

MALABU

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The Charleston Maritime Law Institute is pleased to present readers with the Fall/Spring 2019-2020 Issue produced by the Charleston Maritime Law Bulletin (**MALABU**). We want to ask those new and current subscribers to please return the subscription inserts to receive further issues.

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MALABU
The Charleston School of Law
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FALL/SPRING ISSUE

EDITORS' STATEMENT

MALABU is a challenging yet rewarding experience in every way, form, and fashion. And as co-editors-in-chief, perhaps we could make the previous sentence clearer by merely saying, "in every way," however, that's not **MALABU's** *esprit de corps*. Our predecessors charged us with making **MALABU** the best at The Charleston School of Law, which is electrifying and terrifying at the same time, but encouraging with the right people to turn a challenge into a success. But that is what our staffers did for this Fall/Spring issue.

In the words of the late Kobe Bryant, "great things come from hard work and perseverance." Thank you for enduring the process. So, bravo zulu to **MALABU's** staffers! Well-deserved praise is warranted because the publication does not happen without the Article Editors, Brief Editors, and Assistant Editors! So, now we charge the next **MALABU** leadership with paying **MALABU's** price of greatness, whatever that means to you!

Additionally, we encourage all of our readers to share our publication with the community and continue to support future **MALABU** publication efforts—**MALABU** OUT!!

Ainissa Proctor & Johnathan Rice,
Candidates for Juris Doctor, May 2020
Editors-in-Chief

PRESIDENT'S NOTE

The Charleston School of Law is a special place, different than any other institution of higher education. The faculty, staff, students and alumni make this school an inviting and collegial environment for scholastic achievement. One of the distinct features for this law school is its residence in the historic port city of Charleston, South Carolina. Housed in one of the largest water port cities on the East Coast, The Charleston School of Law and its Maritime Law Bulletin (**MALABU**) are well positioned for advancing knowledge throughout the coastline. This student-run publication assists professionals and practicing attorneys with insight on maritime and admiralty issues. As a practitioner in the coastal state of South Carolina my entire career, it is scholastic publications like this that provide guidance for casework and evolutions in the law. **MALABU** will continue to play an important role in the community and within the legal field, and is a flagship for The Charleston School of Law.

President J. Edward Bell

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LAWS IN BRIEF

Welcome to the 2019/2020 FALL/SPRING ISSUE 1, Volume 9, of **MALABU**! The Laws In Brief section contains numerous case briefings of recent Court decisions about admiralty law throughout the United States. In this section, **MALABU** aims to enlighten readers on current developments of admiralty law; providing for up-to-date Court opinions concerning a variety of aspects within the legal realm of our country's maritime community. We believe these dispositions are critical and serve as an informative basis for all admiralty practitioners as well as scholars alike - no matter where they may be.

We hope that our readers find this section both thoroughly helpful and engaging.



CLARIFYING DISCRETIONARY REVIEW OF FIXED VS. VARIABLE FEE CLASSIFICATIONS WITHIN DEEPWATER HORIZON SETTLEMENT AGREEMENTS.

MARITIME LAW/SETTLEMENT AGREEMENTS—The Fifth Circuit Court of Appeals in *BP Expl. & Prod., Inc. v. Claimant ID 100166553 (Ordes Services LLC)* affirmed the judgment of the district court holding that BP did not identify any issue requiring discretionary review in the case. The Claims Administrator and Appeal Panel accurately classified the Management Fee as a fixed expense.

By M. Calvin Brackin

LAWS IN BRIEF

BP, in this Deepwater Horizon case, filed suit against Ordes Services LLC (“Ordes”), an electrical contractor that provided installation, maintenance, and repair services in southeast Louisiana. In March 2013, Ordes submitted a claim according to the Deepwater Horizon Settlement Agreement (“Settlement”). In October 2017, the Claims Administrator (“CA”) determined Ordes was entitled to \$2,100,000 under the Settlement’s terms. The CA classified Ordes’ Management Fee (“Fee”) as a “fixed” cost. British Petroleum (“BP”) appealed this categorization to the Appeal Panel (“Panel”), suggesting classifying the Fee as a “variable” cost due to the expense fluctuation.

¹ The Panel affirmed the CA’s classification. On appeal, the district court denied BP’s request to take up a discretionary review of the Panel’s decision to uphold the classification. Subsequently, British Petroleum (“BP”) appealed to the Fifth Circuit, arguing that the district court abused its discretion when denying the review by failing to resolve a split within the Panel regarding the proper way to classify

expenses. Also, British Petroleum (“BP”) challenged the Panel’s fixed fee classification. The Court held that the split issue among the Panel was resolved and that they used the proper approach in classifying the Fee.² Furthermore, the Court opined that the lower court was not required to examine the Fee classification, as that is left to the current administrative law scheme.

The Court discussed in detail that CA’s and Panel’s must use their independent judgment when classifying an expense as fixed or variable and must determine such a classification based on the substantive nature of the expense.³ Accordingly, the claimant’s rational basis of how the expense was recorded cannot be used to determine the classification.⁴ Additionally, if a CA expressly considers the types of costs included and does not rely on what the label was classified as under the Settlement, then the CA has appropriately exercised independent judgment.⁵ In the alternative, the Court has determined that when a district court focuses on the label given to the expense, instead of utilizing substantive analysis, then that court has used

improper discretion to classify the expense.⁶ Regardless, the mistaken classification only worked to raise the correctness of a discretionary administrative decision in the facts of a single claimant’s case and was, therefore, not one that required discretionary review.⁷

The Court analyzed the CA’s and Panel’s use of independent judgment and pointed out that the CA had documentation in support of the classification and that multiple relevant factors were considered before the CA labeling the Fee. As such, the Court stated the CA did not rely on Ordes’s label of the Fee in the Settlement. Furthermore, the Panel’s de novo review of the nature of the charges included was considered before classifying the fee, which satisfied the independent judgment test. Lastly, the Court dismissed BP’s contention that the Fee should have been classified as variable. Standing alone, the Court stated, the issue of classification does not rise to warrant discretionary review by the lower court because the issue is for administrative actors to decide as opposed to the lower court. Hence, the appeals process, in this case, had been exhausted within the administrative review. Of note: The Court did not reject BP’s argument that the Fee fluctuates and is, therefore, a variable fee, but rather rejected the argument that the singular issue is one that can be resolved outside of the administrative review process.

This case provides clarity to two issues within Deepwater Horizon Settle Agreements: First, it clarifies a previously resolved issue regarding a split Panel’s classification of fees. Second, a district court can rightly refuse a discretionary review of the administrative actors’ fee classification regardless of whether or not it is correct. However, while the classification challenge cannot stand alone, if coupled with an issue that invokes discretionary review, the classification can be reviewed and potentially overturned by a court.

¹ Whether or not a cost is classified as “variable” or “fixed” can significantly increase or decrease the size of the award. *BP Expl. & Prod., Inc. v. Claimant ID 100094497 (Texas Gulf Seafood)*, 910 F.3d 797, 799 (5th Cir. 2018).

² *Id.*

³ *Id.* at 1142.

⁴ *Id.*

⁵ *Id.*

⁶ *BP Expl. & Prod., Inc. v. Claimant ID 100185315*, 761 Fed. Appx. 260 (5th Cir. Feb. 8, 2019).

⁷ *Texas Gulf Seafood*, 910 F.3d at 800.



LOSS OF CONSORTIUM CLAIMS NOT AUTHORIZED UNDER GENERAL MARITIME LAW

MARITIME LAW/TORT—The Eleventh Circuit Court of Appeals in *Eslinger v. Celebrity Cruises, Inc.* affirmed a district court’s motion to dismiss regarding a loss of consortium claim because recovery is not authorized under general maritime law.

By: William Earnhart

Mr. and Mrs. Eslinger boarded the ship M/S Celebrity Equinox on September 15, 2017. On the evening of September 19, during a dance party on the pool deck, Mr. Eslinger jumped into the pool, ultimately injuring his right ankle.¹ After the injury, Mr. Eslinger received medical care on board and alleged it was inadequate. Afterward, Mr. Eslinger brought a negligence claim against Celebrity Cruises Inc. (“Celebrity”) from which he ultimately recovered damages, although they were reduced due to his contributory negligence.² Mrs. Eslinger, however, simultaneously brought a loss of consortium claim against Celebrity due to her husband’s injury. The district court granted Celebrity’s motion to dismiss because the loss of consortium damages resulting from personal injury claims are not authorized under general maritime law. Mrs. Eslinger appealed, arguing the district court erred in refraining from examining the “exceptional circumstances” related to her claim and in failing to consider her husband’s limited rights and remedies as a non-seafarer passenger.

Generally, personal injury claims by cruise ship passengers complaining of injuries suffered at sea are within the admiralty jurisdiction of the district courts, and general maritime law will apply to the claim when the ship is in navigable waters.³ The Court stated that it has repeatedly held the plaintiffs are unable to recover



punitive damages, including loss of consortium damages, for personal injury claims under general maritime law.

Initially, Mrs. Eslinger argued that the rule against loss of consortium claims must be reexamined in light of a Supreme Court opinion.⁴ However, an identical argument was rejected by the Court.⁵ The Court noted that plaintiffs may not recover loss of consortium damages for personal injury claims under federal maritime law and that nothing in the Supreme Court case undermined their holding before this particular case. The Court opined that in the Supreme Court case, they held as a matter of general maritime law that a seaman might recover punitive damages for the willful and wanton disregard of the maintenance and cure obligation in the appropriate case.⁶ The Court, noting this, stated that under the prior precedent rule, they are bound to follow prior binding precedent unless and until it is overruled by their court en banc or by the Supreme Court.

Additionally, Mrs. Eslinger fails to explain why passenger spouses, but not those of seamen, should be permitted to



On the evening of September 19, during a dance party on the pool deck, Mr. Eslinger jumped into the pool, ultimately injuring his right ankle.

recover for loss of consortium as those damages are unavailable under the statutory schemes of the Jones Act and the Death on the High Seas Act.⁷ The Court did not analyze Mrs. Eslinger’s “exceptional circumstances” argument nor her argument that the cruise ship failed to consider Mr. Eslinger’s limited rights and remedies as a non-seafarer passenger. The Court concluded, after reviewing the record, that the district court did not err in dismissing Mrs. Eslinger’s claim for loss of consortium and affirmed the judgment of dismissal.

Likely, courts will continue refraining from extending liability under maritime law to encompass loss of consortium damages in cases like Mrs. Eslingers. The Court did not address Mrs. Eslinger’s “exceptional circumstances” argument, but this could potentially stem debate among the courts had the circumstance been truly exceptional. Had Mr. Eslinger suffered severe injury or death as a result of the willful and wanton disregard of the maintenance and cure obligation on the part of Celebrity, then the courts may have had a more difficult question before them. Loss of consortium damages are no stranger outside general maritime law and could potentially find their way in via an “exceptional circumstances” argument if a situation so extreme and exceptional were to present itself. If this type of scenario arises, the courts will have to choose between upholding the prior precedent rule or perhaps creating an exception to allow for loss of consortium damages.

¹ *Eslinger v. Celebrity Cruises, Inc.*, 2018 U.S. Dist. LEXIS 224554 (S.D. Fla. 2018).

² *Id.*

³ *Caron v. NCL (Bahamas), LTD.*, 910 F.3d 1359 (11th Cir. 2018).

⁴ *Atl. Sounding Co. v. Townsend*, 557 U.S. 404 (2009).

⁵ *Eslinger v. Celebrity Cruises, Inc.*, 2018 U.S. Dist. LEXIS 224554 (S.D. Fla. 2018) (citing) *Peterson v. NCL (Bahamas) Ltd.*, 748 Fed. Appx. 246 (11th Cir. 2018).

⁶ *Atl. Sounding Co.*, 557 U.S. at 424.

⁷ *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990).

LAWS IN BRIEF

ZONE OF DANGER REQUIREMENTS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS RECOVERY IN CHILD'S NEAR- DROWNING INCIDENT

MARITIME LAW/TORT—The Eleventh Circuit Court of Appeals in *Azzia v. Royal Caribbean Cruises, Ltd.* affirmed a district court's partial grant of summary judgment concerning negligence and negligent infliction of emotional distress claims. Even though there were no lifeguards present watching the Azzias' four-year-old son in the kiddie pool onboard the cruise, the Azzias' failed to demonstrate they were in the zone of danger during their son's near-drowning accident.

By: Ralitsa C. Francois

Valentina Azzia, Stefano Agazzi ("Azzia"), and their two children, citizens and residents of Italy, boarded Royal Caribbean's Oasis of the Seas for a cruise.¹ While on the

cruise, the Azzias' lost sight of their four-year-old son, A.A., who was swimming in the children's pool area. Shortly after, the Azzias' observed a passenger pull their son's body out of the pool and begin CPR in an attempt to resuscitate A.A. Fortunately, with the help of two other passengers, A.A. survived the incident. Thereafter, the Azzias' filed suit against Royal Caribbean Cruises ("Royal") for negligence, on behalf of A.A., and negligent infliction of emotional distress ("NIED"), on behalf of themselves and A.A.'s sibling, alleging that Royal failed to have lifeguards or crewmembers stationed by the children's pool. As an aside, it was public knowledge that other incidents, such as A.A.'s, occurred with other children while aboard Royal ships. Royal moved for partial summary judgment on the NIED claim, and the district court granted the motion. The Azzias' appealed to the Eleventh Circuit.

The Court concurred with the district court that diversity jurisdiction did not exist because the Azzias' were citizens and residents of Italy, and Royal was incorporated in Liberia. Diversity jurisdiction cannot exist between a corporation incorporated solely

in a foreign state and a resident of another foreign state, regardless of that corporation's principal place of business.² Despite the failure to properly elect under FRCP 9(h), the Azzias' claim fell within admiralty jurisdiction.³⁴ The Court reviewed the district court's grant of summary judgment de novo, where they held that the Azzias' were not in the required zone of danger and, as a result, could not recover.

The Azzias' argued that the zone of danger test was inapplicable, but the Court disagreed and cited the prior panel precedent rule. Under the previous panel precedent rule, the Eleventh Circuit binds each succeeding panel by the holding of the first panel in addressing an issue of law unless that holding is overruled en banc or by the Supreme Court.⁵ The Court established that federal maritime law adopted the "zone of danger" test, which provides recovery to plaintiffs placed in immediate risk of physical harm or who sustain a physical impact as a result of the defendant's negligent conduct.⁶ All this considered, plaintiffs who fall outside of that zone of danger cannot recover.

The Court affirmed that the zone of danger test failed because of the lack of sufficient evidence provided by the Azzias' to demonstrate that they sustained physical impact or were placed in immediate risk of physical harm by Royal's failure to station lifeguards or crewmembers in the children's pool area. Most NIED claims involve mental or emotional harms, such as fright or anxiety, caused by the negligence of another, that manifest into physical symptoms. The Azzias' did not produce documentation suggesting that any physical symptoms manifested in themselves, or A.A.'s sibling, after having witnessed A.A.'s near-drowning. As a result, the Court affirmed the district court's grant of partial summary judgment regarding the NIED claim.

¹ *Azzia v. Royal Caribbean Cruises, Ltd.*, No. 18-12644, 2019 WL 4072012, (11th Cir. Aug. 29, 2019).

² *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018).

³ 28 U.S.C. § 1331(1) (2012).

⁴ 28 U.S.C. § 1292(a)(3) (2012).

⁵ *Breslow v. Wells Fargo Bank*, 755 F.3d 1265, 1267 (11th Cir. 2014).

⁶ *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1338 (11th Cir. 2012).



RELEASE AND WAIVER CLAUSES IN LIGHT OF THE LOUISIANA PRODUCTS LIABILITY ACT

MARITIME LAW/TORT—The Fifth Circuit reversed a district court’s holding that Louisiana law validated the release and waiver clause due to the plaintiff’s failure to establish the defendant’s recklessness or intent.

By: Stephany Garcia-Herrera

Petrobras, an oil and gas company, contracted with Technip USA, Inc. (“Technip”) to build a free-standing hybrid riser system.¹ Additionally, Technip subcontracted with Vicinay to engineer and manufacture five tether chains designed to attach the riser system to buoyancy cans, which would prevent the system from kinking over and allow the crude oil to flow from the ocean floor to the above facility. However, Petrobras discovered a defective chain which failed their offshore oil production system. Therefore, Petrobras asserted six claims under Louisiana law against Vicinay for the faulty chain, but the United States District Court for the Southern District of Texas dismissed all claims except for the Louisiana Products Liability Act (“LPLA”) and redhibition claims.

Furthermore, Vicinay moved for summary judgment on the two claims under an affirmative defense based on contractual release provisions. The provisions released Technip and its subcontractors of all claims from Petrobras. Nonetheless, Petrobras argued the release was unenforceable under Louisiana law because it provides that “any clause is null that, in advance, excludes or limits the liability of one party for an intentional or gross fault that causes damage to the other party.” Contrary, Vicinay argued the contractual provisions precluded Petrobras from bringing claims against them and that Texas law, not Louisiana law, should apply. Agreeingly, the district court sustained the validity of both provisions and granted summary judgment against Petrobras.

The district court’s reasoned to make the provisions unenforceable, Petrobras had to prove that Vicinay engaged in reckless conduct. However, under a de novo standard of review, the Fifth Circuit rejected Vicinay’s Texas-law-should-apply argument and applied Louisiana law under the Outer Continental Shelf Lands Act (“OCSLA”). OCSLA requires application of the adjacent state’s laws to controversies occurring at an OCSLA situs (i.e., legal jurisdiction) so long as the claims are consistent with other federal law and are not Maritime claims.² Vicinay argued that Petrobras tort claims were Maritime claims but did not discuss the claims that occurred outside of OCSLA’s legal jurisdiction.

Furthermore, the Court used 43 U.S.C. § 1333(a)(2) to support their choice of law.² Understandingly, the arising controversy must be governed under the laws of the adjacent state, regardless if the parties privately contracted for different law to apply, and even when the adjacent state’s choice-of-law principals would incorporate a different body of law. Thus, the Court concluded that the district court correctly followed the Louisiana law.

¹ *Petrobras Am. Inc. v. Vicinay Cadenas, S.A.*, No. 18-20532, 2019 WL 2521661 (5th Cir. June 18, 2019).

² The Court also relied on 43 U.S.C. § 1333(a)(1)—“the country’s laws and authority ‘extend [. . .] to the subsoil and seabed of the outer Continental Shelf,’ as well as certain man-made structures attached to them, ‘to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state.’”

³ This statute recognizes the adjacent state’s law to a territory as long as they are applicable and not conflicting with other Federal laws.



NINTH CIRCUIT SUPPORTS BENEFITS REVIEW BOARD’S DECISION AND ADHERES TO SUBSTANTIAL EVIDENCE STANDARD

MARITIME LAW/LHWCA—The Ninth Circuit Court of Appeals denied a claimant’s petition for review in *Hernandez v. Nat’l Steel & Shipbuilding Co.* The Court supported both the Administrative Law Judge and the Benefit Review Board’s decision due to the claimant not meeting his preponderance of the evidence burden of proof, and the decision was rational because it was supported by substantial evidence.

By: John D. Hillman, III

Xavier Hernandez (“Claimant”) suffered a compensable work-related injury during his employment with National Steel & Shipbuilding Company.¹ Claimant further contended that he suffered a disabling back and hip work-related injury, which rendered him unable to perform his usual work, further exacerbating his loss of earning capacity. After his injury, Claimant was seen by Dr. Raiszadeh (“Dr.”). The Administrative Law Judge (“ALJ”) first heard the Claimant’s case, and after reviewing the Dr.’s records, determined the Claimant had a 25% permanent partial disability in his left lower extremity; however, the ALJ found that there was no evidence in the Dr.’s records that indicated the Claimant should be restricted from work based on his hip and back injury. It was apparent in the record that the Dr. had examined Claimant’s back, yet after further review of

the records, the Dr. had only diagnosed a left knee and back condition.

Furthermore, the Dr. didn’t specify which one, if any of the conditions, led to the Claimant’s limitations assessed by him. Therefore, the Claimant failed to show that his alleged back and hip work-related injuries were disabling.² Claimant appealed to the Benefit Review Board (“BRB”), who affirmed the ALJ’s decision. The Claimant then petitioned the Ninth Circuit Court of Appeals for review of the decisions.

First, the Court established it had jurisdiction under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”).³ Second, the Court was clear that they review the BRB’s decision on questions of law de novo. Additionally, the Court opined that an ALJ’s findings must be accepted unless they are contrary to the law, irrational, or unsupported by substantial evidence.⁴ The Claimant had to establish with the preponderance of the evidence burden of proof that the asserted injuries to his lower left extremity, back, and hip restricted him from being able to perform his usual work, and that these restrictions resulted in his loss of earning capacity. The Dr.’s examination records of the Claimant led both the ALJ and the BRB to determine that the Claimant did not meet his burden of proof. Thus, the Court was able to detect that their decisions were rational and supported by the substantial evidence provided in the Dr.’s records. Having determined the ALJ and BRB’s factual findings adhered to the substantial evidence standard and discerned that there was no error in their conclusions, the Court unanimously denied the Claimant’s petition for review without oral argument.

¹ *Hernandez v. Nat’l Steel & Shipbuilding Co.*, 771 F. App’x 814 (9th Cir. 2019).

² 33 U.S.C. § 902(10) (2012) (defining disability).

³ 33 U.S.C. § 921(c) (2012).

⁴ *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999).

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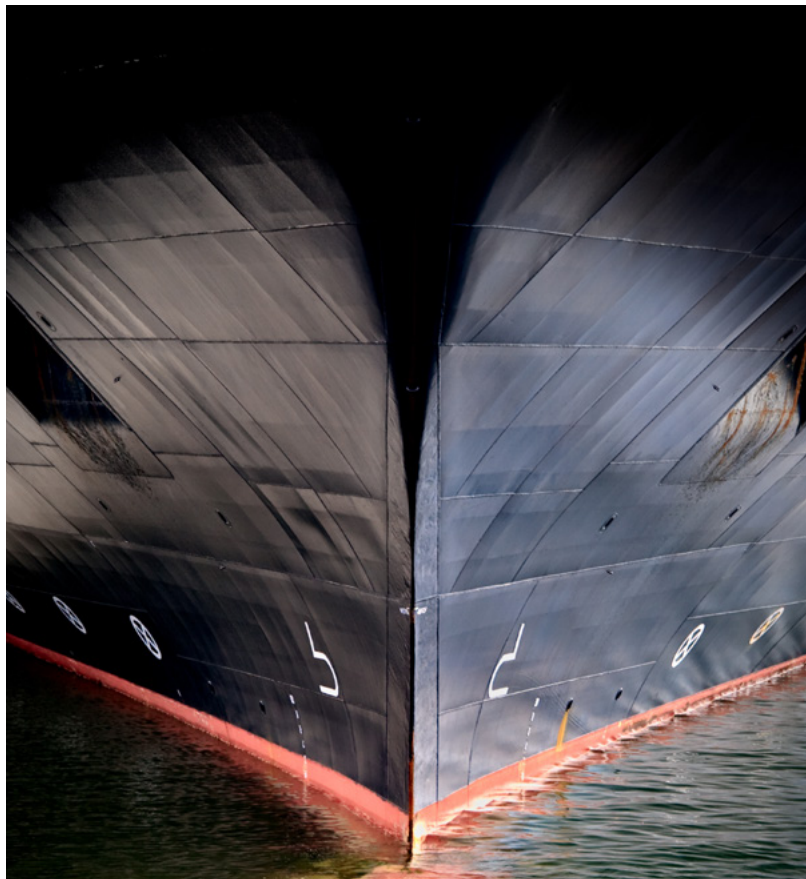
WILLFUL DEFAULT: WHEN IS NOTICE REQUIRED?

MARITIME LAW/FEDERAL CIVIL PROCEDURE—

The Fifth Circuit affirmed a district court's holding in action seeking cleanup costs where the particular shipping entity was already in default for failure to appear and had a history of failing to respond to any filings through the course of the lawsuit.

By: Rachel V. Hillman

This lawsuit arose after a particular ocean carriage's improperly packaged shipment of hydrochloric acid ("HCL") was discovered to be leaking when arriving in Houston, resulting in a costly emergency clean-up response.¹ A.P. Moller-Maersk A/S ("Maersk"), a Danish corporation specializing in transportation of containerized ocean cargo, claimed the Defendant-Appellant Safewater Lines (I) PVT., Ltd. ("Safewater") and Defendant-Appellee Samrat Container Lines, Inc. ("Samrat") refused to take delivery of the abandoned cargo after it arrived in the Port of Houston.² Following a history of Safewater's failure to respond to any



filings throughout the lawsuit from its initial commencement on June 13, 2013, up until it filed the motion to vacate default judgment on January 5, 2017, there came the appeal.

The first matter addressed on appeal concerned notice and hearing under which Safewater argued the district court erred in denying its Rule

60(a) motion to vacate the default judgment where the default was entered before seven days had passed between service of Samrat's motion for default judgment and the district court's grant of default judgment.³ Concerning the matter of notice and hearing, Safewater further argued the failure to give any notice raised questions of due process, and thus, the relief should have been granted, and went on to claim to have been "actively preparing

to oppose the motion for default judgment."⁴ Conversely, Samrat argued that Safewater was already in default when its New Jersey counsel moved to appear, and therefore, notice under Federal Rule of Civil Procedure 5 of the motion for default judgment was not required.⁵

As to the issue of notice and hearing, the court finds that Safewater's argument lacks merit for two reasons.⁶ First, Safewater's motion to vacate default judgment does not mention the seven-day notice period, which forms the basis of this appeal.⁷ The first time Safewater presented their argument was in its motion for reconsideration, but as noted by the court, such motions "cannot be used to raise argument which could, and should, have been made before the judgment issues."⁸ Secondly, Safewater was already in default on December 14, 2016, and as provided under Federal Rule of Civil Procedure 5(a) (2), "no service is required on a party who is in default for failing to appear."⁹ Therefore, Samrat's motion for default judgment, filed December 16, 2016, was not required for service on Safewater by either Samrat's counsel or the district court. Also, as with relevance to Rule 5, Safewater's counsel's filing of a motion for admission pro hac vice on December 19, 2016, only required notice of all subsequent proceedings and copies of all papers, even if one later chooses to default.¹⁰ Significantly, there were no "subsequent proceedings" concerning the granting of Samrat's default judgment, but only the district court's issuance of the order granting such on December 21, 2016.¹¹ The court further reasons that Safewater's history of failing to respond to any filings from its initial commencement until its motion for admission pro hac vice in this lawsuit undermined its claim that it would have responded to the motion for default judgment.¹² Accordingly, the court held the district court did not abuse its discretion in declining to set aside the default judgment.

Also, under review in the appeal, the court addressed whether Safewater willfully defaulted for clear error. Safewater claimed it believed in good faith that if it did respond to Samrat's crossclaim, it would place itself in a dispute that was previously resolved by

its settlement with Maersk, which Safewater thought should have mooted the crossclaim.¹³ Samrat, in support of their argument that Safewater willfully defaulted, argued that the district court correctly denied Safewater's motion to vacate default judgment because they acted "willfully" and without "good cause."¹⁴

A district court may refuse to set aside a default judgment if it finds the default was willful, or in other words, an intentional failure to respond to litigation.¹⁵ As to Safewater asserting it anticipated the complaint would be dismissed, the court significantly noted different courts' findings. Such findings reflected that a proper crossclaim, such as Samrat's, is not subject to dismissal simply because the original complaint is dismissed as to the defendant named in the crossclaim. The Federal Rules of Civil Procedure are clear about unanswered motions for entry of default and entry of default judgment in that they must be responded to, especially as in the present case, where Safewater, the defendant party, has never responded to any pleadings or documents throughout the litigation.¹⁶ Considering Safewater's unresponsive conduct throughout the litigation, the court holds the district court's finding that Safewater willfully defaulted is not clearly erroneous.¹⁷

Moreover, Safewater's motion for reconsideration, as denied by the district court, was addressed by the court on appeal. In support of the argument the district court erroneously denied its motion for reconsideration, Safewater claimed that the district court overlooked that their absence was not the result of any ill will or desire to ignore proceedings, but borne of a good faith belief that its involvement in the lawsuit would undermine its settlement with, and dismissal by, Maersk. Additionally, Safewater argued the district court overlooked their meritorious defense

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to Samrat's crossclaim and asserted the court should remand the matter to the district court to provide reasons for the denial of its motion for reconsideration.¹⁹ Comparatively, Samrat argued that the district court's denial of reconsideration without written reasons was proper.²⁰

As with relevance to this last inquiry, a motion for reconsideration "must clearly establish either a manifest error of law or fact or must present newly discovered evidence."²¹ As to Safewater's assertion, the district court demonstrated manifest error in denying the motion for reconsideration; the court expresses its disagreement. The court finds the district court's order denying Safewater's motion to vacate is based on and supported by its factual findings, as well as the record and order denying their motion for reconsideration supports those findings.²² Furthermore, as to the issue taken by Safewater with the fact that the district court did not provide reasons for its

reconsideration decision, the court in opposition refers to Federal Rule of Civil Procedure 52(a)(3) and ensures that a district court is not required to state findings or conclusions when deciding a Rule 60(b) motion or its reconsideration, as in the present case.²³

Therefore, the United States Fifth Circuit Court of Appeals affirmed the Southern District of Texas court's judgment.

- 1 *A.P. Moller - Maersk A/S v. Safewater Lines (I) Pvt., Ltd.*, No. 18-20655, 2019 WL 3934668 (5th Cir. Aug. 19, 2019).
- 2 *Id.* at 1.
- 3 *Id.* at 3.
- 4 *Id.*
- 5 *Id.*
- 6 *Id.* at 4.
- 7 *Id.* at 2.
- 8 *Id.* at 4.
- 9 *Id.*
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 5.
- 14 *Id.* at 3.
- 15 *Id.* at 5.
- 16 *Id.* at 6.
- 17 *Id.*
- 18 *Id.* at 3.
- 19 *Id.*
- 20 *Id.*
- 21 *Id.* at 6.
- 22 *Id.*
- 23 *Id.*



AFTER ALMOST THREE DECADES OF LITIGATION: RUIZ FACTORS AND JUDICIAL ADMISSIONS HELP DEFINE TORTFEASOR'S SCOPE OF EMPLOYMENT AND EMPLOYER'S LHWCA § 33 RECOVERY

MARITIME LAW/LABOR LAW/TORT—A long-awaited decision; The Fifth Circuit Court of Appeals in *Mays v. Dir., Office of Workers' Comp. Programs* affirmed the ALJ and BRB's decision in this case. By using the Ruiz analysis and judicial admissions, the Court determined a third-party tortfeasor was not a borrowed servant of the employer but was an independent contractor. Additionally, the Court affirmed the award to the employer of § 33(f) benefits, and the denial of a § 33(g) forfeiture, rendering it inapplicable.

By: Tom Krahe

Tom Mays was a welder and employee of Huntington Ingalls, Inc. ("Avondale") when he was injured by John Gliott, a temporary worker for International Marine & Industrial Applicators Inc. ("IMIA"), in the spring of 1991.¹ Avondale contracted with IMIA for cleaning and sandblasting services at its shipyard in Louisiana. Avondale and IMIA had an agreement whereby Avondale paid for services rendered while IMIA maintained insurance for and

supervised its employees. Per the agreement, IMIA employees would work at Avondale's shipyard for up to ninety days, depending on the length of the job. Gliott was on temporary work duty at the Avondale shipyard when, on March 18, 1991, an apparent scuffle ensued, and Gliott kicked Mays in the head. Mays' cheekbone was fractured and one of his eyes was injured. Following surgery, Mays saw several psychiatrists hoping to resolve a psychological condition that developed after the altercation. Avondale paid Mays' disability and medical benefits and, after five months, asked him to return to work. He did not return and instead filed a Longshore and Harbor Workers Compensation Act ("LHWCA") claim against them. The Office of Administrative Law Judges ("ALJ") awarded medical benefits only upon remand from the Benefits Review Board ("BRB"). Then, Avondale appealed, but the BRB affirmed.

Synonymously, Mays filed a third-party suit against both Gliott and IMIA in Louisiana state court. The action resulted in a \$60,000 settlement for Mays. The agreement stipulated that Mays agree to dismiss all claims in the LHWCA matter against Avondale. Mays accepted the settlement without Avondale's approval. Upon learning of the settlement, Avondale filed a motion with the OALJ arguing Mays' rights to compensation and benefits were forfeited according to § 33(g) of the LHWCA. Avondale argued this was due to his failure to secure their approval before accepting a third-party tort settlement for less than the value of his workers' compensation benefits.² The ALJ denied § 33(g) forfeiture but awarded § 33(f) relief allowing Avondale

to credit its liability for medical benefits against the net settlement amount Mays recovered.

Meanwhile, Mays filed a request for modification of his award that was subsequently denied by the ALJ due to untimely filing. On appeal, the BRB affirmed § 33(f) relief but remanded stating the request was not time-barred. The ALJ was further instructed to determine if Mays' potential future benefits would be subject to forfeiture under § 33(g). However, in 2006, Mays withdrew his modification request. Several years later, he reinstated his claim arguing a mistake of fact had been made. Mays contended he had never entered into a third-party settlement with IMIA arguing Gliott was a borrowed servant of Avondale. The BRB ultimately denied the request, which triggered both Mays and Avondale to cross-petition for a review of the BRB's Order. As such, the Court looked to ensure that the BRB did not err in concluding that the ALJ's Order was supported by substantial evidence on the record as a whole and as per the law.³

First, the Court considered all nine Ruiz factors in determining whether Gliott was a borrowed servant of Avondale. No single factor is decisive; however, the central question in borrowed servant cases is the first factor; whether someone has the power to control and direct another person in the performance of his work.⁴⁵ The Court was careful to note that a distinction must be made between cooperation and subordination and, as such, confirmed that the first factor is the most critical. As previously stated, the facts indicated that Avondale monitored the project while IMIA directed and supervised the actions of their employees during the course of their

daily work. The Court opined that Avondale's quality checks and general site management did not amount to the conduct of a borrowing employer. To shore this reasoning up, the Court used the testimony of IMIA's president, in which he indicated his on-site foremen were in charge of all tasks to be performed by IMIA employees. Consequently, the Court struck down Mays' borrowed servant argument and found Gliott to be an independent contractor.

Lastly, the Court noted that Avondale did not argue that the BRB made an error of law; they argued that the BRB failed to consider the findings of the ALJ, whereby § 33(g) was invoked. Hence, the Court found that Avondale misunderstood the ALJ's decision altogether. The ALJ's Order did not modify Mays' benefits at all, and that if the Order had, it would have triggered, and been canceled out by a § 33(g) forfeiture.

Therefore, the § 33(f) relief awarded by the ALJ remains in effect, and the unmodified compensation award stands. The Court found no error, noting that the BRB's conclusion and ALJ's decision were supported by substantial evidence on the record as a whole and under the law. Finally, after almost thirty years since the altercation, on September 11, 2019, the Court affirmed the Order of the BRB.

¹ *Mays v. Huntington Ingalls, No. 18-60004 (5th Cir., September 11, 2019).*

² *33 U.S.C. § 933(g) (2012).*

³ *Avondale Indus., Inc. v. Dir., OWCP, 977 F.2d 186, 189 (5th Cir. 1992) (quoting Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 115 (5th Cir. 1980)); see, Ceres Gulf, Inc. v. Dir., OWCP, 683 F.3d 225, 228 (5th Cir. 2012).*

⁴ *Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969).*

⁵ *Hebron v. Union Oil Co. of Cal., 634 F.2d 245, 247 (5th Cir. Unit A Jan. 1981) (per curiam) (citing Gaudet v. Exxon Corp., 562 F.2d 351, 355 (5th Cir. 1977)).*

SHIPPING ACT OF 1984 OVERRULES THE UIIA: MARITIME CONTRACT LAW

MARITIME LAW/CONTRACT—Defendant-Appellant CMA CGM ("America") LLC and CMA CGM, S.A. (collectively, "CMA") appealed the Central District of California court's interlocutory order that disposed of a counterclaim against Plaintiff- Appellee Lincoln Transportation Services, Inc ("Lincoln") for detention charges. Here, the Ninth Circuit affirmed the interlocutory order

By: Callen Larus

Ocean carrier CMA contracts with its consignees, whereby the latter are liable for all detention charges.¹ Lincoln provides drayage services between CMA's facilities and those of consignees. Lincoln, as required by ocean carriers, signed the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"). The agreement allows Lincoln to remove containers from ports and requires their return within an allotted amount of time. Beyond the allotted time, the UIIA would compel Lincoln to pay the detention charges despite CMA's service contracts that assign such penalties to consignees.

The Shipping Act of 1984 governs contracts between ocean carriers and their consignees whereby statutorily "[a] common carrier...may not provide service in the liner trade that is not following the rates, charges, classifications, rules, and practices contained in a [...] service contract."² Accordingly, federal courts do not uphold contracts that are contrary to statutory orders, thus constituting illegal activity.³ Subsequent agreements cannot doubly

allocate rates and charges otherwise wholly contained in a preceding contract.⁴

The Ninth Circuit, in a unanimous decision, affirmed the interlocutory order. The contracts between CMA and consignees were governed under the Shipping Act of 1984. CMA's terms set all charges to its consignees with no obligations to other parties. CMA deviated from the terms of its service contract with consignees as CMA attempted to shift detention charges from consignees to Lincoln. Lincoln's drayage services were contractually separate under the UIIA. CMA could not legally deviate from its terms with its consignees by utilizing the redundant terms of the UIIA to claim Lincoln owed what CMA's consignees were expressly obligated.

The Shipping Act of 1984 limits damages to express terms in service contracts. The redundant terms of the UIIA regarding detention charges do not overrule the practice set between CMA and its consignees. Furthermore, the District Court correctly held that shifting obligations to Lincoln according to the terms of the UIIA could not apply subsequently.

¹ *Lincoln Transportation Servs., Inc. v. CMA CGM Am., LLC, 772 F. App'x 593, 594 (9th Cir. 2019).*

² *46 U.S.C. § 41104(2)(A) (2006); see also Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1093 (9th Cir. 2001) (damages are limited to actual loss as detention charges are expressly limited to time beyond the contractually allotted time to return; damages do not include the allotted time plus time beyond).*

³ *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77, 102 S.Ct. 851, 856 (1982)*

⁴ *See Yang Ming Marine Transp. Corp., 259 F.3d at 1093*

IMPLIED WAIVER OF PERSONAL JURISDICTION: MARITIME TORT LAW

MARITIME LAW/TORT—Merchant mariners, on a theory of nationwide personal jurisdiction, sued shipowners for exposure to asbestos onboard ships. The Third Circuit Court of Appeals found that actions taken by shipowners and their counsel amounted to a waiver of their affirmative defense of personal jurisdiction.

By Kori McGraw

In the mid-1980s, merchant mariners relied on a theory of nationwide personal jurisdiction, filed thousands of lawsuits in the Northern District of Ohio claiming injury due to exposure to asbestos onboard ships.¹ The shipowners, in turn, filed motions to dismiss, arguing the nationwide theory of personal jurisdiction was improper, and the shipowners did not have sufficient ties to Ohio to amount to personal jurisdiction.² After finding there was a lack of personal jurisdiction over the shipowners, the Judge denied the motions to dismiss and issued an order to transfer the cases instead.³ The defense counsel then requested additional time to consult with the shipowners to determine if they would like the case to be transferred or if they wished to waive their personal jurisdiction defense and remain in the Northern District of Ohio.⁴ At a follow-up hearing, the defense counsel still did not have an answer from his client.⁵ After the hearing's conclusion, the Judge advised the defense to file an answer by the answer deadline if they intended to waive the

personal jurisdiction defense in which the defense counsel agreed to that procedure.⁶

The judge then issued a maritime asbestos docket (MARDOC) order No. 40 and 41 reiterating the procedure agreed to by the defense counsel.⁷ MARDOC No. 40 directed the shipowner to file an answer by January 5, 1989, if they wished to waive their personal jurisdiction defense.⁸ MARDOC No. 41 ordered cases where personal jurisdiction was lacking and not waived to be transferred.⁹ Shipowners then filed a motion for interlocutory appeal to challenge the Northern District of Ohio's authority to transfer rather than dismiss the cases.¹⁰ Before the district court ruled on the motion, the shipowners filed an answer in compliance with the deadline while attempting to reserve their personal jurisdiction defense in their answer.¹¹ The Northern District of Ohio never ruled on the motion for interlocutory appeal and proceeded as if the shipowners waived their personal jurisdiction defense.¹² The case progressed for over a year, and the shipowners never filed additional motions challenging the court's jurisdiction or seeking a transfer.¹³

In 1991, maritime asbestos cases were transferred to the asbestos MDL in the Eastern District of Pennsylvania.¹⁴ In 2011 the cases were reactivated.¹⁵ In 2013 and 2014, MDL court issued memorandum opinions concluding several shipowners were not subject to personal jurisdiction in Ohio. The court found the shipowners preserved their personal jurisdiction defense by raising the defense before the Northern District Court of Ohio and again before the MDL Court.¹⁶ The MDL court dismissed the claims against the shipowners for lack of personal jurisdiction and concluded that the shipowners did not intend to waive their personal

jurisdiction defense and did not do so by filing an answer in the Northern District of Ohio.¹⁷ The shipowners preserved defense by clearly identifying the defense and seeking interlocutory review.¹⁸

There are two issues the Third Circuit Court of Appeal reviews. The first issue is whether the District Court abused its discretion when it concluded that the shipowners' conduct amounted to a waiver of the personal jurisdiction defense as a matter of law.¹⁹ The second issue is "[w]hether the MDL Court abused its discretion when it concluded that the shipowners had not waived their personal jurisdiction defenses by subsequently consenting to, or acquiescing in, the jurisdiction of the Northern District of Ohio."²⁰

The Appeals Court first reviewed the District Court's decision as to the waiver of an affirmative defense for

abuse of discretion.²¹ The Supreme Court and the Third Circuit Court of Appeals have previously found the right to assert a personal jurisdiction defense may be waived through conduct either affirmatively or implicitly.²² If the party litigates the merits of the case or demonstrates a willingness to engage in litigation in the forum, that party has consented to personal jurisdiction.²³ The purpose is to prevent "dilatory tactics" and expedite, as well as simplify, the pretrial phase of litigation.²⁴ Even though the shipowners met the technical requirements of the Federal Rules of Civil Procedures Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule to expedite and simplify proceedings in federal court.²⁵ Thus, the Third Circuit Court of Appeals held that it was improper for the



District Court to conclude that there was no waiver of personal jurisdiction and improperly applied the law to the facts, which is an abuse of discretion.²⁶

The Third Circuit Court of Appeals held there was an implicit waiver, and the MDL Court's contrary ruling was an abuse of discretion.²⁷ The court first looks at the fact that the shipowners requested additional time to consider a transfer or waiver of personal jurisdiction.²⁸ The shipowners' counsel again at a follow-up hearing requested further rulings from the judge before deciding to transfer or waive personal jurisdiction.²⁹ The Appeals Court found parties that request affirmative relief and rulings from a court have waived their personal jurisdiction defense.³⁰

The Court looks at the shipowners' objection to the transfer.³¹ The District Court judge found there was no personal jurisdiction and gave the shipowners two options, to transfer the case or to waive their personal jurisdiction defense.³² Due to the shipowners' objection to the transferring, they constructively opted to waive their personal jurisdiction defense.³³

The Appeals Court views the shipowners' filing an answer in the Northern District of Ohio as a waiver of their personal jurisdiction defense.³⁴ Generally, an answer identifying the affirmative defense of lack of personal jurisdiction would not constitute a waiver.³⁵ Because of the circumstances of the case and the parties express agreement that the shipowners' filing an answer would constitute a waiver of the defense, their actions were consistent with a waiver.³⁶ Further, the shipowners filed an interlocutory appeal; the shipowners were not obligated to file an answer to avoid transfer as they are not bound by scheduling orders of a court that does not have personal jurisdiction over them.³⁷ By filing pleadings, the shipowners chose to litigate their case in the

Northern District of Ohio actively; therefore, their conduct constitutes a waiver.³⁸

The shipowners forfeited their personal jurisdiction defense when they failed to pursue the defense in the Northern District of Ohio diligently.³⁹ The shipowners had an obligation to diligently pursue the defense rather than allow the case to progress for over a year in the Northern District of Ohio.⁴⁰ Based on the above grounds, the Appeals court found it clear that the shipowners both waived their personal jurisdiction defense by their conduct and forfeited their opportunity to pursue the defense in the district court.⁴¹

The MDL Court abused its discretion by concluding, "the shipowners had preserved the personal jurisdiction defense simply by stating in their answer that they did not intend to waive it."⁴² The Court of Appeals found that "words alone are insufficient to preserve a personal jurisdiction defense where conduct indicates waiver."⁴³ Also, the MDL court states that the shipowners faced a "Hobson's choice," and being forced into this choice was inappropriate.⁴⁴ The Court of Appeals concluded, "defendants always face such a choice when a court lacks personal jurisdiction and rules in favor of transfer rather than dismissal."⁴⁵ The MDL Court's concluded that a defendant should not be required to choose a legal error.⁴⁶ The MDL court abused its discretion, and the Court of Appeals reversed.⁴⁷

There is a circuit split between the Third Circuit and the Sixth Circuit's rulings on cases with the same procedural history.⁴⁸ The Sixth Circuit affirmed the MDL Court's order dismissing for lack of personal jurisdiction.⁴⁹ The Sixth Circuit concluded that the district court judge did

not have the authority to create a procedure where filing an answer would waive the defense of personal jurisdiction.⁵⁰ The Third Circuit did not find the Sixth Circuit's reasoning persuasive.⁵¹ The Sixth Circuit ruled that the district judge could not strip the defendant of their right to assert an affirmative defense in an answer.⁵² The Third Circuit, however, found the district judge did not strip the shipowners of their right to assert an affirmative defense as he had already ruled that the court lack personal jurisdiction.⁵³ The district court judge ruled that continuing to litigate by filing an answer was a waiver of personal jurisdiction and an intent to proceed.⁵⁴ The procedure set in place by the district judge was an exercise of case management by the District Court.⁵⁵ Further, the Sixth Circuit found there was no concrete evidence of a forfeiture.⁵⁶ The Third Circuit's precedent does not require concrete evidence, conduct consistent with the waiver is enough.⁵⁷

Judge Fisher, in his dissent, states that based on the record Special Master Martyn ordered, if a party wished to waive personal jurisdiction, it must inform the court in writing.⁵⁸ Judge Fisher further stated the shipowners' "answers included clear and unequivocal statements preserving their jurisdictional defense per the Federal Rules of Civil Procedure and our law."⁵⁹ The third circuit previously held that a defendant may answer to the merits and simultaneously raise a jurisdictional defense without waiving that defense.⁶⁰ Rule 12(b) expressly permits a defendant to raise

a jurisdictional defense by motion or answer.⁶¹ Judge Fisher agrees with the Sixth Circuit Court's conclusion that the district judge had no authority



to order that a filing of an answer constitute a waiver, and such an order would be a violation of the Federal Rules.⁶² Judge Fisher believed the two orders, MARDOC Order No. 40 and 41, left room for a third option, "to file an answer so that the case would not be

automatically transferred, while also maintaining a jurisdictional defense and preserving the issue of dismissal for appellate review."⁶³ The shipowners' answer demonstrated the third option by explicitly stating the defense does not waive its defense of lack of personal jurisdiction.⁶⁴ Judge Fisher argues that the shipowners did not actively participate in litigation, which would waive their personal jurisdiction defense because the only activity reflected in the record pertains to the issue of jurisdiction and transfer.⁶⁵ "Participation related to jurisdictional issues does not reflect the merits-based litigation that [the Third Circuit Court] has required to find implicit waiver."

Furthermore, the shipowners did not forfeit their defense by failing to pursue the case diligently; instead, the case idled.⁶⁶ The shipowners were not delaying litigation or delinquent.⁶⁷ Once the case was reactivated, the shipowners filed renewed motions to dismiss for lack of personal

jurisdiction.⁶⁸ Thus, Judge Fisher affirmed the ruling of the District Court.⁶⁹

Accordingly, the following actions taken by the shipowners amounted to a waiver of their personal jurisdiction defense. The shipowners met the technical requirements of Rule 12(h) by including the jurisdictional issue in their answer, but they failed to comply with the spirit of the rule to expedite and simplify proceedings in federal court.⁷⁰ The defense counsel’s request for additional time to consider a transfer or waiver of personal jurisdiction and the defense counsel’s subsequent request for additional rulings demonstrates their intent to seek affirmative relief from the court, which constituted a waiver of personal jurisdiction.⁷¹ The shipowner’s objection to the transfer constructively acted as a waiver of their personal jurisdiction defense.⁷² By filing pleadings, the shipowners chose to litigate their case in the Northern District of Ohio actively; therefore, their conduct constitutes a waiver.⁷³ The shipowners’ failure to diligently pursue their personal jurisdiction defense forfeited that defense.⁷⁴ Thus, under the circumstances provided in these cases, the Third Circuit Court of Appeal found there was a waiver of the affirmative defense for lack of personal jurisdiction.⁷⁵

1 *In re Asbestos Prods. Liab. Litig. (No. VI)*, 921 F.3d 98, 101 (3rd Cir. 2019).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.* at 102.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 102.
11 *Id.*
12 *Id.* at 102-3.
13 *Id.* at 103.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 104.
20 *Id.* at 105.

21 *Id.* at 104.
22 *Id.* at 105.
23 *Id.* at 105 quoting *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3rd 1230, 1236 (3d Cir. 1994).
24 *Id.* at 105.
25 *Id.*
26 *Id.* at 104.
27 *Id.* at 106.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* at 106.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.* at 106-7.
37 *Id.* at 107.
38 *Id.*
39 *Id.*
40 *Id.* at 103, 107
41 *Id.* at 108.
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 108.
47 *Id.*
48 *Id.* at 108-9.
49 *Id.* at 108. See *Kalama v. Matson Navigation Co.*, 875 F.3d 297 (6th Cir. 2017).
50 *Id.* at 108.
51 *Id.*
52 *Id.*
53 *Id.* at 109.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 110.
59 *Id.* at 112.
60 *Id.* at 113.
61 *Id.*
62 *Id.*
63 *Id.* at 114.
64 *Id.*
65 *Id.* at 115.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 116.
70 *Id.* at 105.
71 *Id.* at 106.
72 *Id.*
73 *Id.* at 107.
74 *Id.*
75 *Id.* at 110.

FEDERAL PREEMPTION ON THE OCS: MARITIME LAW APPLICATION

MARITIME LAW/FEDERAL PREEMPTION—Respondent Brian Newton (“Newton”) brought a class-action lawsuit in California state court under California Minimum wage and overtime laws against Petitioner, Parker Drilling Management Services (“Parker Drilling”). After removal to Federal District Court by California state court, the Court of Appeals of the Ninth Circuit vacated and remanded, reaching a different result from the Fifth Circuit precedent. The Supreme Court of the United States granted certiorari to resolve the disagreement between the circuits. First, the court addresses the issue of what law applies to the outer continental shelf (“OCS”), federal or state. Second, the court faces the issue regarding Newton’s specific minimum wage claims, whether the California minimum wage law or the federal Fair Labor Standards Act applies to Newton’s employment on the OCS. *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019).

By: Angela F. Ray

Newton worked for Parker Drilling on drilling platforms in California.¹ Newton worked fourteen-day shifts in which he worked twelve hours on duty and twelve hours on standby.² On duty, Newton’s employer paid him above the state and federal minimum wages. While on standby, Newton was not paid, nor could he leave the platform.³ During federal court proceedings, Parker Drilling and Newton agreed the platform, which Newton worked, was subject to the Outer Continental Shelf Lands Act (OCSLA).⁴ Newton argued state law applies to (“OCS”) when it is relevant to the subject at issue.⁵ Meanwhile, Parker Drilling claimed there is not a gap in federal law on

the issue; therefore, state law is not applicable because federal law controls the OCS.⁶

The OCSLA was passed by congress and defined the body of law that controls the OCS.⁷ The OCSLA confirmed the OCS was subject to the exclusive control of the Federal Government.⁸ However, the OCSLA allows state laws to be adopted as federal law on the OCS as long as they are applicable and not inconsistent with other federal law.⁹ This specific language of the OCSLA is debated in this case.¹⁰

The Court interpreted the terms “applicable” and “inconsistent” as written in the OCSLA and found, taking the terms standing alone, the problem was not solved. The terms must be interpreted together and read “in light of the entire statute.”¹¹ Moreover, the Court interprets the statute specifying state laws can be “applicable and not inconsistent” with federal law when there is no federal law that addresses the issue.¹² The Court further reiterates the OCSLA makes it clear the OCS is under exclusive regulation of federal law, and thus state law plays a minimal role.¹³ If a federal statute applies to the issue at hand, state law would be inconsistent and, therefore, would not ask.¹⁴

To ensure the Court interpreted the statute correctly, they refer to the federal-enclave model, invoked by the OCSLA.¹⁵ The federal-enclave model arises from the statute’s treatment of the OCS as “an area of exclusive federal jurisdiction within a state.”¹⁶ When a state becomes a federal enclave, only the state law enacted at that time, continues as federal law and only to the extent it does not conflict

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with enacted federal law.¹⁷ Therefore, state law made in the future does not apply to the enclave because it was not in effect at the time the state became a federal enclave.¹⁸

However, Congress amended the OCSLA to adopt state law on an on-going basis.¹⁹ Congress left unchanged that OCS is only federal law, and state law is only adopted when it is “applicable and consistent” with federal law.²⁰ The rationale behind the amendment was to open the pool of law for the abundance of issues.²¹ Federal law serves a limited purpose.²² Federal law gaps can be supplemented with applicable and consistent state law to cope with a wide variety of legal problems on the OCS.²³

The language of the statute resolved the OCSLA interpretation issue. With the first issue resolved, the second issue relating to Newton’s claims were straight forward. Newton’s claims suggested the California state law, requiring payment on duty and while on standby, be adopted as federal law on the OCS.²⁴ Similar to the analysis on the previous issue, federal law already addresses the issue, and the application of California state law would be inconsistent.²⁵ Federal law provides an employer who remains on the employer’s grounds for an extended amount of time, or a permanent basis is not working all the time, and Newton should not be paid while off

duty.²⁶ Additionally, the Fair Labor Standards Act provides minimum wage rates federally, so California’s minimum wages do not apply to the OCS.²⁷

In summary, the Court concluded per the OCSLA, providing that Federal law applies to the OCS.²⁸ State law plays a minimal role, adopted only when needed to fill a gap in federal law.²⁹ State law is not barred from use on the OCS completely.³⁰ Only where federal law is already in existence on a particular issue.³¹ Furthermore, the Court found California state law failed to apply to Newton’s overtime and minimum wage claims because there was a federal law in effect that did not include a gap in which state law was needed to fill.³²

1 Parker Drilling Mgmt. Servs. v. Newton, 139 S. Ct. 1881, 1886 (2019).
2 Id.
3 Id.
4 Id. at 1887.
5 Newton, 139 S. Ct. at 1888.
6 Id.
7 Id. at 1887.
8 Id.
9 Id.
10 Newton, 139 S. Ct. at 1887.
11 Id. at 1888.
12 Id. at 1889.
13 Id.
14 Id.
15 Newton, 139 S. Ct. at 1889.
16 Id. at 1890.
17 Newton, 139 S. Ct. at 1890.
18 Id.
19 Id. at 1891.
20 Id.
21 Id.
22 Newton, 139 S. Ct. at 1891.
23 Id.
24 Id. at 1892.
25 Id.
26 Id. at 1892.
27 Newton, 139 S. Ct. at 1892.
28 Id.
29 Id.
30 Id.
31 Id.
32 Newton, 139 S. Ct. at 1892.

UNSEAWORTHINESS: PERSONAL INJURY LAW

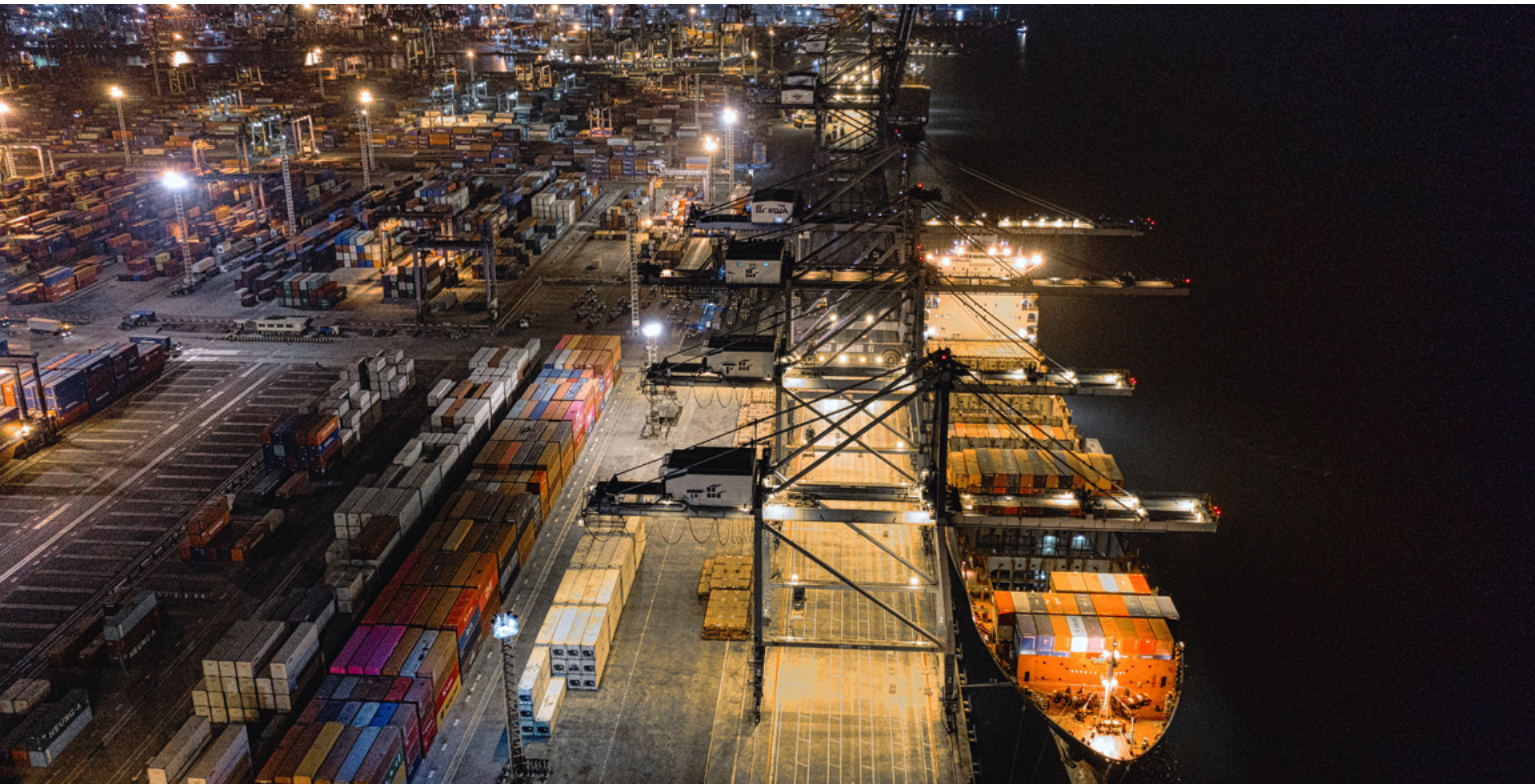
MARITIME LAW/PERSONAL INJURY—The Supreme Court reversed a lower court holding granting a seaman punitive damages resulting from an injury that occurred from the unseaworthiness condition of the vessel. The Supreme Court held the lower court should look into legislative enactments for policy guidance for maritime and admiralty cases, but that damages could not be recovered under Theory of unseaworthiness.

By: Michelle Molina Romero

In June 2019, the district court denied the plaintiff’s claim for unseaworthiness and certified order for immediate appeal, whereas the Court of Appeals for the

Ninth Circuit affirmed the lower court’s ruling and granted certiorari.¹ As to the Supreme Court, it reversed and ruled the plaintiff could not recover punitive damages for claims of unseaworthiness and that the Court should look into legislative enactments for policy guidance when exercising its inherent common-law authority for maritime and admiralty cases.

The plaintiff relied on two particular cases to assert his claim for why the court should award him punitive damages. In *Miles v. Apex Marine Corp*, the court declared punitive damages were made available for wrongful death actions and that non-economic damages were unavailable under general maritime law. On the contrary, the court in *Atlantic Sounding Co. v. Townsend* held a



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seaman is eligible under maritime law for punitive damages regarding an employer's willful and wanton disregard of its obligation to pay maintenance and cure. The court relied heavily on previous case precedents of which granted punitive damages under Theory of maintenance and cure cases but not for unseaworthiness claims.

Under the Jones Act, there was an overwhelming amount of evidence that suggested punitive damages were not recoverable in general maritime law unseaworthiness actions for personal injury cases. Because punitive damages were not a traditional remedy under Theory of unseaworthiness contrary to maintenance and cure claims, the absence of recovery for punitive damages under unseaworthiness the court found practically dispositive.

Justice Ginsberg dissented, and Justice Breyer, as well as Justice Sotomayor, joined the dissent. Ginsberg argued the Court recognized punitive damages normally available under maritime cases. The dissent primarily argued the Court today held that unseaworthiness claims are the exception to that general rule. Thus, the dissents' opinion stated how the Jones Act expanded remedies available for seamen and, rather than restrict remedies, served as a gateway for seamen to obtain protection in the form of punitive damages under unseaworthiness actions unlike what is expressed by the majority opinion in this case.

Seaman, Christopher Batterton ("Batterton") brought a legal action for unseaworthiness under general maritime law against Dutra Group ("Dutra"), the Vessel owner and operator when his hand was injured as a result of the vessel's hatch cover blowing up while he worked on a deckhand.² As a result of his injuries, Batterton sought punitive and general damages.

Here, the issue presented is whether mariners can recover punitive damages on an injury resulting from the unseaworthiness condition of the vessel? The lower court ruled a seaman may not recover punitive damages on a maritime claim for unseaworthiness because historical evidence and case precedent do not show there ever existing a traditional remedy under unseaworthiness, the appeals court affirmed the lower court's ruling and denied punitive damages for unseaworthiness claims. On certiorari, the Supreme Court held punitive damages were not available for the seaman under Theory of unseaworthiness.

In the past, unseaworthy claims have been presented twice in the last two decades, of which were decided on a case-by-case basis. One of the cases involved a wrongful death suit under general maritime law, while the other case involved a personal injury case that occurred on a tugboat. In both of these cases, the court



held a distinct perspective on damages. In *Miles v. Apex Marine Corp.*, it involved the wrongful death suit, where the Court held recovery was limited to pecuniary damages. In *Atlantic Sounding Co. v. Townsend*, the court allowed

recovery for punitive damages based on previous case precedent that granted punitive damages for some maritime torts, including maintenance and cure.³

As to the present case, Batterton suffered injuries when his hand was captured in between the vessel's bulkhead and hatch, which blew open as a result of unventilated air accumulating and pressurizing within the compartment.⁴ Thus, Batterton brought a variety of claims against Dutra other than under Theory of unseaworthiness, which included negligence, maintenance and cure, and unearned wages. Dutra filed suit to strike Batterton's claims for punitive damages under Theory that based on previous case precedent and historical evidence, both suggest that punitive damages are unavailable for claims of unseaworthiness. Distinguished case precedent held punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship. However, the court did not think punitive damages were available for Batterton.

Batterton relied on two specific cases to corroborate his evidence for the relief of punitive damages under Theory of unseaworthiness. However, Batterton utilized both *The Rolph* and *The Noodleburn* to characterize unseaworthiness actions that could have been pursued theoretically as opposed to what the seaman plead; thus, the court deemed both cases as irrelevant.⁵ Batterton alleged unseaworthiness claims based on Theory of unseaworthiness that could have been filed; unfortunately, courts granted damages based on what



the plaintiff plead on the pleadings versus theoretical claims that could be brought forth at a later time.

As to the claim of unseaworthiness, to determine remedies, there has to be consideration of both the heritage of the cause of action in common law and its place in the modern statutory framework. The concept of unseaworthiness is a recent development which, resulted from causes of action unrelated to personal injury. Unseaworthiness consisted of a limited form of recovery, and on its preface was a relatively rarely used remedy. However, there was a shift in the mariner's rights about 1920 and 1950, which prompted the Jones Act, serving as the Act of hope for all seamen's personal injury and wrongful death claims.

While this Act seemed prosperous and a token of hope for seamen, the Court transformed the old claim of unseaworthiness, which had demanded only due-diligence by the owner into a strict liability claim. Given the significant overlap between the Jones Act and unseaworthiness, both claims were commonly presented together as two causes of action. However, due to their overlap, seamen eventually brought forth both claims and used either action as an alternative, and thus courts ruled recovery under both actions

LAWS IN BRIEF

were not acceptable, it would have to be one or the other, but not both.

The Jones Act adopted remedial provisions of the FELA, limiting damages to financial loss; however, it has been recently observed that the Act defines recovery to pecuniary loss. The Federal Court of Appeals have uniformly held no cases have awarded punitive damages under the Jones Act and that thus punitive damages are not recoverable under the Jones Act.

Batterton argues to particular regard that punitive damages are justified from a policy perspective, but the Court was not convinced and remained skeptical of his argument. Unseaworthiness in its current form

is a strict liability claim, resulting shortly after the passage of the Jones Act, which introduced novel remedies contrary to those provided by Congress in similar areas exceeding the court's authority, contrary to their powers.

Unseaworthiness, unlike a claim for maintenance and cure, does not allow recovery of punitive damages because it is not a traditional remedy available to seamen. The duty of maintenance and cure requires the master to provide medical care and wages to an injured seaman in the period after the injury has occurred.

The court's rationale for denying punitive damages in the past for unseaworthiness claims

relied heavily on that it would create disparities in the law, limiting recovery for specific legal actions, as well as discourage mariners from seeking employment in the United States. For instance, as seen in *Miles*, recovery of punitive damages limited compensatory damages in wrongful death actions, and thus a seaman could claim punitive damages if the seaman was injured onboard the ship; however, a seaman's estate would lose the right to seek damages if he died from his injuries. Additionally, the owner of the vessel would be liable for damages, while the operator of the ship, who is in a better position to minimize potential risks, would not be liable for such damages under the Jones Act. Thus, allowing punitive damages would create a disparity by not providing the owner of the vessel with a proper opportunity to delegate liability. Moreover, as seen in *Exxon Shipping*, the court ruled that allowing punitive damages would place American shippers at a competitive disadvantage and would likely discourage foreign-owned vessels from employing American seaman.

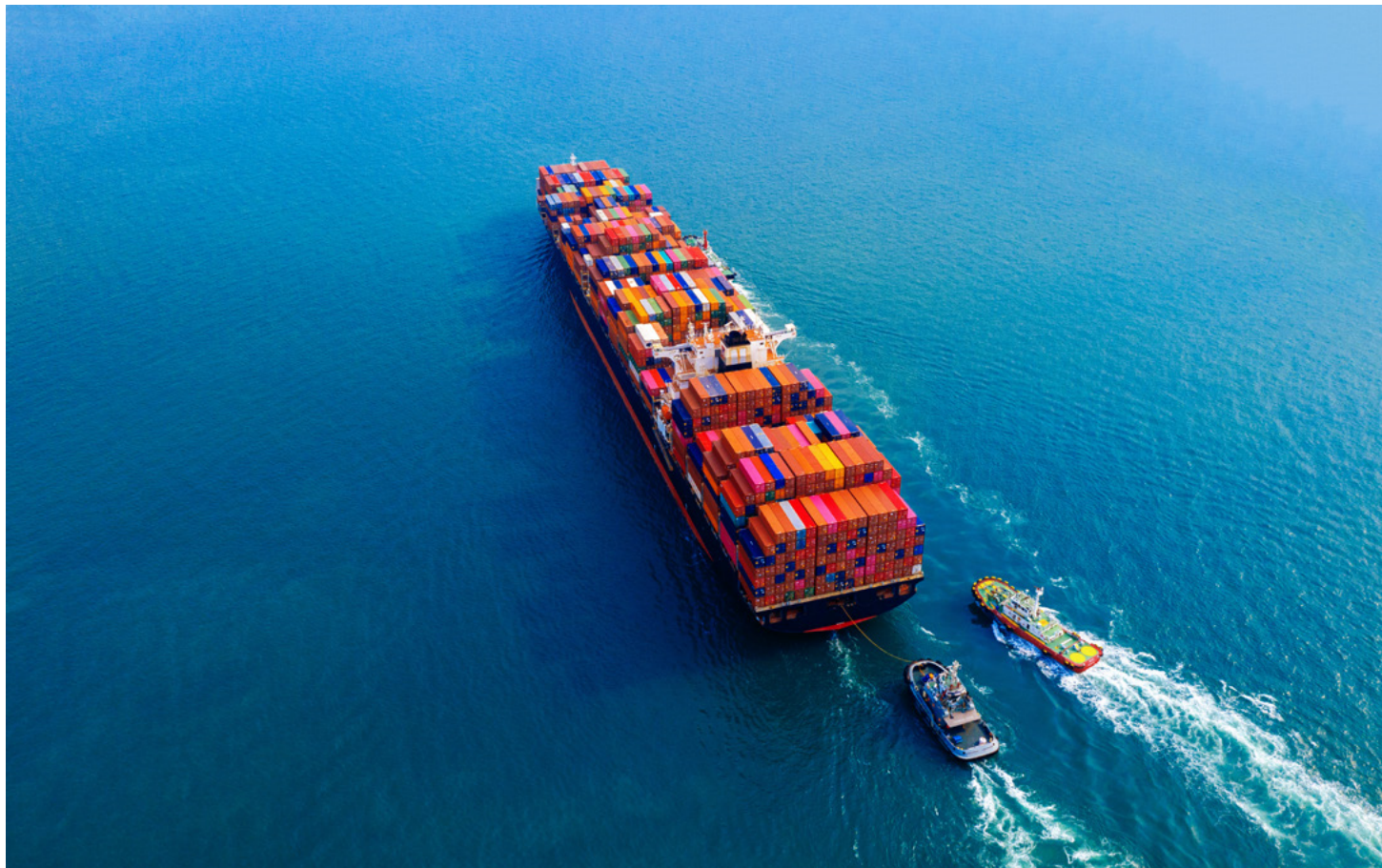
As to whether punitive damages should be granted, historical evidence, as well as case precedent established punitive damages, are not a traditional remedy for unseaworthiness claims under general maritime law. Therefore, the mere existence that punitive damages is not a traditional remedy for unseaworthiness prevents the court from establishing a remedy where none existed in prior incidents.

Presently, there is a lack of substantial evidence and case precedent supporting punitive damages under Theory of unseaworthiness for a seaman in a personal injury suit. This decision may raise the same issue as it did for *Batterton* soon. For instance, as the dissent argues, punitive damages are typically rewarded under maritime cases. Provided that this is a maritime case, one would think it is reasonable for the court to corroborate that general rule and grant punitive damages to seamen.

However, a real-life consequence for a seaman is obtaining punitive damages or any damages at all under a claim of unseaworthiness. As demonstrated in this case, punitive damages have been generally provided for claims under maintenance and cure. Here, the dissent made a good point in terms of punitive damages being made available under maritime cases and thus serving as their foundation to corroborate an acceptance of punitive damages for unseaworthiness claims.

Therefore, while there may not be a substantial amount of evidence supporting a reward of punitive damages for unseaworthiness cases, the mere issue that punitive damages are typically awarded in maritime cases should be further reviewed so that in the future seamen cannot be restricted to pursuing a legal action for recovery solely under maintenance and cure as opposed to unseaworthiness, an injury suffered from an unseaworthy vessel.

- 1 *The Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019).
- 2 *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008).
- 3 *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).
- 4 *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 411-414 (2009).
- 5 *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (C.A. 1987).



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Gordon D. Schreck and the Charleston Maritime Law Institute:

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Ali Bonner: Congratulations! Your photo is this issue's cover photo! Thank you for participating in this issue's photo contest.

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