis 166702 (E.D. La. Sept. 27, 2019) (Ashe).

Opinion

Warren Paving and Florida Marine entered into a fully-found charter party by which Warren Paving hired vessels from Florida Marine. When a deckhand assigned to one of the vessels was injured on a barge at Warren Paving's loading dock on the Cumberland River near Salem, Kentucky, Warren Paving brought a third-party complaint against Florida Marine seeking defense and indemnity pursuant to the indemnity clause of the charter party. That clause provided that Florida Marine would defend and indemnify Warren Paving from any and all injuries to any person arising from or relating to the condition or operation of the vessel. Florida Marine filed a motion for summary judgment seeking dismissal of the claim for defense and indemnity, asserting that (1) the plaintiff's pleading alleged that Warren Paving was negligent and the indemnity clause was insufficient to cover the negligence of Warren Paving and (2) the plaintiff's pleading did not allege fault that stemmed from the operation or condition of the vessel. As the pleadings did not establish whether the accident arose from the operation or condition of the vessel or the extent that any negligence of Warren Paving contributed to the accident, Judge Ashe was not in a position to determine at the summary-judgment stage whether defense and indemnity would be owed. Therefore, he denied the motion for summary judgment. *As this case demonstrates, your Updater cannot understand why anyone uses this type of clause when it only engenders litigation.*

No personal jurisdiction in suit in Louisiana by Panamanian seaman against contractor from Trinidad and Tobago that performed repairs on vessel in Trinidad and Tobago, allegedly resulting in fire on the vessel off the coast of Trinidad and Tobago; fact question on applicable law against American defendants. *Blythe v. Offshore Service Vessels, L.L.C.*, No. 17-5184, 2019 U.S. Dist. Lexis 169991 (E.D. La. Sept. 30, 2019), 2019 U.S. Dist. Lexis 184064 (E.D. La. Oct. 24, 2019), 2019 U.S. Dist. Lexis 184066 (E.D. La. Oct. 24, 2019) (Brown).

Opinion Massy
Opinion Louisiana Machinery
Opinion Caterpillar

Robbin Blythe brought this action in federal court in Louisiana for post-traumatic stress from being trapped aboard the EDISON CHOUEST when a fire occurred in the engine room while the vessel was located off the coast of Trinidad and Tobago. Blythe brought suit against various defendants, including Caterpillar, which manufactured the engine and Louisiana Machinery and Massy which serviced, repaired, and inspected the engine. The claims against Massy Machinery alleged that Massy's inspections and engine work in Trinidad and Tobago contributed to the fire and resulting injury. Massy moved to dismiss the case for lack of personal jurisdiction on the ground that, as the work was performed on the vessel in Trinidad and Tobago, Massy had insufficient contact with Louisiana to subject it to jurisdiction in Louisiana. Blythe countered that the contract for the repair was with a Louisiana company, and it was foreseeable that servicing the engine outside of Louisiana would result in an injury that would be felt in Louisiana. Massy responded that Louisiana's only interest in this case arose from the fact that other defendants (and not the plaintiff or Massy) are Louisiana citizens. Chief Judge Brown granted Massy's motion, noting that all of Massy's contacts giving rise to the worker's claim took place in Trinidad and Tobago, not in Louisiana, rejecting the argument that by contracting with a Louisiana company, Massy contemplated interaction with Louisiana and derived a benefit from that contact. Chief Judge Brown then addressed the choice of law issues in the claims against Louisiana Machinery and Caterpillar. She had previously reviewed the *Lauritzen-Rhoditis* factors and dismissed the general maritime law claims against Louisiana Machinery and Caterpillar but found fact questions on whether the laws of Trinidad and Tobago applied. Louisiana Marine sought reconsideration of the decision on application of the laws of Trinidad and Tobago, asserting that the isolated repairs and maintenance that it performed in Trinidad and Tobago did not change its base of operations from its home base in Louisiana. Louisiana Marine argued that the *Rhoditis* base-of-operations factor was equivalent to its principal place of business, but Chief Judge Brown disagreed, noting that the Fifth Circuit has held that the base of operations is the place where a rig is operated on a day-to-day basis and not where the location of the corporate operations. As there was a fact question where the day-to-day operations regarding the vessel were conducted, Chief Judge Brown held that summary judgment was not appropriate on the choice-of-law issue for Louisiana Machinery. Similarly, Chief Judge Brown found that the fact question on the shipowner's base of operations precluded the granting of summary judgment for Caterpillar on the application of the law of Trinidad and Tobago.

Doctors have nothing to offer seaman; maintenance and cure and punitive damages not owed. *Taylor v. B&J Martin, Inc.*, No. 18-8941, 2019 U.S. Dist. Lexis 167810 (E.D. La. Sept. 30, 2019) (Zainey).

Opinion

Allen Taylor, who had twice injured his back (including a herniated L5-S1 disc) before his employment as a seaman for B&J Martin, injured his back while descending a flight of stairs when he stepped on a cigarette lighter. The fall resulted in damage to the same disc, which required three surgeries. When the third surgery failed to alleviate his symptoms, Taylor's physician declared that he had no further treatment options to offer and placed Taylor at maximum cure on March 19, 2019. Taylor then sought a second opinion, but that doctor advised on May 20, 2019, that he had nothing to offer from a surgical point of

view and Taylor would have to continue to pursue relief via pain management. B&J Martin then stopped paying maintenance and cure on May 23, 2019. Taylor sought continuing maintenance, payment of medical bills, and punitive damages. Concluding that the medical opinions were clear that nothing could be done to improve Taylor's condition, Judge Zainey found that Taylor reached maximum cure on May 20, 2019. Consequently, no further maintenance and cure payments were required. Judge Zainey then addressed B&J Martin's *McCorpen* (willful concealment) defense and found that Taylor's failure to disclose that he had injured his back on two prior occasions was sufficient to satisfy the concealment element of the defense. As the concealment was for the same area of his spine as the injury involved in this suit, Judge Zainey also found that the causal link element of the defense was satisfied. However, Judge Zainey found that there was a fact question whether the materiality element of the defense was satisfied. Although Taylor checked "No" to the question whether he had ever sustained any type of disability or injury, he left blank the boxes related to whether he had ever had an injury or medical problem with his back and whether he had ever experienced back pain. Judge Zainey questioned why B&J Martin would allow Taylor to work before Taylor answered these important questions if the answers to these questions were material to B&J Martin. Finally, as B&J Martin had dutifully paid maintenance and cure until Taylor reached maximum cure, Judge Zainey dismissed Taylor's claim for punitive damages.

Ladder to floating dock used by seaman to get to vessel is not an appurtenance of the vessel for unseaworthiness. *Stein v. County of Nassau*, No. 17-cv-6055, 2019 U.S. Dist. Lexis 172800 (E.D.N.Y. Sept. 30, 2019) (Fuerstein).

Opinion

Richard Stein was employed by the Nassau County Police Department and assigned as a member of one of the Department's two SAFE BOATS, located at its berth in the boat basin at the Department's Marine Bureau Base at Bay Park. While descending a wooden ladder affixed to a bulkhead to a floating dock to get to the vessel, a rung on the ladder broke, causing Stein to fall onto the dock and into the water. He sued the County as a seaman, alleging negligence, unseaworthiness, and a violation of state law. After the close of discovery, Stein moved for partial summary judgment on the issues of liability under the Jones Act and for unseaworthiness, and the defendant requested that the state-law claim be dismissed. Distinguishing a gangway to the vessel from a ladder to a floating dock, Judge Fuerstein held that Stein had not demonstrated that he was injured by an appurtenance of the County's vessel. She also noted that it did not appear that admiralty jurisdiction would extend to the unseaworthiness claim. Consequently, Judge Fuerstein ordered Stein to show cause by written submission why the unseaworthiness claim should not be dismissed. Although the County owed Stein a duty to provide him a safe place to work, Judge Fuerstein found fact questions whether the County was negligent, particularly whether the County knew, or should have known, of the defective condition of the ladder. She also found that Stein had not sufficiently established that the ladder was in the exclusive control of the County so as to apply res ipsa loquitur. Finally, as Stein had not established that the County violated any statute or ordinance, Judge Fuerstein dismissed Stein's claim for violation of New York law.

COGSA statute of limitations bars claim for non-delivery of paint when the shipper did not pay the freight. *Newmann v. Mediterranean Shipping Co.*, No. 18 Civ. 10518, 2019 U.S. Dist. Lexis 169571 (S.D.N.Y. Sept. 30, 2019) (Nathan).

Opinion

Amy Newmann purchases paint in the United States and ships it to Ghana to sell there. She purchased eight containers of paint from David Smith, who contracted with Mediterranean Shipping to ship the paint to Ghana. When the paint arrived, Newmann was told that Smith had not paid the freight and she could not receive the paint. She offered to pay the freight herself, but her request was denied, and the paint was eventually sold at auction. When Newmann filed suit in state court in New York three years later (pro se), Mediterranean Shipping removed the case to federal court and moved to dismiss the suit based on the one-year statute of limitations in the Carriage of Goods by Sea Act. Judge Nathan agreed that the action was time-barred unless the carrier was estopped from asserting the defense. Newmann asserted in her response to the motion to dismiss that the defendant had told her that she could not file the suit while the defendant was investigating the claim. However, Judge Nathan rejected that argument as Newmann did not file suit until two years after the investigation was concluded. Judge Nathan dismissed her complaint, but without prejudice, giving her 30 days to file an amended complaint.

Seaman's loss of his own household services is a pecuniary loss and is recoverable in his suit under the Jones Act and general maritime law. *Schlueter v. Ingram Barge Co.*, No. 3:16-cv-02079, 2019 U.S. Dist. Lexis 171152 (M.D. Tenn. Oct. 1, 2019) (Trauger).

Opinion

Bobby Schlueter was injured while serving as a crewmember on the M/V SARAH L. INGRAM, owned and operated by Ingram Barge Co. He brought suit against Ingram under the Jones Act and general maritime law, and Ingram filed a motion for partial summary judgment, contesting Schlueter's right to recover his household services (his expert opined that Schlueter's loss of household services was $323,200.80). Ingram's motion was based on a case holding that Tennessee law does not recognize a claim for loss of household services as they are a form of non-economic damages, and seamen are not entitled to recover non-pecuniary damages, such as loss of society, under *Miles v. Apex Marine Corp*. In contrast, Judge Trauger noted that the cases under the Jones Act, general maritime law, and FELA have recognized that loss of household services is a pecuniary loss that is recoverable when established with competent proof. Consequently, Ingram's motion on the issue of loss of household services was denied.

Passenger allowed to recover only medical costs incurred and paid. *Morrison v. Royal Caribbean Cruises, Ltd.*, No. 19-21220, 2019 U.S. Dist. Lexis 169993 (S.D. Fla. Oct. 1, 2019) (Goodman).

Opinion

Patricia Morrison was injured when she tripped over an ashtray left in the walkway of a casino on Royal Caribbean's ENCHANTMENT OF THE SEAS. Although the cruise line's attorney advised Morrison's counsel that the defendant would amend its affirmative defense to provide that the passenger could only introduce evidence of medical bills and costs that were paid by collateral sources (rather than the billed amount), the defendant did not present that amendment, and the passenger filed a motion to strike the defense that was not so limited. Magistrate Judge Goodman granted the motion but noted that the passenger would not be permitted to introduce medical bills that were discounted or written off or not paid, and the cruise line would not be permitted to introduce evidence that the passenger had been compensated for the medical bills that were incurred and paid.

Judge declined to set aside verdict for negligent medical care in favor of daughter of passenger who died on cruise. *Goodloe v. Royal Caribbean Cruises, Ltd.*, No. 18-21125, 2019 U.S. Dist. Lexis 169995 (S.D. Fla. Oct. 1, 2019) (Altonaga).

Opinion

Richard Puchalski was a passenger on Royal Caribbean's EXPLORER OF THE SEAS. He suffered from shortness of breath while the vessel was docked in Juneau, Alaska, and was evaluated by Dr. Saunders on the vessel. She prescribed medication, but did not transfer him to a shoreside hospital. Later, Puchalski collapsed in his cabin and was transferred to a hospital in Juneau and then airlifted to a hospital in Anchorage, where he died. This suit was brought by his daughter. Two months before trial, Dr. Saunders disclosed at her deposition that Puchalski left the ship's medical facility against her advice, which was inconsistent with the cruise line's earlier discovery answers and information provided by the cruise line's experts. The magistrate judge issued an order that Judge Altonaga followed at trial, allowing the plaintiff to question Dr. Saunders about when she disclosed her recollection to defendant's counsel. Judge Altonaga also allowed the plaintiff's medical expert, a cardiologist, to testify over the objection of the cruise line that the cardiologist was not qualified in emergency medicine. The jury found the cruise line 70% at fault, awarded $265,000 for medical expenses and $4.8 million for loss of companionship and protection and for the daughter's past and future suffering, which resulted in a judgment of $3,384,073.22. Judge Altonaga declined to change the previous decisions to allow the testimony of the cardiologist and the impeachment of Dr. Saunders on when she disclosed her recollection to defense counsel of Puchalski leaving the medical facility. Judge Altonaga also addressed the showing to the jury of an unredacted medical record from the medical center in Alaska with speculation about the cause of death. Judge Altonaga had given a curative instruction at the time and concluded that the brief showing of the unredacted version to the jury, together with the closing argument made by the plaintiff's counsel that the plaintiff was prevented from showing any document that showed the final cause because it was against the Rules of Evidence, were not sufficiently prejudicial to the defendant. Judge Altonaga also rejected defendant's objection to the suggestion from plaintiff's counsel that the jury should draw an adverse inference for the defendant's failure to produce defendant's nurse, a South African, as the defendant had the opportunity to address through testimony and evidence any incorrect suggestion that the nurse was not equally available to both parties. Judge Altonaga then addressed

arguments for a remittitur, beginning with the contention that Florida law, which allows recovery for loss of companionship and mental suffering, should supplement the general maritime law as the death occurred in state waters. The cruise line argued that the law of Wisconsin, where Puchalski resided and where his estate was administered, should apply, and Wisconsin law did not provide a remedy supplemental to the damages available under the general maritime law. Undertaking a choice-of-law analysis, Judge Altonaga concluded that Florida law applied (as Wisconsin does not apply its laws outside the state). Therefore, Judge Altonaga held that the award was permissible under Florida law. Finally, Judge Altonaga addressed whether the damages were excessive. Noting that the cruise line had not suggested an amount for a reduction, Judge Altonaga held that although the amount awarded was large, she would not declare that it was excessive.

District court invited clarification from Ninth Circuit on dismissal of claim in limitation of liability action. *Williams Sports Rentals, Inc. v. Willis*, No. 2:17-cv-653, 2019 U.S. Dist. Lexis 170698 (E.D. Cal. Oct. 1, 2019) (Mendez).

Opinion

This case continues to bounce back and forth between the district court and the Ninth Circuit (June 2019 Update) in connection with the drowning of Raeshon Williams who fell off the back of a jet ski in South Lake Tahoe. Williams Sports Rentals, owner of the jet ski, filed this limitation action, and Judge Mendez denied the motion to lift the anti-suit injunction from the limitation action and dismissed the claim of Williams' mother (Marian Willis) on the ground that she did not allege that WSR owed her son a duty of care. The Ninth Circuit reversed the dismissal and directed the district court to conduct a proper inquiry into the single claimant exception to the limitation injunction. On remand, the district judge questioned the effect of lifting the injunction when he had already ruled that WSR should be exonerated. Willis sought a writ of mandamus in the Ninth Circuit, and the Ninth Circuit requested a response from WSR and invited the district judge to comment. The district judge explained in this comment that whether the injunction was lifted or not, Willis would still have to prove WSR's negligence in federal court, and the court had previously found that she failed to set forth a negligence claim. Accordingly, Judge Mendez considered the issue with respect to the injunction to be moot and invited clarification from the Ninth Circuit.

Jones Act case removed to federal court was remanded when the defendant did not assert any reason to avoid the non-removability. *New v. Texas Petroleum Investment Co.*, No. 19-12096, 2019 U.S. Dist. Lexis 170999 (E.D. La. Oct. 2, 2019) (Fallon).

Opinion

The defendant removed this Jones Act case on the basis of diversity jurisdiction, and the seaman moved to remand. Judge Fallon noted that the defendant could assert that the Jones Act allegation was improperly pled (formerly known as fraudulently joined) to avoid the general non-removability of Jones Act cases under 28 U.S.C. § 1445(a). However, the defendant did not attempt to establish improper joinder and agreed to the

remand of the case. Therefore, the court held that the removal was improper, even though the parties were diverse, and remanded the case.

Petitioners allowed to stay their limitation action. *In re Smithland Towing & Construction, LLC*, No. 5:18-cv-113, 2019 U.S. Dist. Lexis 171973 (W.D. Kent. Oct. 3, 2019) (Russell).

Opinion

You do not often see the limitation petitioners moving to stay their limitation action. This case arose after the inland towboat, WILLIAM E. STRAIT, was involved in a collision and sank in the Mississippi River. Later, a fatal explosion occurred at the First Marine Shipyard during the rebuilding process. The owner and owner pro hac vice of the vessel brought this limitation action in connection with the explosion. A number of state suits were filed that did not name the limitation petitioners, and the petitioners requested the court to stay the limitation action pending resolution of the parallel state actions. Alternatively, the petitioners asked the court to coordinate discovery in the state and federal proceedings. Three claimants in the limitation action opposed the motion to stay on the ground that they were not parties to the state litigation and would be excluded from the discovery in the state proceedings. Judge Russell agreed to the stay and the coordination. Staying the limitation action would afford the petitioners the protections of the Limitation Act, and granting the request to coordinate discovery would prevent the three claimants from suffering prejudice because they would be able to conduct additional discovery in the limitation proceeding after the conclusion of the state litigation.

Court rejected *McCorpen* defense and awarded punitive damages for willful failure to pay maintenance and cure. *Hurtado v. Balerno International Ltd.*, No. 17-62200, 2019 U.S. Dist. Lexis 17355 (S.D. Fla. Oct. 4, 2019) (Cohn).

Opinion

Louis Rafael Hurtado, a Venezuelan citizen, suffered a strangulated umbilical hernia while serving as chef on a Caribbean voyage of a private yacht. The voyage began in Puerto Rico and ended in Fort Lauderdale, and included two trips to Cuba and a stop in Key West. The dispute centered on Hurtado's failure to disclose his pre-existing inguinal hernia and whether he wanted to visit Cuba so that, as a Venezuelan citizen, he could have free surgery to correct his hernia. The defendant did not require a pre-employment examination or completion of a medical questionnaire, but it had a policy to request a valid medical certificate of fitness for duty. The vessel's captain testified that Hurtado confessed that he had lied about having a current medical certificate because he needed the free surgery, and the yacht's stewardess asserted that Hurtado told her he wanted to visit Cuba to receive the free surgery. The stewardess also testified that she saw Hurtado on the beach without his shirt early in the voyage and noticed the bulge in his abdomen (similar to the movies when a baby's foot is coming out). When the flag-state surveyor (Marshall Islands) came aboard to inspect the documentation for the crew, Hurtado informed the surveyor and the Captain that he had left his certificate at home (it was expired). As the vessel was allowed to sail with temporary crewmembers who do not have

a valid certificate, the Captain did not make a big deal about the situation. After Hurtado sustained the strangulated hernia, however, the Captain denied authorization for medical treatment in Cuba based on the alleged confession, and the insurer ultimately denied maintenance, cure, and wages. Hurtado was eventually able to receive free surgery in Cuba, but the repair was improper and another surgery was necessary to repair the hernia. The case was tried, and Judge Cohn found that the Captain's testimony was false and that the stewardess was not credible. On the *McCorpen* defense, this was a nondisclosure case, not a concealment situation (the shipowner did not require an examination or questionnaire). As the hernia that strangulated was not Hurtado's pre-existing inguinal hernia but an undiagnosed umbilical hernia, Judge Cohn did not find willful nondisclosure and awarded cure of $7,000 for the second surgery in Venezuela, $56,486.16 in maintenance at the rate of $60 per day, and $10,350 in unearned wages. He also awarded $300,000 for pain and suffering for the aggravation of Hurtado's condition by the failure to pay maintenance and cure (concluding that the defendant had failed to put forth a reasonable defense to the maintenance and cure claim). Judge Cohn also found that the defendant made no effort to investigate the claim and displayed a "shocking disregard" for the well-being of Hurtado, including "outright cruelty" based on the Captain's "personal animus" for Hurtado. Therefore, Judge Cohn awarded punitive damages equal to the compensatory damages ($373,836.16) together with attorney's fees and prejudgment interest (the prejudgment interest may have been miscalculated on the total award if it included any future pain and suffering in the award of $300,000 for pain and suffering as Hurtado has not yet had the second surgery to alleviate his pain).

Seaman's mesothelioma claim for exposure to asbestos on vessels dismissed under Washington law for lack of evidence that he was exposed to an asbestos-containing product for which the defendant was responsible. *Klopman-Baerselman v. Air & Liquid Systems Corp.*, No. 3:18-cv-5536, 2019 U.S. Dist. Lexis 175650 (W.D. Wash. Oct. 9, 2019) (Bryan).

Opinion

Rudie Klopman-Baerselman died from mesothelioma that his personal representative claimed resulted from exposure to asbestos while the decedent served as an oilman on vessels from 1955 to 1959. The administrator cited ship's records to support the contention that the decedent was exposed to asbestos from working around insulated pumps supplied by Air & Liquid's predecessor, Buffalo Pumps. Applying Washington law (Air & Liquid sought application of maritime law), Judge Bryan held that the evidence was insufficient to establish that the decedent had used or been exposed to an asbestos-containing product for which Air & Liquid was responsible. Therefore, he dismissed Air & Liquid from the case.

Passenger who was tripped when a cruise photographer unexpectedly stuck her leg out did not sufficiently allege negligence of the cruise line. *Navarro v. Carnival Corp.*, No. 19-21072, 2019 U.S. Dist. Lexis 176773 (S.D. Fla. Oct. 10, 2019) (Moreno).

Opinion

Margarita Navarro was injured after being tripped by a cruise line photographer who unexpectedly stuck out her leg while taking a picture. Navarro brought this suit alleging that Carnival breached a duty of care to her by creating a hazardous condition, failing to properly rope off the area, failing to train its personnel to prevent such accidents, and failing to warn passengers of a dangerous condition. Judge Moreno dismissed the complaint because it failed to explain how the cruise line had actual or constructive notice of the risk-creating condition (the unexpected leg movement). Additionally, the complaint failed to allege facts to support the negligence theories; for example, how did the leg movement fall below the requisite standard of care, or how did the failure to warn fall below the standard of care.

Court found triable issue of fraudulent transfer of assets in Rule B garnishment action to collect on arbitration award arising from breach of contract of affreightment. *Armada (Singapore) PTE Ltd. v. Amcol International Corp.*, No. 1:13-cv-3455, 2019 U.S. Dist. Lexis 176142 (N.D. Ill. Oct. 10, 2019) (Bucklo).

Opinion

Armada sought recovery for losses it suffered when Ashapura failed to perform under a contract of affreightment requiring Ashapura to provide cargoes of bauxite for Armada to carry in its vessels. Armada obtained arbitral awards of about $70 million against Ashapura and filed this action to enforce those awards through a Rule B garnishment of funds held by the Amcol defendants. Armada alleged that the Amcol defendants engaged in fraud by orchestrating a complex series of corporate transactions among related entities in order to shield assets belonging to Ashapura from turnover. Judge Bucklo concluded that Armada had sufficiently established its case against some of the defendants so that it was entitled to a trial on the issue that there was a fraudulent transfer of assets belonging to Ashapura that should have been disclosed in the Rule B action.

No duty owed to passenger for hazard that was hidden during cruise booking but was known to the passenger (and subject of his complaint to the stateroom attendant) prior to his accident. *McDermott v. Celebrity Cruises, Inc.*, No. 18-23203, 2019 U.S. Dist. Lexis 177701 (S.D. Fla. Oct. 11, 2019) (Martinez).

Opinion

John McDermott, who is disabled and uses an electric scooter for mobility, wanted to book a handicapped-accessible cabin on the CELEBRITY SUMMIT, but all ADA-compliant cabins were booked. On the representation of the sales representative that cabin 7190 was "one level," McDermott booked the cabin. However, the cabin had a raised step at the threshold of the bathroom, and there was a sign warning to "watch your step." McDermott was aware of the step and warning sign, and complained to the stateroom attendant, who apologized but repeated that the cruise was fully booked. McDermott navigated the step several times before he fell while attempting to enter the bathroom. In response to the cruise line's motion for summary judgment, McDermott argued that the step was hidden from him at the time of booking, but Judge Martinez rejected that basis

for a duty on behalf of the cruise line. Judge Martinez answered that the step was open and obvious, both from an objective and subjective standpoint at the relevant time—prior to his fall. As there was no duty, Judge Martinez granted the cruise line's motion for summary judgment.

Economic loss rule bars vessel owner's claim against vessel repairer, and express agreement bars unjust enrichment claim. *American Marine Tech., Inc. v. World Group Yachting, Inc.*, No. 19-cv-60636 (S.D. Fla. Oct. 11, 2019) (Bloom).

Opinion

World Group Yachting entered into a Service Agreement with American Marine (located in Palm Beach County, Florida) to provide materials and services for World Group's yacht, M/Y ALCHEMIST, including a total engine repower. American Marine brought suit against World Group for the outstanding balance for the work, and World Group brought a counterclaim for negligence, breach of implied warranty, and unjust enrichment, based on claims of poor workmanship, delays, and overbilling. American Marine moved to dismiss the counts of the counterclaim based on negligence and unjust enrichment, and Judge Bloom agreed. Noting that the maritime economic loss rule generally bars tort actions where the basis for liability arises from a contract, Judge Bloom found the parties to be in contractual privity and held that the economic loss rule barred the negligence claim (she did give World Group leave to amend to bring a breach of contract claim). American Marine also moved to dismiss the unjust enrichment count of the counterclaim based on the existence of the written agreement between the parties covering the transaction. World Group argued that it had not alleged a breach of contract action in the counterclaim, but Judge Bloom answered that there was an express agreement between the parties. She stated that if American Marine did not deliver on its obligations, World Group could seek contractual remedies. Therefore, the claim for unjust enrichment was dismissed without prejudice. Judge Bloom held that World Group could bring that claim in the alternative to the breach of contract claim in the amended complaint.

Passenger did not state correct duty in complaint for maritime negligence against cruise line based on negligence of shore excursion operator. *Ruben v. Silversea Cruises, Ltd.*, No. 19-cv-22241, 2019 U.S. Dist. Lexis 176827 (S.D. Fla. Oct. 11, 2019) (Bloom).

Opinion

Ronna Ruben was thrown from her motorized bicycle and sustained injuries during a shore excursion in Corsica. The passenger's amended complaint asserted two counts against the cruise line, negligence and apparent agency for the excursion operator. The cruise line moved to dismiss the amended complaint, and Judge Bloom agreed. The negligence count alleged that the cruise line owed the passenger a duty to exercise reasonable care in planning, organizing, and supervising the excursion. However, that allegation impermissibly heightened the actual duty owed by cruise lines for passengers on shore excursions—to warn of known dangers in areas beyond the cruise ship where passengers are invited or are reasonably expected to visit. As such, the negligence count

was dismissed without prejudice. With respect to apparent agency, Judge Bloom noted that this doctrine allows the plaintiff to sue a principal for the misconduct of an independent contractor who reasonably appeared to be an agent of the principal. Rather than determining whether the elements of apparent agency were properly pled, Judge Bloom noted that those elements must be asserted in addition to the underlying act of negligence. As the negligence had to be repleaded, Judge Bloom dismissed the apparent agency allegation to be repleaded as well in compliance with the elements of an apparent agency cause of action. Finally, the passenger sought attorney's fees without stating any statutory or contractual basis for such an award. In the absence of that supporting authority, Judge Bloom dismissed the request for attorney's fees.

Federal court did not dismiss declaratory judgment action on coverage where the underlying suit for which coverage was sought was pending in state court. *Starr Indemnity & Liability Insurance Co. v. Camenzind Dredging, Inc.*, No. 19-cv-694, 2019 U.S. Dist. Lexis 177412 (N.D. Cal. Oct. 11, 2019) (Koh).

Opinion

Paul Williams filed an action against Camenzind and MB Marine in state court in the County of San Luis Obispo, California, alleging an injury on the vessel SURVEYOR. MB Marine filed a cross-claim against Camenzind. Camenzind tendered its defense and indemnity to its insurer, Starr Indemnity, based on its P&I policy, its Commercial Marine Liability policy, and its Bumbershoot policy. Starr denied coverage for the claims of both Williams and MB Marine, and brought this declaratory judgment action in federal court against Camenzind seeking a declaration that it owed no duty to defend or indemnify Camenzind in connection with the litigation in state court. Camenzind then asked the federal court to abstain in the federal declaratory judgment action or, alternatively, to stay the federal action pending the state court litigation. Judge Koh denied Camenzind's motion. The federal coverage action did not involve a needless determination of state issues as the case likely involved federal admiralty law rather than state insurance law. There was no forum shopping in the filing of the federal suit as Starr was not a party to the state action. Finally, there was no parallel state proceeding as the state action involved the personal injury liability claims against the insured, and the federal action involved insurance coverage between the insured and insurer.

Cooks and crane operators on offshore lift boats held to be seaman under the Fair Labor Standards Act and exempt from overtime.

Adams v. All Coast, LLC, No. 16-1426, 2019 U.S. Dist. Lexis 178859 (W.D. La. Oct. 15, 2019) (Milazzo).

Opinion

The plaintiffs were employed as cooks and crane operators on All Coast's fleet of liftboats that service offshore oil and gas platforms in the Gulf of Mexico. They sought overtime pay under the Fair Labor Standards Act, and All Coast argued that they were exempted from overtime under the seaman exception in the FLSA. Judge Milazzo concluded that

cooks who cook for seamen are seamen for the FLSA and that the crane operators were also seamen in this case because their work is a "service which is rendered primarily as an aid in the operation of such vessel as a means of transportation" as defined in the regulations of the Department of Labor.

Court dismissed seaman's claims against defendant who did not employ the seaman or own or operate the vessel on which he was injured and found fact questions that prevented enforcement of arbitration clause.

Kozur v. F/V Atlantic Bounty, LLC, No. 18-08750, 2019 U.S. Dist. Lexis 178901 (D.N.J Oct. 16, 2019) (Rodriguez).

Opinion

Anthony Kozur sued three defendants for injuries he sustained as a seaman on the F/V ATLANTIC BOUNTY. One of the defendants moved to dismiss and established that it did not own the vessel or employ Kozur, so it could not be liable for negligence under the Jones Act or for unseaworthiness or maintenance and cure under the general maritime law. Based on that evidence, Judge Rodriguez dismissed that defendant from the suit. The other defendants moved to dismiss or stay and compel arbitration pursuant to an arbitration clause in Kozur's employment contract. The seaman countered that the clause was never presented to him and that he did not agree to its terms. Based on the factual dispute, Judge Rodriguez held that an evidentiary hearing was necessary to determine whether the seaman agreed to arbitrate his claims.

Court did not dismiss allegations against cruise line with respect to death on jet ski rented from contractor at its cruise center; court dismissed bystander claim of decedent's mother, who was on the beach, but did not dismiss bystander claim of father who attempted to rescue his son. *Twyman v. Carnival Corp.*, No. 19-21896, 2019 U.S. Dist. Lexis 180881 (S.D. Fla. Oct. 16, 2019) (Altonaga).

Opinion

Nicholas Twyman and his parents were passengers on the CARNIVAL SUNSHINE. When the vessel called at the Grand Turk Cruise Center, owned and operated by Carnival, Nicholas inquired at the shore excursion desk about renting a jet ski. The crewmember advised him that there was no excursion with jet skis, but that jet skis were available for rent. Nicholas located a jet ski rental facility at the beach that was operated by a local company and was thrown into the water when his jet ski collided with the jet ski rented by another passenger. Nicholas' father jumped into the water from his jet ski, put his son onto his jet ski, and carried him back to the beach, where Nicholas' mother led the medical response because the paramedics did not know how to use the defibrillator. Nicholas died from blunt force injuries and drowning. Nicholas' parents brought five counts against Carnival under the Death on the High Seas Act, including claims for negligent infliction of emotional distress. In response to Carnival's motion to dismiss, Judge Altonaga held that while some of the notice allegations were insufficient, the plaintiffs did allege sufficient facts to avoid dismissal of the negligence claims. She

specifically addressed Carnival's argument that it had no duty to warn the decedent of the risks associated with jet skis, as the danger was open and obvious. She held that an analysis of these risks requires a context-specific inquiry from a factual record, not a simple analysis of the allegations in a complaint. Therefore, she declined to dismiss the complaint without giving the parties the opportunity to develop the record. As to the counts that sought to impose liability on Carnival based on an agency theory for the negligence of the shoreside contractor, Judge Altonaga held that the representations of the crewmember at the shore excursion desk that jet skis would be available to rent at the Cruise Center was sufficient to support a finding that the contractor was authorized to act on Carnival's behalf. Finally, Judge Altonaga addressed the claims of decedent's father and mother for negligent infliction of emotional harm. The father alleged that he entered the water following the collision and feared the immediate risk of being struck by other jet skis or boats in the vicinity while he attempted to rescue his son. In declining to dismiss the father's claim, Judge Altonaga tried to fit the father's claim into the rule that a bystander may recover when that person is placed in immediate risk of physical harm by the defendant's negligent conduct. She then ruled that he stated a claim by witnessing the accident and then attempted to provide assistance, fearing that he might drown or be subject to an accident with another jet ski or vessel (questionable application of authority). However, she ruled that the claim of the decedent's mother, who was on the beach, was not within the zone of danger even though she was an active participant in the injury-producing event caused by Carnival's alleged negligent conduct.

Judge declined motions in limine seeking to exclude testimony of experts and held that the objections could be raised at trial. *Parker v. John W. Stone Oil Distributors, L.L.C.*, No 18-3666, 2019 U.S. Dist. Lexis 178924 (E.D. La. Oct. 16, 2019) (Fallon).

Opinion

We return to this case (July and September 2019 Updates) arising from the injury to a tankerman on the defendant's vessel when a shackle fell and hit the seaman on the head. The seaman brought four motions in limine to exclude testimony of Dr. Archie Melcher, Dr. Dennis Occhipinti, Dr. Evert Robert, and Dr. Richard Roniger. Judge Fallon addressed the plaintiff's objection to a doctor's testimony about the contents of medical records for a prior injury as "classic hearsay," but Judge Fallon disagreed. Experts are allowed to rely on hearsay in forming their opinions, but their testimony is not a vehicle to introduce otherwise inadmissible evidence. Noting that evidence should not be excluded before trial unless it is clearly inadmissible on all potential grounds, Judge Fallon held that the objection should be raised at trial based on all the information necessary for the court to make the decision at that time. The plaintiff objected to the testimony of an Ear, Nose, and Throat doctor with respect to the impact of plaintiff's multiple sclerosis on his symptoms, but Judge Fallon held that this challenge should be made during cross-examination of the doctor. The plaintiff objected to the testimony with respect to statements made by other doctors about the plaintiff's prior orbital fracture, but Judge Fallon held that this objection required a factual context that should be addressed at trial. Finally, Judge Fallon held that evidence of the plaintiff's criminal history was only admissible to impeach his character for truthfulness if the requirements

of Fed. R. Evid. 609 were satisfied, and a doctor may not use criminal history to impeach the plaintiff's credibility.

Injuries of workers on platform in Louisiana waters were governed by maritime law, and contract to clean flow lines may be maritime when vessels were involved in the operation. *Clovelly Oil Co. v. BTB Refining, LLC*, Nos. 17-14435, 18-5488, 18-9385, 18-9391, 2019 U.S. Dist. Lexis 179790 (E.D. La. Oct. 17, 2019) (Barbier).

Opinion

This case arises from an explosion and fire on a fixed platform (not a vessel) in Lake Pontchartrain in Louisiana. Clovelly, which owned and operated the platform, processed oil and gas from wells that were connected to the platform by flow lines. Clovelly entered into an oral agreement with companies to remove paraffin wax accumulations from three of the lines. The contracting companies mobilized a tug and spud barge for the work. During the cleaning of the third line, the explosion occurred on the platform. Clovelly and three injured workers filed suit against the contracting companies, and the question was presented whether state law or maritime law applied to the claims. As Clovelly's claims sounded primarily in contract, the question was whether the contract to clean the flow lines was maritime. Judge Barbier found this case to be nearly indistinguishable from the Fifth Circuit decision in *Crescent Energy Services, L.L.C. v. Carrizo Oil & Gas Inc.*, 896 F.3d 350 (5th Cir. 2018) involving a contract to plug and abandon wells on platforms in Louisiana waters in which vessels were necessary for the operation. The Fifth Circuit applied the test enunciated by the en banc Fifth Circuit in *In re Larry Doirion, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc), and held that the contract in *Crescent Energy* was maritime. As Judge Barbier considered matters outside the complaint for this motion to dismiss and as the parties had not addressed *Crescent Energy*, Judge Barbier did not decide the issue and advised the parties to address the issue by a motion for summary judgment. However, as the plaintiffs were injured on a platform by the use of vessels on navigable waters, Judge Barbier held that maritime tort law applied to the claims of the injured workers.

Failure to establish defect at sale of vessel sinks products liability claim resulting from capsized vessel. *Judy v. Mako Marine International, Inc.*, No. 2:18-cv-1843, 2019 U.S. Dist. Lexis 179569 (D.S.C. Oct. 17, 2019) (Gergel).

Opinion

Keith Judy purchased a 2006 Mako Marine 234 in July 2015 from the prior owner of the vessel. He took the boat out on Lake Santee, but the battery running a radio died. Judy recharged the boat's batteries and then took the boat into the ocean at Mt. Pleasant, South Carolina. While the vessel was approximately 25 miles offshore, the batteries died. The radio was unusable, and the bilge pump did not work. Ultimately, the vessel took on water and capsized, leaving Judy and his passengers floating in the ocean for 22 hours before being rescued. Judy brought three products liability claims against the manufacturer of the vessel, tort claims for negligence and strict liability (falling under general maritime

law because of the tort committed on navigable waters) and breach of warranty (based on South Carolina law because the warranty arose from the non-maritime sale of a vessel). Regardless of the theory, however, Judy was required to establish a defect that was the cause of the damages. Judy sought to establish a defect by expert testimony that lack of a watertight seal on the fish boxes permitted water to accumulate in the bilge. However, the expert could not testify that there was anything wrong with the seal when the vessel was sold. As there was no more than a possibility of a defect that caused the boat to capsize, Judge Gergel granted summary judgment to the manufacturer.

Lessee of dock held contractually responsible for repairs to dock. *Port of Vancouver, USA v. Metro Metals Northwest, Inc.,* No. C17-5571, 2019 U.S. Dist. Lexis 180037 (W.D. Wash. Oct. 17, 2019) (Leighton).

Opinion

The Port of Vancouver leased a dock on the Columbia River to Metro Metals for the export of scrap metal. In order to facilitate the export of additional scrap metal from the wharf, the parties entered into an agreement for expansion of the dock by the Port that included the responsibility of lessee Metro Metals to repair damage to the terminal areas used for scrap metal operations. When Metro's expanded operations caused damage to the dock to the point that longshore workers complained about its safety, the Port performed repairs at a cost of more than $1.5 million. Metro Metals asserted that it did not intend to pay for repairs to the dock, rendering the agreement unenforceable and void, and the Port brought suit for breach of contract. As the agreement was unambiguous with respect to the obligation to repair, Judge Leighton held that Metro Metals could not "manufacture a question of fact, or a contract defense, by claiming that it subjectively meant something else entirely." Therefore, Judge Leighton granted the Port summary judgment that it was entitled to the cost of the repairs.

Judge orders medical examination of injured passenger in limitation action. *In re Griffith*, No. 3:19-cv-53, 2019 U.S. Dist. Lexis 182743 (S.D. Tex. Oct. 21, 2019) (Edison).

Opinion

Paul Santillan was injured as a passenger on a vessel during a fishing trip. The owner and owner pro hac vice of the vessel filed a limitation action in federal court in Galveston and requested that the passenger undergo a medical examination with a board certified orthopedic surgeon, Dr. Michael Kaldis. Santillan objected on the ground that the limitation petitioners failed to establish good cause for the examination. It was undisputed that Santillan had put his medical condition in issue by seeking to recover damages for his injuries. However, Santillan argued that there were less invasive means to learn about his medical conditions because Dr. Kaldis had access to all of Santillan's records and could electronically review Santillan's deposition. Magistrate Judge Edison easily rejected those arguments as unpersuasive, noting that review of cold medical records is no substitute for an in-person examination and stating that it was patently unfair for Santillan to stand in the way of an independent examination when he filed a

lawsuit seeing more than a million dollars. The twist was Santillan's contention that the IME was not necessary (liability was not an issue) until after the court determined whether Santillan was entitled to limit liability. Magistrate Judge Edison responded that he had already denied Santillan's effort to allow him to pursue his personal injury claim in state court (July 2019 Update), and, as the liability and limitation would be tried together in one proceeding, there was no reason to delay the examination. Therefore, Judge Edison ordered that Dr. Kaldis be permitted to conduct the physical examination of Santillan.

Mentioning vessel in documents submitted with policy application is not the same as declaring the vessel to the insurer, so the policy excluded liability from incident involving vessel chartered to the insured. *Certain Underwriters at Lloyds, London v. AdvanFort Co.*, No. 1:18-cv-1421, 2019 U.S. Dist. Lexis 182338 (E.D. Va. Oct. 21, 2019) (Ellis).

Opinion

After the Indian government seized the SEAMAN GUARD OHIO, a vessel chartered by AdvanFort, for illegally importing weapons, AdvanFort's insurer, Certain Underwriters at Lloyds, brought this declaratory judgment action asserting that there was no coverage for claims of AdvanFort's employees related to their detention and for payments made by AdvanFort to the owner of the vessel. The policy excluded coverage for bodily injury or property damage arising out of the use of any vessel operated by or rented to AdvanFort unless the vessel had been declared to the insurer and accepted by the insurer. AdvanFort argued that passing reference to the existence of the vessel in hundreds of pages of documents describing AdvanFort's operations qualified as declaring the vessel to the insurer. However, Judge Ellis responded that mentioning the vessel is different from specifically requesting coverage. Consequently, he held that there was no coverage under the policy in connection with the seizure of the vessel. Judge Ellis also found additional reasons for denying coverage. The policy covered the crew and guards employed by AdvanFort when they were performing "Insured Services," defined as providing off-shore security services to Vessels. However, the crews and guards were passengers on the vessel in preparation to protect another vessel or off-shore unit. Therefore, their claims were excluded from the policy on that ground as well. Additionally, Judge Ellis concluded that the payments made to the workers for the wages they lost while in jail were not for bodily injury, nor was the payment made to the charterer on account of property damage.

Judge found that seaman's back injury was not caused by incident on vessel and denied his claims. *Young v. Freeport McMoran Oil & Gas, LLC*, No. 18-4464, 2019 U.S. Dist. Lexis 182462 (E.D. La. Oct. 22, 2019) (Zainey).

Opinion

Curtis Young was employed off and on by Offshore Marine Contractors for 16 years. He had suffered back pain since January 2010 and had undergone treatment at the emergency room in 2015 for a chronic problem for which he was prescribed narcotic pain medication and muscle relaxers. He continued to be rehired by Offshore Marine, denying

that he had recurrent back pain even though the day after being rehired he complained of back pain to his doctor and received opiate pain pills and muscle relaxers. On September 1, 2016, Young reported that he had injured his back when a ladder fell on him three days earlier. He brought this action and changed doctors to see Dr. Zoran Cupic, who performed a laminectomy, discectomy, and fusion. In the June 2019 Update, we discussed that Judge Zainey denied Offshore Marine's motion for summary judgment on the *McCorpen* defense (willful concealment), reserving the issue for trial. Judge Zainey now entered findings of fact after trial of Young's seamen's claims. Instead of believing Young and Dr. Cupic, Judge Zainey credited the testimony of Dr. Gordon Nutik, who opined that there was a good likelihood that the disc in Young's back looked the same before the incident as it did on the MRI after the incident. Judge Zainey questioned Young's contention that he did not take the prescribed medications when he went to the trouble of repeatedly visiting physicians to obtain medication and then filled the prescriptions. Also noting that Young had not reported the incident for three days, Judge Zainey doubted that Young could have sustained a blow to his spine that was significant enough to herniate a disc yet leave him with the impression for three days that he was not injured. Concluding that Young did not sustain an injury in the service of the vessel, Judge Zainey denied Young's claims under the Jones Act and for unseaworthiness and cure under the general maritime law.

Seaman's beneficiaries allowed to recover survival damages but not loss of society for exposure to asbestos products on Navy ships on the high seas, in foreign ports, and in United Sates territorial waters. *Evans v. John Crane, Inc.*, No. 15-681, 2019 U.S. Dist. Lexis 184048 (D. Del. Oct. 24, 2019) (Noreika).

Opinion

Icom Henry Evans developed mesothelioma and brought this action for his injuries against suppliers of products containing asbestos. After he died, his widow amended the allegations to assert a wrongful death claim and a survival claim on behalf of his estate and beneficiaries. In this opinion, Judge Noreika addressed survival damages and loss of consortium. With respect to the survival claim, the decedent suffered an indivisible injury from exposure that occurred on the high seas and foreign ports (subject to the Death on the High Seas Act that does not provide a survival cause of action) and in state territorial waters. Judge Noreika held that application of DOHSA's pecuniary loss limitation for wrongful death on the high seas did not preclude application of state law as a gap filler for the survival claim for the injury sustained in state waters. Therefore, the decedent's estate could recover under the Delaware survival statute for the decedent's pain and suffering as well as punitive damages. However, Judge Noreika did not give the same treatment to the claim for wrongful death damages and held that recovery for loss of consortium was not permitted because of the application of DOHSA's pecuniary loss limitation.

From the state courts:

Seaman not entitled to Hawaii workers' compensation. *Bosworth v. Foss Maritime Co.*, No. CAAP-16-315, 2019 Haw. App. Lexis 455 (Haw. App. Sept. 30, 2019) (Ginoza).

Opinion

Larry Bosworth was employed by Foss Maritime as a Class II Tug Operator, performing substantial work on a harbor tug. He was placed into a remedial training program to address the performance of his job, and he complained of mental health injuries related to management pressure while performing his duties "on Tug in Harbor." Bosworth brought a claim for benefits under the Hawaii workers' compensation statute, and that claim was denied. Bosworth was found to be a seaman, and his claim was excluded by the provision that the statute applied to employees in maritime employment "not otherwise provided for by the laws of the United States." As he remained a Jones Act seaman during his remedial training, Bosworth's injury was provided for by the Jones Act, and the appellate court held that he was not entitled to benefits under the Hawaii statute.

Jury instructions in Jones Act case on the primary duty doctrine were not confusing so as to require retrial. *Thomas v. Louisiana Department of Wildlife & Fisheries*, No. 2018 CA 0869, 2019 La. App. Lexis 1766 (La. App. 1 Cir. Oct. 2, 2019) (Penzato).

Opinion

This Jones Act case involves an injury to an enforcement agent employed by the Louisiana Department of Wildlife & Fisheries while working on a boat owned by LDWF, when he tripped on a bow rope that he had put in that position on the boat. The defendant argued that Thomas could not recover because he was injured because of the breach of a duty that he had assumed. The case was submitted to the jury on questions that asked if the defendant was negligent (answer: yes); whether the injury was caused solely by the plaintiff's failure to perform a duty that he had consciously assumed (answer: no); whether the plaintiff was injured solely by the dangerous condition that he either created or that he knew existed and could have controlled or protected against (answer: yes); and whether his injury was caused solely by a knowing failure to carry out his responsibility to protect against the unsafe condition (answer: no). The instructions directed the jury to determine whether the plaintiff was comparatively negligent if it found fault of the defendant, and the jury found that the plaintiff was negligent and that the plaintiff was 72.4% at fault and the defendant was 27.6% at fault. On appeal, Thomas asserted that the instructions were confusing or misleading, but the appellate court disagreed. The court noted that the primary duty doctrine had been limited, so that it did not apply unless the defendant was free of fault or the plaintiff was solely at fault. Although the jury was allowed to answer questions on the primary duty doctrine, the instructions directed the jury to determine the relative fault of the parties in the event the defendant was found at fault. Thus, the jury assessed fault to both parties, and the questions on the primary duty doctrine did not prevent a judgment from being rendered in accordance with the comparative fault of the parties.

Discovery rule did not apply to Jones Act and unseaworthiness claims of seaman who injured her back in 2011 but was not diagnosed with a herniated disc until 2015, but her maintenance and cure claim was not barred by

limitations. *Grazette v. Magical Cruise Co.*, No. 5D18-821, 2019 Fla. App. Lexis 15308 (Fla. 5th DCA Oct. 11, 2019) (Higbee).

Opinion

Onica Grazette worked as a custodial hostess on Disney's cruise ships from October 2011 to January 2015. Two months after she was hired, she bent over to lift a piece of heavy luggage on the DISNEY WONDER and felt a "pop" in her low back. She continued to work until December 29, 2011, when she went to the ship's medical center and told the doctor that she bent over while vacuuming and could not stand upright afterward. Her initial contract ended shortly thereafter, and she was employed by Disney with four more contracts. She sometimes sought treatment for back pain during those contracts until she fell and hit her back on November 22, 2014 during her fifth contract. An MRI on January 17, 2015, revealed that she had a herniated disc at L5-S1. She did not work for the cruise line again. Grazette filed this action in October 2016 noting that she felt that pain in her back while working on the DISNEY WONDER in 2011, but that her condition was not diagnosed until January 17, 2015. Disney contended that her Jones Act claim was untimely (three-year statute of limitations) based on the date of her accident in 2011, but Grazette replied that, based on the discovery rule, her claim did not accrue until the diagnosis of the herniated disc. As her injury was not purely latent, and she had a noticeable, traumatic occurrence in 2011, the court held that the statute began to run in 2011, and her liability claim was time-barred before the suit was filed. However, Grazette had received maintenance and cure payment and ultimately returned to work. There was a fact question when she became incapacitated, so the court reversed the granting of summary judgment on the maintenance and cure claim.

Seaman's asbestos suit dismissed because he could not establish asbestos exposure from the defendant's pumps. *In re New York City Asbestos Litigation*, No. 190364/2017, 2019 Misc. Lexis 5606 (N.Y. Sup. Ct. NY Cty. Oct. 17, 2019) (Mendez).

Opinion

John Eylers was diagnosed with mesothelioma that he claimed resulted from exposure to asbestos insulation on M.T. Davidson's pumps during Eylers' service in the Navy from 1956 to 1958 as a seaman on two Navy vessels. He could not give the brand name of any particular pump, but he cited to Navy records that identified Davidson pumps on the vessels on which he served. Davidson presented evidence that there was no external insulation on the pumps on the two vessels, and Judge Mendez held that Eylers had presented no evidence of exposure to asbestos from Davidson's pumps. Therefore, Judge Mendez granted summary judgment to the defendant, dismissing Eylers' claims against it.

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

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Quote:

Just as developments in technology have revolutionized maritime trade and transactions, so too has the role of admiralty judges changed to respond to an increasingly complex sea of maritime authorities. The role of admiralty judges has not diminished; it has evolved. Admiralty judges not only steer through channels of precedent that were charted by the leading admiralty jurists of the past, but they must also consider increasing numbers of federal and state regulations and legislation.

Hon. W. Eugene Davis, *Admiralty Law Institute Symposium: A Sea Chest for Sea Lawyers. The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tulane L. Rev. 1355, 1356-57 (2001) (footnotes omitted).

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