IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BOBBY SCHLUETER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:16-cv-02079**
	)	**Judge Aleta A. Trauger**
INGRAM BARGE COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM & ORDER

Before the court is defendant Ingram Barge Company's Motion for Partial Summary Judgment on the Issue of Loss of Household Services. (Doc. No. 63.) For the reasons set forth herein, the motion is **DENIED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an injury suffered by plaintiff Bobby Schlueter on February 7, 2014, while he was a member of the crew of the M/V Sarah L. Ingram, a vessel owned and operated by the defendant, Ingram Barge Company ("Ingram"). Schlueter filed the Complaint initiating this action on August 8, 2016, asserting claims under the Jones Act, 46 U.S.C. § 30104, and the general maritime law of the United States. (Doc. No. 1.)

One of the elements of damages that Schlueter seeks to recover is the loss of his household services. In support of these damages, he has retained the services of Robert E. "Jay" Marsh, who has opined that this loss will be $323,200.80. (Doc. No. 64-1.) Schlueter and his wife both testified that, prior to his injury, Schlueter performed a lot of work around his house and yard, including household maintenance and home improvement. He also performed mechanical and maintenance work on his own cars.

The Initial Case Management Order entered on October 20, 2016 prohibits the filing of partial motions for summary judgment except upon leave of court. (Doc. No. 12, at 3.) The defendant, without leave of court, filed its first Motion for Partial Summary Judgment on August 21, 2019. (Doc. No. 49.) The court thereafter entered an order directing that that motion be held in abeyance pending the defendant's compliance with the court's procedures. (Doc. No. 54.) The defendant filed a Motion for Leave of Court to File Motion for Partial Summary Judgment. The court ultimately granted that motion in part and set a briefing schedule for the filing of a new motion for partial summary judgment on one of the two issues on which the defendant sought partial judgment.

In accordance with the court's directive, the defendant filed its Motion for Partial Summary Judgment on the Issue of Household Services, supporting Memorandum of Facts and Law, and Statement of Undisputed Material Facts on September 6, 2019, asserting that it is entitled to judgment in its favor on the plaintiff's claim of damages associated with the loss of his own household services. (Doc. Nos. 64, 65.) The plaintiff filed a Response, Response to the Statement of Undisputed Facts, and Statement of Additional Facts. (Doc. Nos. 73, 74.) The defendant filed a Reply and a Response to the Plaintiff's Statement of Additional Facts. (Doc. Nos. 75, 76.) The facts relevant to the defendant's motion are undisputed.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party bringing the summary judgment motion has the initial burden of informing the court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003). In evaluating a motion for summary judgment, the court views the facts in the light most

favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmoving party. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 242 (6th Cir. 2015); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003).

III. ANALYSIS

The issue presented here is purely a legal one: whether a plaintiff bringing suit under the Jones Act based on personal injury, rather than death, may recover as part of his damages the value of the loss of his *own* household services.[1] The defendant concedes that the value of the loss of household services is recoverable under the Jones Act but argues that such recovery is available only in death cases brought by a decedent's estate and beneficiaries, rather than in injury cases brought by the injured party. The available legal authority does not support this distinction, and all relevant caselaw indicates that such damages are available in Jones Act injury cases as well.

The Jones Act provides in relevant part:

> A seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104. That is, the Jones Act expressly incorporates by reference the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq. See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (recognizing that Congress "incorporate[ed] FELA unaltered into the Jones Act"); *Sobieski v. Ispat Island, Inc.*, 413 F.3d 628, 631 (7th Cir. 2005). Consequently, cases interpreting FELA are generally relevant to Jones Act cases. *See Miles*, 498 U.S. at 32; *Sobieski*,

[1] The defendant does not address the question of whether such damages are available [redacted] whether the plaintiff's claims are properly brought under

413 F.3d at 631 (7th Cir. 2005) ("The act by its terms extends the protections of [FELA] to seamen, and thus FELA caselaw is broadly applicable in the Jones Act context." (citations omitted)). In *Miles*, the Supreme Court recognized that, although the Jones Act "does not explicitly limit damages to any particular form," *Miles*, 498 U.S. at 32, by the time of the enactment of the Jones Act, FELA had long been construed as limiting recovery to pecuniary losses. The Court concluded that Congress was aware of the existing case law at the time and, therefore, "must have intended to incorporate the pecuniary limitation on damages [into the Jones Act] as well." *Id.* The Court therefore held that the Jones Act did not authorize recover for "loss of society," a non-pecuniary form of damages, in a Jones Act wrongful death action. *Id.* Courts recognize that the same limitation applies to Jones Act *injury* actions as well. *See, e.g.*, *Michel v. Total Transp., Inc.*, 957 F.2d 186, (5th Cir. 1992) (rejecting the plaintiffs' attempt to distinguish their case from *Miles* on the basis that *Miles* involved wrongful death, rather than personal injury, and reversing the award of loss of consortium damages to injured seaman's wife on the basis of the holding in *Miles* that damages for loss of society are not recoverable under the Jones Act).

The defendant appears to be arguing that the injured plaintiff's own claim for damages related to the loss of household services constitutes a form of non-pecuniary damages that are not recoverable under the Jones Act. (*See* Doc. No. 65, at 5.) The defendant relies, in large part, on this court's opinion in *Dwyer v. Southwest Airlines, Inc.*, No. 3:16-cv-03262 (lead case), 2019 WL 2025243 (M.D. Tenn. May 8, 2019), denying the plaintiff's motion to amend her complaint as futile, because Tennessee does not appear to recognize a plaintiff's claim for damages in the form of the loss of her own household services.

Although the court characterized the plaintiff's damages claim in that case as a form of non-economic damages based on Tennessee law, *see id.*, at *4, the Jones Act preempts state law, and the Sixth Circuit has expressly recognized that the loss of household services in the context of a Jones Act claim qualifies as a form of pecuniary damages. *See, e.g., Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 631 (6th Cir. 1978) (recognizing that "societal losses," as nonpecuniary losses, are not recoverable under the Jones Act, but that "[h]auling out the garbage, mowing the lawn, making repairs, and other household tasks may be performed by a father as labors of love, but they are labors nonetheless, and historically where they have been performed for others, they have commanded an economic price which we think may fairly be included as a part of the pecuniary loss suffered by the decedent's family, considered apart from the non-pecuniary element of loss of society" (footnotes omitted)).

The Sixth Circuit in *Morvant* noted, at the same time, that "the loss of services is a recognized element of damages" in a wrongful death action under both the Jones Act and general maritime law. *Id.* at 633 n.7. In fact, as the defendant concedes, courts universally recognize that the value of a decedent's household services in a Jones Act case are recoverable as damages. *See, e.g., De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 141 (5th Cir. 1986) ("Recoverable items [in Jones Act death action] include . . . loss of Centeno's household services . . . "); *In re Magnolia Fleet*, No. CV 16-12297, 2017 WL 5541360, at *1 (E.D. La. Nov. 17, 2017) ("Under both general maritime law and the Jones Act, survivors are entitled to recover 'pecuniary damages for . . . loss of household services.'" (citing *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 868–69 (E.D. La. 1989), *aff'd*, No. 9-3265, 889 F.2d 273 (Table) (5th Cir. 1989)); *Champ v. Marquette Transp. Co., LLC*, No. 5:12-CV-00084-TBR, 2014 WL 2879152, *18 (W.D. Ky.

2014) ("Certainly, loss of support and loss of services are recoverable under both the Jones Act and the general maritime law." (citing *Neal*, 707 F. Supp. at 868–69)).

While these cases involved the death of the seaman, neither the statute itself nor the caselaw distinguishes between the type of damages available in a death case and the type of damages available in an injury case, and the defendant has provided no reason to do so. The sparse caselaw this court has located on the topic indicates that courts—and parties—presume that such damages, if properly supported by admissible evidence, are available in injury cases as well. *See, e.g.*, *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 91 F. App'x 370, 373 (6th Cir. 2004) (in an action under the Jones Act and general maritime law for negligence causing injuries, affirming judgment for the plaintiff including damages in the amount of $7,500 for "loss of household services," where both parties appealed the damages award but neither appealed the award of damages for loss of household services); *Williams v. Cent. Contracting & Marine, Inc.*, No. 15-CV-867-SMY-RJD, 2018 WL 1612019 (S.D. Ill. Apr. 3, 2018) (following a bench trial, noting that damages for loss of household services were among those sought by the plaintiff but declining to award them based on the lack of evidence to support them); *Semien v. Parker Drilling Offshore USA LLC*, 179 F. Supp. 3d 687, 717 (W.D. La. 2016) (following a bench trial, awarding the plaintiff damages for "the value of household services Mr. Semien can no longer perform").

In addition, such damages are routinely recovered in FELA cases. *See, e.g.*, *Cowden v. BNSF Ry. Co.*, 980 F. Supp. 2d 1106, 1123 (E.D. Mo. 2013) (denying motion to exclude the plaintiff's economic expert's testimony regarding the plaintiff's lost household services, finding that the challenges went to the credibility of the testimony rather than its admissibility); *Larson v. Wis. Cent. Ltd.*, No. 10-C-446, 2012 WL 359665, at * (E.D. Wis. Feb. 2, 2012) (rejecting

motion in limine to exclude the plaintiff's expert economist on the issue of the value of household services); *Magelky v. BNSF Ry. Co.*, 579 F. Supp. 2d 1299, 1308 (D.N.D. 2008) (denying motion for remittitur of damages and specifically rejecting the defendant's argument that "future household damages . . . should be excluded from future economic damages" on the grounds that the expert's "opinion lacked foundation as to [the plaintiff's] alleged future loss of household services"); *Rachel v. Consol. Rail Corp.*, 891 F. Supp. 428, 431 (N.D. Ohio 1995) (denying the defendant's motions in limine seeking to "exclude evidence of the value to Plaintiff of household services he can no longer perform," noting that the "Defendant claims damages may not be recovered for this injury under FELA but cites no authority for this proposition"). Because, as set forth above, "FELA caselaw is broadly applicable in the Jones Act context," *Sobieski*, 413 F.3d at 631, the fact that such damages are available in FELA cases further supports the conclusion that they are available under the Jones Act.

Finally, courts have also recognized that damages related to an injured individual's loss of household services are recoverable under general maritime law. *See, e.g., Jones v. Carnival Corporation*, No. 04-20407-CIV-JORDAN, 2005 WL 8156681 (W.D. Fla. Dec. 12, 2005). Their availability in that context, again, supports the conclusion that the loss of household services is a recoverable element of damages in Jones Act cases, too, because the Supreme Court has expressly recognized that recovery under the Jones Act is intended to be consistent with recovery under general maritime law. *See Miles*, 498 U.S. at 32–33 (holding that, because the Jones Act also precludes recovery for loss of society, such damages were also not recoverable in general maritime action for wrongful death, stating: "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting

from negligence."); *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir. 1992) ("In *Miles*, the Supreme Court stressed the importance of uniformity concerning the claims available under the Jones Act and general maritime law.").

Jones, in fact, is particularly instructive. In that case, a passenger injured on a cruise ship brought suit for personal injuries under general maritime law. The defendant filed a motion in limine to exclude the plaintiff's claim for loss of household services, arguing broadly that "general maritime law does not permit *anyone* to recover for loss of services." *Id.* at *1. The court rejected that premise, noting that *Miles*, on which the defendant relied, was not on point. Although *Miles* held that only pecuniary damages were recoverable under the Jones Act, which meant that damages for "loss of society" were not recoverable, "the Court implied that it viewed claims for loss of *services* to be claims for pecuniary loss and thus, distinct from claims for loss of *society*." *Id.* at *1 n.1 (citing *Miles*, 488 U.S. at 325). As noted above, the Sixth Circuit has also recognized that distinction, even prior to *Miles*. *See Morvant*, 570 F.2d at 631.

The court in *Jones* did agree that any evidence relating to the plaintiff's *spouse's* loss of services should be excluded. The context of the case indicates that the plaintiff's husband happened to be disabled. Although he was not a plaintiff in the case, there was some suggestion that he was affected by the plaintiff's injuries because he suffered the loss of her services in caring for him. The court concluded that the plaintiff was not entitled to recover for the loss of services *her husband* would suffer as a result of her injury. "Ms. Jones does not cite—and I cannot find—a case where the injured party recovered loss of services damages on behalf of his or her spouse." *Id.*

However, the court denied the motion insofar as it related to the plaintiff's claim for "household services replacement costs" brought by the plaintiff for her own services, based on

caselaw from other general maritime cases and related law indicating that the loss of household services is a recoverable element of damages. *See id.* at *2 (citing *Purdy v. Belcher Refining Co.*, 781 F. Supp. 1559, 1563 (S.D. Ala. 1992) (permitting injured party in a case brought under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, to recover for loss of household services where he testified that he was very industrious around his house during off-duty hours); *Webb v. Ensco Marine Co.*, 135 F.Supp.2d 756, 771 (E.D. Tex. 2001) (injured party in case governed by general maritime law permitted to recover for loss of household services where physical limitations prevent him from doing work around his house); Thomas J. Schoenbaum & Jessica L. McClellan, *Admiralty and Maritime Law* § 5-15 (3rd ed. 2001) ("The law further presumes that a tort victim may have three kinds of losses: (1) lost earning capacity; (2) medical and *other necessary expenses*; (3) pain and suffering.") (emphasis added); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 588-89 (5th Cir. 1988) (injured party not permitted to recover for loss of household services where he could not prove he performed household services prior to his injury).

Based on the cited cases, the court in *Jones* also explained what the term "household services" encompasses and how damages for their loss are measured:

> "Household services" include a wide variety of routine, common, household chores and tasks. Thus, they are those services that the injured party performed prior to the injury for the common benefit of the marital partnership or the household as a whole, as distinct from services to a particular member of the house. Loss of household services damages are measured by the cost of employing someone else to perform these services after [the injured party's] disability.

Id. (internal quotation marks and citations omitted).

The defendant's attempt to distinguish the maritime cases holding that an injured plaintiff may recover for the loss of his own household services is unavailing; there is no meaningful

distinction. The court is persuaded by the overwhelming weight of authority that a plaintiff bringing suit for damages under the Jones Act may recover as damages the value of the loss of his own household services, assuming he submits competent proof establishing that he has suffered, or will suffer, such damages and their value.

IV. CONCLUSION & ORDER

For the reasons set forth herein, the defendant's Motion for Partial Summary Judgment on the Issue of Loss of Household Services (Doc. No. 63) is **DENIED.**

The Clerk is **DIRECTED** to **TERMINATE** the first Motion for Partial Summary Judgment (Doc. No. 49) as superseded by the second.

It is so **ORDERED.**

ALETA A. TRAUGER
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 18–266

THE DUTRA GROUP, PETITIONER
v. CHRISTOPHER BATTERTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 24, 2019]

JUSTICE ALITO delivered the opinion of the Court.

By granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in admiralty to proceed "in the manner of a common law court." *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 489–490 (2008). Thus, where Congress has not prescribed specific rules, federal courts must develop the "amalgam of traditional common-law rules, modifications of those rules, and newly created rules" that forms the general maritime law. *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, 864–865 (1986). But maritime law is no longer solely the province of the Federal Judiciary. "Congress and the States have legislated extensively in these areas." *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990). When exercising its inherent common-law authority, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Ibid.* We may depart from the policies found in the statutory scheme in discrete instances based on long-established history, see, *e.g.*, *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404, 424–425 (2009), but we do so

cautiously in light of Congress's persistent pursuit of "uniformity in the exercise of admiralty jurisdiction." *Miles*, *supra*, at 26 (quoting *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 401 (1970)).

This case asks whether a mariner may recover punitive damages on a claim that he was injured as a result of the unseaworthy condition of the vessel. We have twice confronted similar questions in the past several decades, and our holdings in both cases were based on the particular claims involved. In *Miles*, which concerned a wrongful-death claim under the general maritime law, we held that recovery was limited to pecuniary damages, which did not include loss of society. 498 U. S., at 23. And in *Atlantic Sounding*, after examining centuries of relevant case law, we held that punitive damages are not categorically barred as part of the award on the traditional maritime claim of maintenance and cure. 557 U. S., at 407. Here, because there is no historical basis for allowing punitive damages in unseaworthiness actions, and in order to promote uniformity with the way courts have applied parallel statutory causes of action, we hold that punitive damages remain unavailable in unseaworthiness actions.

I

In order to determine the remedies for unseaworthiness, we must consider both the heritage of the cause of action in the common law and its place in the modern statutory framework.

A

The seaman's right to recover damages for personal injury on a claim of unseaworthiness originates in the admiralty court decisions of the 19th century. At the time, "seamen led miserable lives." D. Robertson, S. Friedell, & M. Sturley, Admiralty and Maritime Law in the United States 163 (2d ed. 2008). Maritime law was largely judge-

made, and seamen were viewed as "emphatically the wards of the admiralty." *Harden* v. *Gordon*, 11 F. Cas. 480, 485 (No. 6,047) (CC Me. 1823). In that era, the primary responsibility for protecting seamen lay in the courts, which saw mariners as "peculiarly entitled to"—and particularly in need of—judicial protection "against the effects of the superior skill and shrewdness of masters and owners of ships." *Brown* v. *Lull*, 4 F. Cas. 407, 409 (No. 2,018) (CC Mass. 1836) (Story, J.).[1]

Courts of admiralty saw it as their duty not to be "confined to the mere dry and positive rules of the common law" but to "act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend[ed], they act[ed] as courts of equity." *Ibid.* This Court interpreted the Constitution's grant of admiralty jurisdiction to the Federal Judiciary as "the power to . . . dispose of [a case] as justice may require." *The Resolute*, 168 U. S. 437, 439 (1897).

Courts used this power to protect seamen from injury primarily through two causes of action. The first, maintenance and cure, has its roots in the medieval and renaissance law codes that form the ancient foundation of maritime common law.[2] The duty of maintenance and cure

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[1]Riding circuit, Justice Story described mariners in markedly paternalistic terms:

"Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised." Brown, 4 F. Cas., at 409.

[2]A right resembling maintenance and cure appears in the Laws of Oleron, promulgated by Eleanor of Aquitaine around 1160, in the 13th-century Laws of Wisbuy, in the Laws of the Hanse Towns, published in 1597, and in the Marine Ordinances of Louis XIV, published in 1681.

requires a ship's master "to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441 (2001). This duty, "which arises from the contract of employment, does not rest upon negligence or culpability on the part of the owner or master, nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 527 (1938) (citations omitted).

The second claim, unseaworthiness, is a much more recent development and grew out of causes of action unrelated to personal injury. In its earliest forms, an unseaworthiness claim gave sailors under contract to sail on a ship the right to collect their wages even if they had refused to board an unsafe vessel after discovering its condition. See, *e.g.*, *Dixon* v. *The Cyrus*, 7 F. Cas. 755, 757 (No. 3,930) (Pa. 1789); *Rice* v. *The Polly & Kitty*, 20 F. Cas. 666, 667 (No. 11,754) (Pa. 1789). Similarly, unseaworthiness was a defense to criminal charges against seamen who refused to obey a ship master's orders. See, *e.g.*, *United States* v. *Nye*, 27 F. Cas. 210, 211 (No. 15,906) (CC Mass. 1855); *United States* v. *Ashton*, 24 F. Cas. 873, 874–875 (No. 14,470) (CC Mass. 1834). A claim of unseaworthiness could also be asserted by a shipper to recover damages or by an insurer to deny coverage when the poor condition of the ship resulted in damage to or loss of the cargo. See *The Caledonia*, 157 U. S. 124, 132–136 (1895) (cataloging cases).

Only in the latter years of the 19th century did unseaworthiness begin a long and gradual evolution toward

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See 30 F. Cas. 1169 (collecting sources). The relevant passages are the Laws of Oleron, Arts. VI and VII, 30 F. Cas., at 1174–1175; the Laws of Wisbuy, Arts. XVIII, XIX, and XXXIII, 30 F. Cas., at 1191–1192; the Laws of the Hanse Towns, Arts. XXXIX and XLV, 30 F. Cas., at 1200; the Marine Ordinances of Louis XIV, Tit. IV, Arts. XI and XII, 30 F. Cas., at 1209.

remedying personal injury. Courts began to extend the cases about refusals to serve to allow recovery for mariners who were injured because of the unseaworthy condition of the vessel on which they had served.[3] These early cases were sparse, and they generally allowed recovery only when a vessel's owner failed to exercise due diligence to ensure that the ship left port in a seaworthy condition. See, *e.g.*, *The Robert C. McQuillen*, 91 F. 685, 686–687 (Conn. 1899); *The Lizzie Frank*, 31 F. 477, 480 (SD Ala. 1887); *The Tammerlane*, 47 F. 822, 824 (ND Cal. 1891).

Unseaworthiness remained a suspect basis for personal injury claims until 1903, when, in dicta, this Court concluded that "the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship." *The Osceola*, 189 U. S. 158, 175 (1903). Although this was the first recognition of unseaworthiness as a personal injury claim in this Court, we took pains to note that the claim was strictly cabined. *Ibid.* Some of the limitations on recovery were imported from the common law. The fellow-servant doctrine, in particular, prohibited recovery when an employee suffered an injury due to the negligent act of another employee without negligence on the part of the employer. *Ibid.*; see, *e.g.*, *The Sachem*, 42 F. 66 (EDNY 1890) (deny-

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[3]Most of these cases allowed recovery for personal injury in "erroneous reliance" on certain passages in *Dixon* v. *The Cyrus*, 7 F. Cas. 755 (No. 3,930) (Pa. 1789). Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 390 (1954) (Tetreault). These cases misread *The Cyrus* as resting on an implied warranty of seaworthiness. Tetreault 390. But *The Cyrus* is more fairly read to turn on a theory of true implied condition. While a warranty would provide a basis for damages if the breach caused an injury, an implied condition would only allow the mariner to escape performance without surrendering the benefit of the contract. In other words, "[t]he manifest unseaworthiness of the vessel at the commencement of the voyage would excuse non-performance by the mariners but did not constitute a basis for damages." Tetreault 390.

ing recovery based on fellow-servant doctrine). Because a claimant had to show that he was injured by some aspect of the ship's condition that rendered the vessel unseaworthy, a claim could not prevail based on "the negligence of the master, or any member of the crew."[4] *The Osceola*, *supra*, at 175; see also *The City of Alexandria*, 17 F. 390 (SDNY 1883) (no recovery based on negligence that does not render vessel unseaworthy). Instead, a seaman had to show that the owner of the vessel had failed to exercise due diligence in ensuring the ship was in seaworthy condition. See generally *Dixon* v. *United States*, 219 F. 2d 10, 12–14 (CA2 1955) (Harlan, J.) (cataloging evolution of the claim).

B

In the early 20th century, then, under "the general maritime law . . . a vessel and her owner . . . were liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship and her appliances; but a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of the master or any member of the crew." *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 134 (1928); see also *Plamals* v. *S. S. "Pinar Del Rio,"* 277 U. S. 151, 155 (1928) (vessel was not unseaworthy when mate negligently selected defective rope but sound rope was available on board). Because of these severe limitations on recovery, "the seaman's right to recover damages for injuries caused by unseaworthiness

[4]To be sure, in some instances the concept of "unseaworthiness" expanded to embrace conditions that resulted from the negligence of fellow servants, see, *e.g.*, *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259 (1922) (vessel was rendered unseaworthy when it left port with gasoline in a container labeled "coal oil"); see also G. Robinson, Handbook of Admiralty Law in the United States §37, p. 305–307 (1st ed. 1939) (collecting cases). But it was only after the passage of the Jones Act that negligence by a fellow mariner provided a reliable basis for recovery. See Part I–B, *infra*.

of the ship was an obscure and relatively little used remedy." G. Gilmore & C. Black, The Law of Admiralty §6–38, p. 383 (2d ed. 1975) (Gilmore & Black).

Tremendous shifts in mariners' rights took place between 1920 and 1950. First, during and after the First World War, Congress enacted a series of laws regulating maritime liability culminating in the Merchant Marine Act of 1920, §33, 41 Stat. 1007 (Jones Act), which codified the rights of injured mariners and created new statutory claims that were freed from many of the common-law limitations on recovery. The Jones Act provides injured seamen with a cause of action and a right to a jury. 46 U. S. C. §30104. Rather than create a new structure of substantive rights, the Jones Act incorporated the rights provided to railway workers under the Federal Employers' Liability Act (FELA), 45 U. S. C. §51 *et seq.* 46 U. S. C. §30104. In the 30 years after the Jones Act's passage, "the Act was the vehicle for almost all seamen's personal injury and death actions." Gilmore & Black §6–20, at 327.

But the Jones Act was overtaken in the 1950s by the second fundamental change in personal injury maritime claims—and it was this Court, not Congress, that played the leading role. In a pair of decisions in the late 1940s, the Court transformed the old claim of unseaworthiness, which had demanded only due diligence by the vessel owner, into a strict-liability claim. In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (1944), the Court stated that "the exercise of due diligence does not relieve the owner of his obligation" to provide a seaworthy ship and, in the same ruling, held that the fellow-servant doctrine did not provide a defense. *Id.*, at 100, 101. *Mahnich*'s interpretation of the early cases may have been suspect, see Tetreault 397–398 (*Mahnich* rests on "startling misstatement" of relevant precedents), but its assertion triggered a sea-change in maritime personal injury. Less than two years later, we affirmed that the duty of seaworthiness

was "essentially a species of liability without fault . . . neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94–95 (1946) (citations omitted). From *Mahnich* forward, "the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549 (1960). As a result of *Mahnich* and *Sieracki*, between the 1950s and 1970s "the unseaworthiness count [was] the essential basis for recovery with the Jones Act count preserved merely as a jury-getting device."[5] Gilmore & Black §6–20, at 327–328.

The shifts in plaintiff preferences between Jones Act and unseaworthiness claims were possible because of the significant overlap between the two causes of action. See *id.*, §6–38, at 383. One leading treatise goes so far as to describe the two claims as "alternative 'grounds' of recovery for a single cause of action." 2 R. Force & M. Norris, The Law of Seamen §30:90, p. 30–369 (5th ed. 2003). The two claims are so similar that, immediately after the Jones Act's passage, we held that plaintiffs could not submit both to a jury. *Plamals*, *supra*, at 156–157 ("Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both"). We no longer require such election. See *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 222, n. 2 (1958). But a plaintiff still cannot duplicate his recovery

[5]The decline of Jones Act claims was arrested, although not reversed, by our holding that some negligent actions on a vessel may create Jones Act liability without rendering the vessel unseaworthy. See *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971); see also 1B Benedict on Admiralty §23, p. 3–35 (7th rev. ed. 2018).

by collecting full damages on both claims because, "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, . . . there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong." *Peterson*, 278 U. S., at 138; see also 2 Force, *supra*, §§26:73, 30:90.

II

Christopher Batterton worked as a deckhand and crew member on vessels owned and operated by the Dutra Group. According to Batterton's complaint, while working on a scow near Newport Beach, California, Batterton was injured when his hand was caught between a bulkhead and a hatch that blew open as a result of unventilated air accumulating and pressurizing within the compartment.

Batterton sued Dutra and asserted a variety of claims, including negligence, unseaworthiness, maintenance and cure, and unearned wages. He sought to recover general and punitive damages. Dutra moved to strike Batterton's claim for punitive damages, arguing that they are not available on claims for unseaworthiness. The District Court denied Dutra's motion, 2014 WL 12538172 (CD Cal., Dec. 15, 2014), but agreed to certify an interlocutory appeal on the question, 2015 WL 13752889 (CD Cal., Feb. 6, 2015).

The Court of Appeals affirmed. 880 F. 3d 1089 (CA9 2018). Applying Circuit precedent, see *Evich* v. *Morris*, 819 F. 2d 256, 258–259 (CA9 1987), the Court of Appeals held that punitive damages are available for unseaworthiness claims. 880 F. 3d, at 1096. This holding reaffirmed a division of authority between the Circuits. Compare *McBride* v. *Estis Well Serv., L. L. C.*, 768 F. 3d 382, 391 (CA5 2014) (en banc) (punitive damages are not recover-

Dock Co., 832 F. 2d 1540, 1550 (CA11 1987) ("Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship . . ."). We granted certiorari to resolve this division. 586 U. S. ___ (2018).

III

Our resolution of this question is governed by our decisions in *Miles* and *Atlantic Sounding*. *Miles* establishes that we "should look primarily to . . . legislative enactments for policy guidance," while recognizing that we "may supplement these statutory remedies where doing so would achieve the uniform vindication" of the policies served by the relevant statutes. 498 U. S., at 27. In *Atlantic Sounding*, we allowed recovery of punitive damages, but we justified our departure from the statutory remedial scheme based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure. 557 U. S., at 411–414 (discussing cases of piracy and maintenance and cure awarding damages with punitive components). We were explicit that our decision represented a gloss on *Miles* rather than a departure from it. *Atlantic Sounding*, *supra*, at 420 ("The reasoning of *Miles* remains sound"). And we recognized the importance of viewing each claim in its proper historical context. "'[R]emedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures.'" 557 U. S., at 423.

In accordance with these decisions, we consider here whether punitive damages have traditionally been awarded for claims of unseaworthiness and whether conformity with parallel statutory schemes would require such damages. Finally, we consider whether we are compelled on policy grounds to allow punitive damages for unseaworthiness claims.

A

For claims of unseaworthiness, the overwhelming historical evidence suggests that punitive damages are not available. Batterton principally relies on two cases to establish that punitive damages were traditionally available for breach of the duty of seaworthiness. Upon close inspection, neither supports this argument.

The Rolph, 293 F. 269, 271 (ND Cal. 1923), involved a mate who brutally beat members of the crew, rendering one seaman blind and leaving another with impaired hearing. The central question in the case was not the form of damages, but rather whether the viciousness of the mate rendered the vessel unseaworthy. *The Rolph*, 299 F. 52, 54 (CA9 1924). The court concluded that the master, by staffing the vessel with such an unsuitable officer, had rendered it unseaworthy. *Id.*, at 55. To the extent the court described the basis for the damages awarded, it explained that the judgment was supported by testimony as to "the expectation of life and earnings of these men." 293 F., at 272. And the Court of Appeals discussed only the seamen's entitlement "to recover an indemnity" for their injuries. 299 F., at 56. These are discussions of compensatory damages—nowhere does the court speak in terms of an exemplary or punitive award.[6]

The Noddleburn, 28 F. 855, 857–858 (Ore. 1886), involved an injury to a British seaman serving on a British vessel and was decided under English law. The plaintiff in the case was injured when he fell to the deck after being

[6] Even if this case did involve a *sub silentio* punitive award, we share the Fifth Circuit's reluctance to "rely on one dust-covered case to establish that punitive damages were generally available in unseaworthiness cases." *McBride* v. *Estis Well Serv., L. L. C.*, 768 F. 3d 382, 397 (2014) (Clement, J., concurring). Absent a clear historical pattern, *Miles* v. *Apex Marine Corp.*, 498 U. S. 19 (1990), commands us to seek conformity with the policy preferences the political branches have expressed in legislation.

ordered aloft and stepping on an inadequately secured line. *Id.*, at 855. After the injury, the master neglected the man's wounds, thinking the injury a mere sprain. *Id.*, at 856. The leg failed to heal and the man had to insist on being discharged to a hospital, where he learned that he would be permanently disabled. *Ibid.* As damages, the court awarded him accrued wages, as well as $1,000 to compensate for the loss in future earnings from his disability and $500 for his pain and suffering. *Id.*, at 860. But these are purely compensatory awards—the only discussion of exemplary damages comes at the very close of the opinion, and it is clear that they were considered because of the master's failure to provide maintenance and cure. *Ibid.* (discussing additional award "in consideration of the neglect and indifference with which the libelant was treated by the master *after his injury*" (emphasis added)).

Finally, Batterton points to two other cases, *The City of Carlisle*, 39 F. 807 (Ore. 1889), and *The Troop*, 118 F. 769 (Wash. 1902). But these cases, like *The Noddleburn*, both involve maintenance and cure claims that rest on the willful failure of the master and mate to provide proper care for wounded sailors after they were injured. 39 F., at 812 ("master failed and neglected to procure or provide any medical aid or advice . . . and was contriving and intending to get rid of him as easily as possible"); 118 F., at 771 (assessing damages based on provision of Laws of Oleron requiring maintenance). Batterton characterizes these as unseaworthiness actions on the theory that the seamen *could have* pursued that claim. But, because courts award damages for the claims a plaintiff actually pleads rather than those he could have brought, these cases are irrelevant.

The lack of punitive damages in traditional maritime law cases is practically dispositive. By the time the claim of unseaworthiness evolved to remedy personal injury, punitive damages were a well-established part of the

common law. *Exxon Shipping*, 554 U. S., at 491. American courts had awarded punitive (or exemplary) damages from the Republic's earliest days. See, *e.g.*, *Genay* v. *Norris*, 1 S. C. L. 6, 7 (1784); *Coryell* v. *Colbaugh*, 1 N. J. L. 77, 78 (1791). And yet, beyond the decisions discussed above, Batterton presents no decisions from the formative years of the personal injury unseaworthiness claim in which exemplary damages were awarded. From this we conclude that, unlike maintenance and cure, unseaworthiness did not traditionally allow recovery of punitive damages.

B

In light of this overwhelming historical evidence, we cannot sanction a novel remedy here unless it is required to maintain uniformity with Congress's clearly expressed policies. Therefore, we must consider the remedies typically recognized for Jones Act claims.

The Jones Act adopts the remedial provisions of FELA, and by the time of the Jones Act's passage, this Court and others had repeatedly interpreted the scope of damages available to FELA plaintiffs. These early decisions held that "[t]he damages recoverable [under FELA] are limited . . . strictly to the financial loss . . . sustained."[7] *American R. Co. of P. R.* v. *Didricksen*, 227 U. S. 145, 149 (1913); see also *Gulf, C. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173, 175 (1913) (FELA is construed "only to compensate . . . for the actual pecuniary loss resulting" from the worker's injury or death); *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 68 (1913) (FELA imposes "a liability for the pecuniary

[7]Treatises from the same period lend further support to the view that "in all actions under [FELA], an award of exemplary damages is not permitted." 2 M. Roberts, Federal Liabilities of Carriers §621, p. 1093 (1918); 1 *id.*, §417, at 708; 5 J. Berryman, Sutherland on Damages §1333, p. 5102 (4th ed. 1916) (FELA "provid[es] compensation for pecuniary loss or damage only").

damage resulting to [the worker] and for that only"). In one particularly illuminating case, in deciding whether a complaint alleged a claim under FELA or state law, the Court observed that if the complaint "were read as manifestly demanding exemplary damages, that would point to the state law." *Seaboard Air Line R. Co.* v. *Koennecke*, 239 U. S. 352, 354 (1915). And in the years since, Federal Courts of Appeals have unanimously held that punitive damages are not available under FELA. *Miller* v. *American President Lines, Ltd.*, 989 F. 2d 1450, 1457 (CA6 1993); *Wildman* v. *Burlington No. R. Co.*, 825 F. 2d 1392, 1395 (CA9 1987); *Kozar* v. *Chesapeake & Ohio R. Co.*, 449 F. 2d 1238, 1243 (CA6 1971).

Our early discussions of the Jones Act followed the same practices. We described the Act shortly after its passage as creating "an action for compensatory damages, on the ground of negligence."[8] *Peterson*, 278 U. S., at 135. And we have more recently observed that the Jones Act "limits recovery to pecuniary loss." *Miles*, 498 U. S., at 32. Looking to FELA and these decisions, the Federal Courts of Appeals have uniformly held that punitive damages are not available under the Jones Act. *McBride*, 768 F. 3d, at 388 ("[N]o cases have awarded punitive damages under the Jones Act"); *Guevara* v. *Maritime Overseas Corp.*, 59 F. 3d 1496, 1507, n. 9 (CA5 1995) (en banc); *Horsley*, 15 F. 3d, at 203; *Miller*, *supra*, at 1457 ("Punitive damages are not . . . recoverable under the Jones Act"); *Kopczynski* v. *The Jacqueline*, 742 F. 2d 555, 560 (CA9 1984).

Batterton argues that these cases are either inapposite or wrong, but because of the absence of historical evidence to support punitive damages—evidence that was central to

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[8]We also note that Congress declined to allow punitive damages when it enacted the Death on the High Seas Act. 46 U. S. C. §30303 (allowing "fair compensation for the pecuniary loss sustained" for a death on the high seas).

our decision in *Atlantic Sounding*—we need not reopen this question of statutory interpretation. It is enough for us to note the general consensus that exists in the lower courts and to observe that the position of those courts conforms with the discussion and holding in *Miles*. Adopting the rule urged by Batterton would be contrary to *Miles*'s command that federal courts should seek to promote a "uniform rule applicable to all actions" for the same injury, whether under the Jones Act or the general maritime law. 498 U. S., at 33.

C

To the extent Batterton argues that punitive damages are justified on policy grounds or as a regulatory measure, we are unpersuaded. In contemporary maritime law, our overriding objective is to pursue the policy expressed in congressional enactments, and because unseaworthiness in its current strict-liability form is our own invention and came after passage of the Jones Act, it would exceed our current role to introduce novel remedies contradictory to those Congress has provided in similar areas. See *id.*, at 36 (declining to create remedy "that goes well beyond the limits of Congress' ordered system of recovery"). We are particularly loath to impose more expansive liabilities on a claim governed by strict liability than Congress has imposed for comparable claims based in negligence. *Ibid.* And with the increased role that legislation has taken over the past century of maritime law, we think it wise to leave to the political branches the development of novel claims and remedies.

We are also wary to depart from the practice under the Jones Act because a claim of unseaworthiness—more than a claim for maintenance and cure—serves as a duplicate and substitute for a Jones Act claim. The duty of maintenance and cure requires the master to provide medical care and wages to an injured mariner in the period after

the injury has occurred. *Calmar S. S. Corp.*, 303 U. S., at 527–528. By contrast, both the Jones Act and unseaworthiness claims compensate for the injury itself and for the losses resulting from the injury. *Peterson*, *supra*, at 138. In such circumstances, we are particularly mindful of the rule that requires us to promote uniformity between maritime statutory law and maritime common law.[9] See *Miles*, *supra*, at 27. See also *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978) (declining to recognize loss-of-society damages under general maritime law because that would "rewrit[e the] rules that Congress has affirmatively and specifically enacted").

Unlike a claim of maintenance and cure, which addresses a situation where the vessel owner and master have "just about every economic incentive to dump an injured seaman in a port and abandon him to his fate," in the unseaworthiness context the interests of the owner and mariner are more closely aligned. *McBride*, *supra*, at 394, n. 12 (Clement, J., concurring). That is because there are signif-

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[9]The dissent, *post* at 9, and n. 7 (opinion of GINSBURG, J.), suggests that because of the existing differences between a Jones Act claim and an unseaworthiness claim, recognizing punitive damages would not be a cause of disparity. But, as the dissent acknowledges, much of the expanded reach of the modern unseaworthiness doctrine can be attributed to innovations made by this Court following the enactment of the Jones Act. See *post* at 8, and n. 6; *supra*, at 7–8. Although Batterton and the dissent would continue this evolution by recognizing damages previously unavailable, *Miles* dictates that such innovation is the prerogative of the political branches, our past expansion of the unseaworthiness doctrine notwithstanding.

Of course, *Miles* recognized that the general maritime law need not be static. For example, our decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), smoothed a disjunction created by the imperfect alignment of statutory claims with past decisions limiting maritime claims for wrongful death. But when there is no disjunction—as here, where traditional remedies align with modern statutory remedies—we are unwilling to endorse doctrinal changes absent legislative changes.

icant economic incentives prompting owners to ensure that their vessels are seaworthy. Most obviously, an owner who puts an unseaworthy ship to sea stands to lose the ship and the cargo that it carries. And if a vessel's unseaworthiness threatens the crew or cargo, the owner risks losing the protection of his insurer (who may not cover losses incurred by the owner's negligence) and the work of the crew (who may refuse to serve on an unseaworthy vessel). In some instances, the vessel owner may even face criminal penalties. See, *e.g.*, 46 U. S. C. §10908.

Allowing punitive damages on unseaworthiness claims would also create bizarre disparities in the law. First, due to our holding in *Miles*, which limited recovery to compensatory damages in wrongful-death actions, a mariner could make a claim for punitive damages if he was injured onboard a ship, but his estate would lose the right to seek punitive damages if he died from his injuries. Second, because unseaworthiness claims run against the owner of the vessel, the ship's owner could be liable for punitive damages while the master or operator of the ship—who has more control over onboard conditions and is best positioned to minimize potential risks—would not be liable for such damages under the Jones Act. See *Sieracki*, 328 U. S., at 100 (The duty of seaworthiness is "peculiarly and exclusively the obligation of the owner. It is one he cannot delegate").

Finally, because "[n]oncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries," *Exxon Shipping*, 554 U. S., at 497, allowing punitive damages would place American shippers at a significant competitive disadvantage and would discourage foreign-owned vessels from employing American seamen. See Gotanda, Punitive Damages: A Comparative Analysis, 42 Colum. J. Transnat'l L. 391, 396, n. 24 (2004) (listing civil-law nations that restrict private plaintiffs to compensatory damages). This would frustrate another

"fundamental interest" served by federal maritime jurisdiction: "the protection of maritime commerce." *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 25 (2004) (internal quotation marks omitted; emphasis deleted).

Against this, Batterton points to the maritime doctrine that encourages special solicitude for the welfare of seamen. But that doctrine has its roots in the paternalistic approach taken toward mariners by 19th century courts. See, *e.g.*, *Harden*, 11 F. Cas., at 485; *Brown*, 4 F. Cas., at 409. The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law. It is not sufficient to overcome the weight of authority indicating that punitive damages are unavailable.

IV

Punitive damages are not a traditional remedy for unseaworthiness. The rule of *Miles*—promoting uniformity in maritime law and deference to the policies expressed in the statutes governing maritime law—prevents us from recognizing a new entitlement to punitive damages where none previously existed. We hold that a plaintiff may not recover punitive damages on a claim of unseaworthiness.

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ONICA GRAZETTE,

Appellant,

v.

Case No. 5D18-821

MAGICAL CRUISE COMPANY LIMITED,
D/B/A DISNEY CRUISE LINE,

Appellee.

_____/

Opinion filed October 11, 2019

Appeal from the Circuit Court
for Brevard County,
Tonya B. Rainwater, Judge.

Paul B. Feltman, of Alvarez, Feltman & Da Silva, PL, Coral Gables, for Appellant.

Richard J. McAlpin and Kassandra Doyle Taylor, of McAlpin Conroy, P.A., Miami, for Appellee.

HIGBEE, H.L., Associate Judge.

Onica Grazette ("Grazette") appeals the final summary judgment entered in favor of Magical Cruise Company Limited, d/b/a Disney Cruise Line ("Disney"), based on Disney's statute of limitations defense. For the following reasons, we reverse the judgment as to one aspect of Grazette's claim but otherwise affirm.

Grazette worked aboard Disney's cruise ships as a custodial hostess from October 2011 through January 2015. During this time, she worked four contracts and was medically debarked during her fifth. Two months into her first contract, aboard the *Disney Wonder*, Grazette bent over to lift heavy luggage and felt a "pop" in her lower back. She experienced an immediate sharp pain, but the pain went away after she sat down for a few minutes. She was able to finish out the rest of her shift and did not report the incident or go to the medical center.

Over the next two weeks, Grazette continuously worked, pain-free, 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. She informed the doctor about the pop in her back two weeks prior, and the doctor diagnosed her with mechanical back pain in the coccyx region. She was debarked, and her contract aboard the *Disney Wonder* ended shortly thereafter. After debarking, she went home to Trinidad and received and completed treatment. Grazette said she was pain-free at that time and thought she could return to work without any restrictions.

During her second, third, and fourth contracts, Grazette went to the ships' medical centers on numerous occasions, sometimes for back pain and other times for medical issues unrelated to back pain. On November 22, 2014, during her fifth contract, Grazette went to the medical center after she fell and hit her back against a ladder by her bunk bed. She had multiple follow up visits and went shoreside for an MRI on January 17, 2015, which revealed that she had an L5-S1 disc herniation. She was medically debarked on January 20, 2015, and never worked onboard a Disney ship again.

When Grazette returned home in January 2015, she received chiropractic treatment until September 2015, when Disney referred her to a neurosurgeon where she underwent a conservative treatment plan. This plan included rest, medication, physical therapy, and injections. By December 2016, she still had not reached maximum medical improvement ("MMI").

In October 2016, two months prior to her final visit with the neurosurgeon, Grazette filed a four-count complaint against Disney, asserting: (1) Jones Act negligence; (2) unseaworthiness; (3) failure to provide maintenance and cure; and (4) failure to provide prompt, proper, and adequate medical treatment. She alleged that, while working on the *Disney Wonder*, she felt pain in her lower back but was continuously sent back to work in the same job with the same job requirements and without a proper diagnosis or treatment, and that she did not receive a proper diagnosis until January 17, 2015.

Since Grazette alleged that her injuries accrued while she was working on the *Disney Wonder*, but the complaint was not filed until October 2016, Disney asserted in its answer that all four claims were thus time-barred by maritime tort law's three-year statute of limitations. After conducting discovery, Disney then moved for summary judgment. In her response in opposition, Grazette argued that there were genuine issues of material fact and that the claims were not time-barred.[1] She argued that the statute of limitations

[1] Grazette also moved to amend her complaint, citing newly discovered evidence wherein she sought to change the injury from one aboard the *Disney Wonder* to the one aboard the *Fantasy* when she fell out of the bunk bed in 2014. However, this issue was not properly preserved as it was never set for hearing and was never brought to the court's attention at any point after filing. *See Hernandez v. Kissimmee Police Dep't*, 901 So. 2d 420, 421 (Fla. 5th DCA 2005). Furthermore, an amendment would have been futile because the amendment would have directly contradicted Grazette's sworn testimony that the back pain was caused by a specific incident relating to luggage in 2011. *See ABC Liquors, Inc. v. Centimark Corp.*, 967 So. 2d 1053, 1057 (Fla. 5th DCA 2007).

did not begin to run until there was notice of a medical injury and a relationship between the injury and the job, and she asserted that the earliest it began to run would have been January 17, 2015.

"The statute of limitations for maritime torts is governed by 46 U.S.C. § 30106," which holds that "'a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.'" *Pretus v. Diamond Offshore Drilling, Inc.*, 571 F.3d 478, 481 (5th Cir. 2009). "The Jones Act, 46 U.S.C. § 30104 . . . , adopts the same statute of limitations applicable to suits under the Federal Employees' Liability Act ('FELA'), 45 U.S.C. § 56, which is three years." *Id.* Here, there is no dispute that the federal maritime law applies and that the statute of limitations is three years. Instead, the dispute is when the causes of action actually accrued.

Grazette's complaint specifically stated that she was injured aboard the *Disney Wonder*, on which she had not worked since 2012, and she testified during her deposition that there was a specific incident when she hurt her back in 2011. At the summary judgment hearing, Grazette argued under a continuing tort theory and an aggravation theory that the claim did not accrue until her 2015 diagnosis. Grazette, however, admitted that the incident that started her back pain occurred two weeks prior to December 29, 2011. The trial court granted Disney's motion for summary judgment.

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *Gabriel v. Disney Cruise Line*, 93 So. 3d 1121, 1123 (Fla. 5th DCA 2012) (quoting *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). "The burden of proving the nonexistence of any genuine issue of material fact is on the moving party." *Id.* "The evidence contained

in the record, including any supporting affidavits, must be viewed in the light most favorable to the non-moving party." *Id.* "If the slightest doubt exists, then summary judgment must be reversed." *Id.*

Despite the allegations in the complaint and her sworn testimony to the contrary, Grazette contends that her maritime claims were not time-barred because, under the discovery rule, she did not discover her injury until her diagnosis in January 2015. Whether the court should apply the discovery rule is a pure question of law which this Court reviews de novo. *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1430 (11th Cir. 1997).

The discovery rule "applies to pure latent injury cases, cases in which the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred." *Foland v. Seacor Marine, Inc.*, No. 94-30228, 1994 WL 652535, at *2 (5th Cir. Nov. 4, 1994). On the other hand, the discovery rule is an exception to the general "time of event" rule, which "is one in which the plaintiff has sustained both immediate and latent injuries caused by a noticeable, traumatic occurrence." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 231 (5th Cir. 1984). Here, the undisputed facts reflect that Grazette's injury was not purely latent and that she had a "noticeable, traumatic occurrence" in December 2011. Because she was aware in 2011 of both the injury and the cause, the causes of action accrued under the time of event rule in 2011 when the injury occurred. Therefore, her claims for negligence under the Jones Act, unseaworthiness, and failure to provide prompt, proper, and adequate medical treatment are time-barred as she did not file her complaint until 2016, two years after the statute of limitations had run. *See Hicks v. Hines*

Inc., 826 F.2d 1543, 1547 (6th Cir. 1987). Accordingly, summary judgment was proper on these claims.

We reverse, however, as to Grazette's claim for maintenance and cure damages. "Under general maritime law, a seaman has the right to receive compensation for food, lodging, and medical services resulting from illnesses or injuries suffered while working aboard a ship." *Gabriel*, 93 So. 3d at 1123. "The duty to provide said compensation, i.e., maintenance and cure, continues during a seaman's recuperative period until 'maximum medical recovery,' or MMI, is reached." *Id.* Claims for maintenance and cure are deemed to have accrued when the seaman becomes incapacitated to do a seaman's work, *Spencer v. Grand River Navigation Co.*, 644 F. App'x 559, 565 (6th Cir. 2016), and continues until the seaman reaches MMI. *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962).

Here, there is an issue of fact as to when Grazette became incapacitated to do seaman's work since she was medically debarked on two separate occasions. After the first disembarkment, which occurred shortly after she sustained the back injury in 2011, her contract terminated, she was sent home to Trinidad for treatment, and she received maintenance and cure payments from Disney, but she ultimately returned to do seaman's work several months later. After the second disembarkment in 2015, she was deemed unfit and unable to physically do seaman's work. Because there is a dispute of material fact as to when Grazette became incapacitated, we reverse only as to that claim.

AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings.

LAMBERT, J., and JACOBUS, B.W., Senior Judge, concur.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 22nd day of October, two thousand twenty.

Present: ROSEMARY S. POOLER,
RAYMOND J. LOHIER, JR.,
WILLIAM J. NARDINI,
Circuit Judges.

BRIAN DOTY,

Plaintiff-Appellant,

v. 20-36-cv

TAPPAN ZEE CONSTRUCTORS, LLC,

Defendant-Appellee.

Appearing for Appellant: Paul T. Hofmann, Hofmann & Schweitzer, New York, N.Y.

Appearing for Appellee: Robert N. Dengler, Flicker, Garelick & Associates, LLP, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Karas, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Brian Doty appeals from the December 18, 2019 judgment of the United States District Court for the Southern District of New York (Karas, *J.*) granting summary judgment to Tappan Zee Constructors, LLC ("TZC") on his claims brought under the Jones Act and Longshore and Harbor Workers' Compensation Act. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

TZC was hired by the New York State Thruway Authority to design and construct the Governor Mario M. Cuomo Bridge to replace the Tappan Zee Bridge. TZC hired Doty in May 2014 to work as a night-shift mechanic. In that role, he maintained and repaired both vessels and equipment appurtenant to materials barges, tug boats, work boats and crane barges. The bridge construction site had four ringer crane barges—barges with cranes attached to the barge decks, with a ring of steel beams that allowed the cranes to rotate 360 degrees while lifting equipment and materials. As relevant here, one crane was affixed to a 214-foot long crane barge named "The Strong Island," which was held in place by a 40-foot steel ring. The barges at the bridge construction site were stationary and moored. Aside from taking a boat between moored barges, Doty did not work aboard a vessel while it was traveling over water.

On November 19, 2014, Doty was injured while repairing a crane attached to the Strong Island. He was transported by work boat to the barge. Once there, he entered the engine compartment cab and performed diagnostic testing before exiting the cab to go the source of the problem. To do so, he had to walk on top of 8-to-10-inch-wide steel beams, without the benefit of hand rails. He slipped and fell five feet to the crane's deck, injuring several vertebrae. Doty sued, alleging TZC was negligent in failing to provide a safe place to work and that the vessel was unseaworthy due to dangerous walking surfaces providing a dangerous condition. He sued for damages under the Jones Act, 46 U.S.C. § 30104, and, alternatively, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 905(b) and 933 ("LHWCA").

On appeal, Doty first challenges the district court's holding that he was not a seaman within the meaning of the Jones Act. In *Chandris, Inc. v. Latsis*, the Supreme Court set out a two-part test for who is a seaman within the meaning of the Jones Act: "First . . . an employee's duties must contribute to the function of a vessel or to the accomplishment of its mission" and "[s]econd . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." 515 U.S. 347, 368-69 (1995).

The district court relied on our decision in the *Matter of Buchanan Marine, L.P.*, where this Court considered whether a barge maintainer working at a riverside facility was a seaman. 874 F.3d 356, 365 (2d. Cir. 2017). There, the plaintiff was not assigned to any vessel and never operated a barge. *Id.* at 366. When the plaintiff worked aboard barges, the barges were secured to the dock in order to inspect them for cargo loading and cargo transport. *Id.* The plaintiff reported directly to the dock foreman, belonged to a union for equipment operators, and did not have a maritime license. *Id.* at 367. Moreover, the plaintiff "never spent the night aboard a barge" but rather "worked an hourly shift and went home every night after his shift ended." *Id.* Weighing the total circumstances of the plaintiff's employment, the court found that "none of [his] work was of a seagoing nature [and] he was not exposed to the perils of the sea in the manner associated with seaman status." *Id.* at 368 (citations and internal quotation marks omitted). Based

on these facts, the Court found that the plaintiff was not a seaman within the meaning of the Jones Act. *Id.*

We agree with the district court that Doty is not a seaman. Like the plaintiff in *Buchanan*, Doty (1) performed maintenance work exclusively on stationary vessels rather than vessels navigating over water; (2) did not operate or otherwise assist in the navigation of any vessel; (3) held no maritime license; and (4) went home at the end of an hourly shift and never slept aboard a vessel. *See id.* at 366-67; *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002) (finding lack of seaman status for dock worker who (1) worked only on vessels secured to a pier; (2) did not "operate a barge or otherwise assist in its navigation"; (3) "held no Coast Guard license or other seaman's papers"; and (4) "never spent the night aboard a barge." (internal quotation marks omitted)). Doty argues that his employment circumstances differ from those of the plaintiff in *Buchanan* in that Doty worked on vessels that were floating (though secured) in the middle of open water rather than moored to a riverside dock; accordingly, he claims that he had a greater exposure to certain maritime perils, such as choppy waters or heavy boat traffic. Even assuming that to be correct, however, that one factor would not tip the scales in his favor under the totality of the circumstances analysis. Considering all the circumstances, we conclude that Doty was not a seaman.

Doty also challenges the district court's dismissal of his negligence claim brought under the LHWCA. The LHWCA provides no-fault workers' compensation benefits for land-based, non-seaman maritime workers injured "in the course of employment." 33 U.S.C. § 902(2-4). "The LHWCA's no-fault compensation structure is the exclusive remedy for injured [maritime employees] against their employers." *Buchanan Marine*, 874 F.3d at 363 (citing 33 U.S.C. § 905(a)). Thus, the LHWCA generally bars negligence claims brought by maritime workers against their employers. *See O'Hara*, 294 F.3d at 62 ("As with most other workers' compensation schemes, th[e] entitlement [to no-fault compensation payments under the LHWCA] displaces the employee's common-law right to bring an action in tort against his or her employer.").

However, an injured maritime employee covered by the LHWCA may sue negligent third parties in tort, including the owner or charter of the vessel on which the employee was injured. *Id.* at 363-64; *see* 9 U.S.C. § 905(b). Here, TZC is both the employer and the vessel owner, requiring analysis under the "dual capacity" standard set forth *Gravatt v. City of New York*, 226 F.3d 108, 125 (2d Cir. 2000). This analysis focuses on "the allegedly negligent conduct to determine whether that conduct was performed in the course of the operation of the owner's vessel as a vessel or whether the conduct was performed in furtherance of the employer's harbor-working operations." *Id.* "The negligence of the employer's agents, acting in tasks constituting harbor-work employment, may not be imputed to their employer in its capacity as vessel owner." *Id.*

In *Gravatt*, a journeyman dock builder, who was employed by a construction contractor retained by the City of New York to repair one of its bridges, was injured while working on a barge chartered by the contractor at a construction site. *Id.* at 111. Normally, his duties did not include handling materials on the barges, but, on the day of his injury, he was instructed by the site foreman to go onto a materials barge to help move old piles so as to clear access to new

materials. *Id.* at 113. He was subsequently hit by a pile that was being moved in an allegedly unsafe and negligent manner by personnel working on the crane barge and knocked into the water, causing serious injuries. *Id.* The Court assessed whether the employees' negligent conduct was undertaken in pursuance of the contractor's role as vessel owner or as employer. The Court noted that "the task of the materials barge, as a vessel, was to transport building materials from Newark to the work site and to transport debris from the work site to Newark," while the work assigned to the foreman and to the injured dock builder was to make repairs to the bridge, "which included the unloading of construction materials brought by the barges and the reloading of the barges with debris." *Id.* at 125. Moreover, all of the personnel working on the crane barge were engaged in bridge repair; none was engaged in seafaring work. *Id.* at 125-26. Simply put, "[n]either the materials barge, nor the crane barge, nor anybody present at the bridge repair site was engaged in vessel duties at the time of the accident." *Id.* at 125. Accordingly, this Court held that the contractor was negligent in its capacity as employer, but not as a vessel owner. *Id.* at 125. Thus, there was no claim under Section 905(b) because the defendants were responsible only as employers, not as the vessel owners.

We agree with the district court that Doty cannot bring a negligence action against TZC. Doty was engaged in inspection and repair work at the time of his injury. Assuming Doty's injury was caused by TZC's negligence, the negligent act was committed while TZC acted as a construction company building a bridge. The Strong Island barge was moored and being used as a work platform for the crane, and the crane was being used to build the bridge. The allegedly dangerous condition was related to TZC's work as a construction company, not as a vessel owner.

We have considered the remainder of Doty's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13883

D.C. Docket No. 3:16-cv-00170-RV-HTC

PATRICIA LACOURSE,
Individually and as personal representative
of the Estate of Lt. Colonel Matthew LaCourse,

Plaintiff - Appellant,

versus

PAE WORLDWIDE INCORPORATED, et al.,

Defendants,

DEFENSE SUPPORT SERVICES LLC,
Witness 7,
Witness 8,
Witness 9,
JOHN DOES,
1 through 10 inclusive,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(November 17, 2020)

Before WILSON, NEWSOM, and ANDERSON, Circuit Judges.

NEWSOM, Circuit Judge:

This appeal requires us to decide whether and to what extent the Death on the High Seas Act, 46 U.S.C. §§ 30301–08, applies to Patricia LaCourse's wrongful-death action, in which she alleges that PAE Worldwide Incorporated failed to properly service and maintain the F-16 that her husband was flying when it crashed into the Gulf of Mexico. We must also determine whether PAE, which was operating under a services contract with the United States Air Force, is shielded from liability by the so-called "government contractor" defense.

For the reasons that follow, we hold that DOHSA governs LaCourse's action, that it provides LaCourse's exclusive remedy and preempts her other claims, and that PAE is entitled to the protection of the government-contractor defense.

I

A

The tragic story underlying this appeal began when an Air Force F-16 fighter jet departed Tyndall Air Force Base, east of Panama City, Florida, for a continuation-training sortie. The only person on board was the pilot, Matthew LaCourse, a retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense. The plan was for Lt. Col. LaCourse to take the jet out

over the Gulf of Mexico, perform a series of training maneuvers, and then return to Tyndall. Unfortunately, he never came back. During the flight—for reasons the parties dispute—the F-16 crashed into the Gulf more than twelve nautical miles offshore. Sadly, Lt. Col. LaCourse was killed.

Five years prior to the accident, PAE's predecessor—Defense Support Services—had been awarded a contract with the Air Force to provide aircraft service and maintenance at Tyndall, including, as it turns out, on the F-16 that Lt. Col. LaCourse was flying when he crashed. In performing under the contract, PAE was required to follow detailed guidelines and adhere to specific standards, including Air Force Instructions (AFIs), Technical Orders (TOs), and Job Guides (JGs), all of which were prepared by or on behalf of the Air Force.

F-16s are equipped with two hydraulic systems: A and B. The systems operate independently of one another and are designed to allow the plane to continue to fly in the event that one of them fails. Beginning two months before the crash, the jet at issue here experienced a succession of problems that implicated one or both of its hydraulic systems. In particular, on separate occasions: (1) hydraulic fluid was discovered in the outboard flight-control accumulator gauge; (2) System B's hydraulically actuated landing gear twice failed to retract during flight; (3) a hydraulic system pressure-line clamp on System A broke; (4) System B's reservoir accumulator was found to be depleted; (5) a pre-flight control check

revealed a hydraulic leak; (6) System A's cockpit indicator showed no pressure and System B's flight-control accumulator pre-charge was low; and (7) both systems failed a "confidence run."[1] The F-16 was serviced and parts were repaired or replaced as these problems were identified.

On the day of the crash, the F-16 experienced two issues shortly before takeoff. First, the emergency-power unit took longer than expected to activate during the pre-flight check. Second, and more importantly for our purposes, the jet initially failed the "pitch-override check"—in which the pilot applies full pressure to the stick and presses a switch to make the stabilizers at the tail move a few inches or degrees in a nose-down direction. Despite these two "hiccups," as one witness called them, the jet ultimately passed all of its pre-flight checks, which indicated no problem with the hydraulic systems. The PAE mechanics who conducted the pre-flight checks were satisfied that the plane was safe to operate, and they released it for flight.

During the sortie, the F-16 performed a number of aerial maneuvers leading up to a "pitch-back"—an over-the-shoulder tactical maneuver in which the pilot uses the pitch axis to rejoin another aircraft. By all accounts, everything leading up to the pitch-back appeared normal—*i.e.*, no gauge, light, warning, or caution

[1] The district court assumed that each of these problems was related to the hydraulic systems for purposes of deciding LaCourse's claims on summary judgment but noted that this was "far from certain."

indicated any problem, and there were no reports of any vibrations, shakes, etc. The issue that led to the crash occurred at the end of the pitch-back maneuver—Lt. Col. LaCourse appeared to level off and there followed, as one witness described it, "a period of no data, no inputs, no control or . . . no maneuvers," at which point the jet entered a "pitch-down" from about 12,000 feet. There is no evidence that Lt. Col. LaCourse made any effort to eject or radio for help during his final descent.[2]

B

Lt. Col. LaCourse's widow and personal representative, Patricia LaCourse, filed this wrongful-death action and jury demand in Florida state court alleging state-law claims for negligence, breach of warranty, and breach of contract. PAE removed the case to federal court based on federal-officer jurisdiction, diversity jurisdiction, and jurisdiction under DOHSA—which, in relevant part, confers admiralty jurisdiction "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 30302. Resisting PAE's removal, LaCourse disputed that federal jurisdiction existed on any basis.

[2] Although it has no real bearing on the issues before us, it's worth noting—by way of background—that the parties vigorously dispute the crash's cause. LaCourse and her experts blame the F-16's dual-hydraulic system, as well as PAE's failure to discover, diagnose, and address the problems. PAE and its experts, by contrast, posit that Lt. Col. LaCourse suffered a G-induced loss of consciousness following the pitch-back.

Once in federal court, PAE moved for partial summary judgment, arguing that DOHSA governed LaCourse's suit and, accordingly, that any potential recovery should (per the statute) be limited to pecuniary damages. The district court granted PAE's motion and held that DOHSA applies and "provides the exclusive remedy for death on the high seas, preempts all other forms of wrongful death claims, and only permits recovery for pecuniary damages."

PAE then filed a motion to strike—or, in the alternative, for partial summary judgment—asking the district court to strike LaCourse's state-law breach-of-warranty and breach-of-contract claims, as well as her jury demand. The district court again granted PAE's motion, concluding that because DOHSA preempts all other wrongful-death causes of action, LaCourse's warranty and contract claims had to be stricken. The district court further held that because all that remained was the DOHSA claim, LaCourse was not entitled to a jury trial.

PAE subsequently moved for final summary judgment, contending that it was protected by the "government contractor" defense, which extends the United States' sovereign immunity to a federal-government contractor, thereby shielding it from civil liability, provided that, among other things, the contractor complies with reasonably precise government specifications. The district court once again agreed with PAE and granted it summary judgment on government-contractor grounds.

This is LaCourse's appeal.[3]

II

Before us, LaCourse argues that the district court erred in several ways. First, she contends that the court wrongly held that DOHSA governs this case—both (1) because by its plain terms DOHSA applies only when a death is caused by "wrongful act, neglect, or default occurring on the high seas," whereas the alleged negligence here occurred on land, and (2) because, in any event, her husband's plane crash lacked a "maritime nexus." Second, LaCourse argues that the district court erred in striking her breach-of-warranty and breach-of-contract claims because they don't seek a remedy broader than DOHSA and therefore aren't preempted. Finally, she asserts that the district court improperly applied the

[3] As PAE points out, LaCourse's notice of appeal identified only two of the district court's three orders—the order striking her non-DOHSA claims and her jury demand (Doc. 90) and the order granting PAE final summary judgment based on the government-contractor defense (Doc. 134). The notice did not specifically state that LaCourse was also appealing the district court's initial order concluding that DOHSA applied and supplied her exclusive remedy (Doc. 74). LaCourse acknowledges the oversight in her reply brief, but as she explains, it is "well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was effectively to appeal." *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006) (citation omitted). LaCourse's intent to appeal all three orders is apparent from the briefing, and PAE addressed all three orders (and constituent issues) in its response. Moreover, and in any event, our review of the latter two orders necessarily requires us to review the district court's determination of DOHSA's applicability. So in short, LaCourse's oversight hasn't prejudiced either party and, based on our case law, it's appropriate to let it slide under the circumstances.

government-contractor defense because PAE failed to show that it complied with the Air Force's reasonably precise specifications for maintaining the F-16.[4]

We will examine each contention in turn.[5]

A

The first question we must address is whether DOHSA applies to LaCourse's suit. The district court held that it does; LaCourse insists that it doesn't.

In relevant part, DOHSA's operative provision states that

> [w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.

46 U.S.C. § 30302. DOHSA's applicability matters, among other reasons, because it limits a plaintiff's recovery to "compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought" and thereby forecloses recovery for emotional injury and punitive damages. *Id.* § 30303.

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[4] LaCourse also contends that the district court erred in striking her jury demand. But because—for reasons we'll explain—we hold that the district court's grant of summary judgment in PAE's favor is due to be affirmed, we needn't reach the jury-demand issue.

[5] "We review the district court's grants of partial summary judgment and summary judgment *de novo,* reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, and applying the same standard as the district court." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

1

LaCourse first argues that the district court erred in holding that DOHSA applies because the "wrongful act, neglect, or default" asserted here—PAE's negligent maintenance of the F-16—did not "occur[] on the high seas," as the Act's plain language requires. Rather, she says, the alleged negligence occurred on land—when the jet was improperly serviced at Tyndall Air Force Base. Accordingly, LaCourse contends, DOHSA doesn't apply to her suit.

If we were writing on a clean slate, we would almost certainly agree. LaCourse is exactly right that, according to its language, DOHSA applies only when the "death of an individual is caused by wrongful act, neglect, or default occurring on the high seas." And she is also right that the alleged "wrongful act, neglect, or default" here occurred not "on the high seas," but on terra firma. Unfortunately for LaCourse, though, we are bound by controlling precedent to reject her plain-text argument. In *Offshore Logistics, Inc. v. Tallentire*, for instance, the Supreme Court observed that "admiralty jurisdiction is expressly provided under DOHSA *[where] the accidental deaths occurred beyond a marine league from shore*." 477 U.S. 207, 218 (1986) (emphasis added). So too, in *In re Dearborn Marine Service, Inc.*, our predecessor court, whose decisions bind us,[6] recognized that "DOHSA has been construed to confer admiralty jurisdiction over

[6] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

claims *arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.*" 499 F.2d 263, 272 n. 17 (5th Cir. 1974) (emphasis added); *accord, e.g.*, *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) ("[T]he simple fact that [plaintiff's] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA. . . . [A]dmiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land. The place where the negligence or wrongful act occurs is not decisive.") (footnote omitted). It's not for the three of us to second-guess the correctness of *Offshore Logistics* or *Dearborn Marine*. Because we are bound by those decisions, we are constrained to agree with the district court that DOHSA applies despite the fact that PAE's alleged negligence occurred on land at Tyndall Air Force Base.

2

LaCourse separately argues that DOHSA doesn't govern here because the plane crash that killed her husband lacked a "maritime nexus," which she insists is required by the Supreme Court's landmark admiralty decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

In that case, a plane flying from Ohio to Maine crashed into Lake Erie after striking a flock of seagulls shortly after takeoff. *Id.* at 250. Although the crew

wasn't injured, the plane was a total loss, so its owners brought an action in admiralty, alleging negligence by several airport employees. *Id.* at 250–51. The Supreme Court held that maritime locality alone—there, Lake Erie's navigable waters—is not a sufficient predicate for admiralty jurisdiction in aviation-tort cases, and that "in the absence of legislation to the contrary," claims arising from airplane crashes are not cognizable in admiralty unless the alleged wrong bears "a significant relationship to traditional maritime activity"—*i.e.*, has a maritime nexus. *Id.* at 268. Because the flight in *Executive Jet* "would have been almost entirely over land . . . within the continental United States" and was "only fortuitously and incidentally connected to navigable waters," the Court determined that it bore "no relationship to traditional maritime activity"—and, accordingly, that admiralty jurisdiction was lacking. *Id.* at 272–73. LaCourse argues that, like the flight in *Executive Jet*, her husband's flight—which was intended to begin and end at Tyndall Air Force Base—was also only "fortuitously over water" and thus bore no significant relationship to "traditional maritime activity."

The problem with LaCourse's argument is that *Executive Jet* didn't involve DOHSA—there were no injuries, let alone any fatalities to support a wrongful-death claim. *Id.* at 250. And significantly, the Supreme Court was careful there to include a caveat when announcing its holding—namely, that a maritime nexus is required only "in the absence of legislation to the contrary." *Id.* at 268. And

indeed, the Court in a footnote specifically identified DOHSA as an example of a statute that would constitute "legislation to the contrary." *Id.* at 274 n. 26.

If *Executive Jet* stood alone, LaCourse's maritime-nexus argument might still have a chance. In flagging DOHSA as an example of "legislation to the contrary," the Court suggested that the Act might apply only to flights that *require* traversing the high seas: "Some such flights, e.g., New York City to Miami, Florida, *no doubt* involve passage over 'the high seas beyond a marine league from the shore of any State.' To the extent that the terms of the Death on the High Seas Act become applicable to *such flights*, that Act, of course, is 'legislation to the contrary.'" *Id.* (emphasis added). Because Lt. Col. LaCourse's sortie didn't *require* him to fly over the ocean, the argument would go, it wasn't one of the "such flights" that the *Executive Jet* Court thought DOHSA would cover.

But *Executive Jet* wasn't the Supreme Court's last word on DOHSA's application to aviation-based torts. Rather, as already explained, the Court held in *Offshore Logistics* that DOHSA applies to *all* cases—including aviation-related cases—in which a death occurs on the high-seas. *See* 477 U.S. at 218. In the course of so holding, the Court explained the applicability (or non-applicability, as the case may be) of the maritime-nexus requirement in these terms: "[A]dmiralty jurisdiction is expressly provided under DOHSA [where] the accidental deaths occurred beyond a marine league from shore. *Even without this statutory*

provision, admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity." *Id.* at 218–19 (emphasis added). Translation: Where a death occurs on the high seas, DOHSA applies, full stop; separately, in a non-DOHSA case, maritime jurisdiction might still exist, provided that there is a maritime nexus. To the extent that *Executive Jet*'s New-York-to-Miami footnote left any doubt, *Offshore Logistics* clarified that the occurrence of a death on the high seas is a sufficient condition to DOHSA's application—without any further maritime-nexus gloss.[7]

In sum, then, we agree with the district court that DOHSA doesn't require a maritime nexus—and therefore, that because (on the Supreme Court's

[7] In support of her maritime-nexus argument, LaCourse points to *Miller v. United States*, 725 F.2d 1311 (11th Cir. 1984), in which we assumed (without actually considering or specifically deciding) that a maritime nexus may be required under DOHSA. *See id.* at 1315 (concluding that DOHSA provided jurisdiction over an aviation crash after determining that there *was* a maritime nexus on the facts of that case). We think it a full answer to *Miller* to recognize that it was decided before the Supreme Court clarified in *Offshore Logistics* that DOHSA imposes only a locality requirement, and not a separate maritime-nexus requirement. Other courts have distinguished *Miller* on precisely this basis, and we agree with their assessment. *See, e.g.*, *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 918 (9th Cir. 2002) (listing *Miller* as an example of how "several courts initially presumed" that DOHSA required a maritime nexus, but noting that those cases came before *Offshore Logistics* and that now, "the prevailing view holds that DOHSA established independent requirements for the exercise of admiralty jurisdiction"); *see also Palischak v. Allied Signal Aerospace Co.*, 893 F. Supp. 341, 345 & n.5 (D.N.J. 1995) (holding that "the requirement of a traditional maritime nexus is not a prerequisite to the exercise of admiralty jurisdiction pursuant to DOHSA," and (citing *Miller*) noting that "[w]e are unable to locate a single decision after [*Offshore Logistics*] in which a lower court required a maritime nexus before applying DOHSA"); *Bernard v. World Learning Inc.*, 2010 WL 11505188, at *8 n.14 (S.D. Fla. June 4, 2010) (acknowledging the circuit precedent in *Miller* but explaining that it was decided prior to *Offshore Logistics* and holding that a maritime nexus is no longer required in DOHSA cases).

interpretation) the Act applies whenever a death occurs on the high seas, it governs LaCourse's wrongful-death suit.

B

Having concluded that DOHSA applies to LaCourse's action, we must now determine whether it provides her exclusive remedy, such that it preempts all other claims arising out of her husband's crash.

The district court concluded that LaCourse's breach-of-warranty and breach-of-contract claims—both of which she initially brought under Florida's Wrongful Death Act, Fla. Stat. § 768.16—had to be stricken on the ground that where DOHSA applies it "preempts all other forms of wrongful death claims." LaCourse contends that the district court erred because, she says, her state-law claims don't seek a remedy broader than DOHSA and therefore aren't preempted.

Again, while it seems to us that LaCourse might have the plain language on her side—in a section titled "Nonapplication," DOHSA expressly states that it "does not affect the law of a State regulating the right to recover for death," 46 U.S.C. § 30308—the controlling precedent is squarely against her. In particular, the Supreme Court held in *Offshore Logistics* that "in light of the language of the Act as a whole, the legislative history of [§ 30308's predecessor], the congressional purposes underlying the Act, and the importance of uniformity of admiralty law," the provision that is now codified at § 30308 "was intended only to

serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore." 477 U.S. at 221. And, the Court continued, once it is determined that § 30308 (or there, its predecessor) "acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable." *Id.* at 232.

Put simply, under *Offshore Logistics*, § 30308 preserves only state-court jurisdiction—*not* state substantive wrongful-death law—and where DOHSA applies, it preempts all other wrongful-death claims under state or general maritime law. Accordingly, we hold that the district court was correct to conclude that DOHSA forecloses LaCourse's breach-of-warranty and breach-of-contract claims.

STOP; go to Supp C

Having concluded that DOHSA governs LaCourse's suit and supplies her exclusive remedy, we must now determine whether LaCourse's claim is barred by the so-called "government contractor" defense. Provided that certain conditions are met, that defense—a creation of federal common law—extends the United States' sovereign immunity to a government contractor, thereby protecting it against civil liability. In essence, it allows the contractor to escape liability on the

NEWSOM, Circuit Judge, with whom WILSON, Circuit Judge, joins, concurring:

I write separately to explain that, while I agree that we must follow existing precedent to hold that DOHSA applies to (and thereby supplies the exclusive wrongful-death remedy for) any claim arising out of a death occurring on the high seas—even where, as here, the negligence alleged to have caused the death occurred on land—I do so holding my nose, as DOHSA's plain language is squarely to the contrary.

As a refresher, DOHSA's operative provision states in relevant part that "[w]hen the death of an individual is caused by a wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30302. LaCourse contends (1) that DOHSA applies only when the *negligence* occurred on the high seas, without respect to where the *death* occurred, and (2) that all here agree that the alleged negligence occurred on land, when the jet was improperly serviced at Tyndall Air Force Base. Accordingly, she insists, DOHSA doesn't govern her case.

LaCourse's logic, it seems to me, is unassailable. By its plain terms, DOHSA limits its application to instances in which the "wrongful act, neglect, or default occur[ed] on the high seas," regardless of where the resulting death occurred. Indeed, there is no reasonable reading of the Act by which the phrase

"occurring on the high seas" modifies the word "death" rather than the phrase "wrongful act, neglect, or default." One needn't even resort to the canons to come to that conclusion—the plain, ordinary, and obvious meaning of the words is sufficient. (Having said that, the canons would lead to precisely the same determination. *See Nearest-Reasonable-Referent Canon*, Black's Law Dictionary (11th ed. 2019); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012).)

Somehow, though, precedent—mounds of it, some of it binding on us—has whistled past the text's unmistakable focus of the location of the alleged negligence as the decisive factor for determining DOHSA's applicability. For instance—

- *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990) ("DOHSA . . . create[ed] a wrongful death action for *all persons killed on the high seas*.")
- *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218 (1986) ("Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore.")
- *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620 (1978) (noting that DOHSA creates "a remedy in admiralty for wrongful deaths more than three miles from shore")
- *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 272 n. 17 (5th Cir. 1974) ("DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.")

- *Bergen v. F/V ST. PATRICK*, 816 F.2d 1345, 1348 (9th Cir. 1987) ("[DOHSA] has been held to refer to the site of an accident on the high seas, not to where . . . the wrongful act causing the accident may have originated.")

- *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) ("[T]he simple fact that [plaintiff's] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA. ... [A]dmiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land. The place where the negligence or wrongful act occurs is not decisive.") (footnote omitted)

I could go on and on and on—this is but a small sampling of cases holding that DOHSA applies to any claim arising out of a death occurring on the high seas, wholly without regard to where the underlying negligence occurred. But again, that seems obviously wrong to me.

I'm not the first to recognize the textual disconnect. The Fifth Circuit, for instance, once remarked that "[a]t first glance, the plain text of this statutory provision seems to indicate that DOHSA is implicated only when the wrongful act precipitating death occurs on the high seas." *Motts v. M/V Green Wave*, 210 F.3d 565, 569 (5th Cir. 2000). But the court went on: "As subsequent courts have interpreted DOHSA, however, the statute's application is not limited to negligent acts that actually occur on the high seas. The Supreme Court has repeatedly noted that when the death itself occurs on the high seas, DOHSA applies." *Id.* My only disagreement with the Fifth Circuit's assessment is the "[a]t first glance" part. I've

read § 30302 over and over—glanced, peered, gawked, and glared—and I can't make it say anything other than that DOHSA applies when the alleged act of *negligence*—rather than the resulting *death*—occurs on the high seas.

So how did we get ourselves into this predicament—reading DOHSA to mean something that it obviously doesn't say? The answer, apparently, traces back to century-old admiralty law premised on a "consummation of the injury" theory. *See e.g.*, *In re Dearborn Marine*, 499 F.2d at 274 ("Historically maritime jurisdiction has been measured by the locality of the wrong with locality defined as where the 'substance and consummation of the injury' took place.") (citing *The Plymouth*, 70 U.S. (3 Wall.) 20, 33 (1886)) (footnote omitted). Put simply, if a claim is premised on a negligence theory, the underlying negligence isn't complete until it is "consummated in an actual injury." *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012). So, the argument goes, a DOHSA claim for wrongful death based on negligent service—as we have here—accrues at the time and place where the allegedly wrongful act culminates in an actual injury (the high seas), not when and where the negligence itself allegedly occurred (at Tyndall Air Force Base).

That's fine. It's just not what the statute says. DOHSA doesn't say that the decedent's personal representative may bring an action "when the death of an individual *occurring on the high seas* is caused by wrongful act, neglect, or

default"; rather, it says that the personal representative can sue "[w]hen the death of an individual is caused by wrongful act, neglect, or default *occurring on the high seas*." 46 U.S.C. § 30302. End of story.

Bottom line: As in all cases, we should give effect to DOHSA's unambiguous language. *See, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."). If it were up to me, I would hold that DOHSA doesn't apply here because the alleged negligence—the failure to properly maintain the F-16 that Lt. Col. LaCourse was piloting when he crashed—occurred on land, not on the high seas.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PERRY PARCHMONT	**CIVIL ACTION**
VERSUS	**NO: 18-9056**
COMPLETE LOGISTICAL SERVICES, LLC, ET AL.	**SECTION: "H" (4)**

ORDER AND REASONS

Before the Court is Defendants' Joint Motion for Partial Summary Judgment Regarding Plaintiff's Claim for Maintenance and Cure (Doc. 29). For the following reasons, the Motion is **GRANTED**.

BACKGROUND

This is a maritime personal injury suit. Plaintiff, Perry Parchmont, alleges that while working on board a vessel, he suffered injuries to his neck and back when he moved a "lift bag" across the deck of the vessel.[1] Seeking damages from his employers, Defendants Complete Logistical Services, LLC, and Oceaneering International, Inc., Plaintiff asserts claims for Jones Act negligence, unseaworthiness, and maintenance and cure.[2]

Defendants move this Court for summary judgment on Plaintiff's maintenance and cure claim pursuant to *McCorpen v. Central Gulf S.S. Corp.*[3] Defendants assert that when he was hired, Plaintiff did not disclose certain

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[1] As Defendants explain, "[a] lift bag is a canvas bag fitted with nylon straps and is used to provide 'lift' to objects in a subsea environment. The bags are attached to subsea objects and inflated with air, thereby providing buoyancy (lift) to the object." Doc. 29-1 at 4 n.25.
[2] Doc. 1; Doc. 5.
[3] 396 F.2d 547 (5th Cir. 1968).

pre-existing injuries. Defendants argue that this alleged concealment should bar his recovery of maintenance and cure.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[5]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[6] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[7] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[8] "In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial."[9] "We do not . . . in the absence

[4] Sherman v. Hallbauer, 455 F.2d 1236, 1241 (5th Cir. 1972).
[5] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
[6] Coleman v. Hous. Indep. Sch. Dist., 113 F.3d 528, 532 (5th Cir. 1997).
[7] Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir. 1995).
[8] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).
[9] John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

of any proof, assume that the nonmoving party could or would prove the necessary facts."[10] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[11]

LAW AND ANALYSIS

Defendants contend that Plaintiff is not entitled to maintenance and cure for his alleged neck and back injuries because he failed to disclose several prior neck and back injuries upon being hired in January 2018. Defendants explain that in 2012, while working for Hornbeck Offshore Services, Inc., Plaintiff suffered an injury to his lower back. At his deposition, Plaintiff testified about this injury, calling it a "muscle spasm" and saying it caused "some heavy pain."[12] In 2015, Plaintiff was in a car accident that totaled his car and resulted in injuries to his neck and back.[13] In January 2017, Plaintiff went to the emergency room over pain that began in his neck and radiated

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[10] Badon v. R J R Nabisco, Inc., 224 F.3d 382, 394 (5th Cir. 2000) (quoting Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)).

[11] Boudreaux v. Banctec, Inc., 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

[12] Doc. 29-2 at 5–6.

[13] Doc. 29-1 at 2; Doc. 29-2 at 16; Doc. 34-1 at 1. At his deposition, Plaintiff testified that he was not injured in the car accident but felt only "a little discomfort" in his neck. Doc. 29-2 at 16. His medical records, however, establish otherwise. One doctor who saw him days after the injury wrote that "[a]fter a few days of continued pain the patient decided to seek treatment at this office for his injuries." Doc. 29-5 at 1. Plaintiff complained to the doctor of pain in his lower back. *Id.* The records further show that Plaintiff began chiropractic therapy and then saw another doctor. *See* Doc. 29-6 at 1. He complained of "severe low back pain." *Id.* In the medical records, this doctor wrote as follows:

> It is my medical opinion the below posttraumatic diagnoses are causally related to the accident that occurred on 04/21/2015:
>
> 1. Posttraumatic lumbar pain.
> 2. Posttraumatic facet arthropathy.
> 3. Posttraumatic muscle spasms.
> 4. Posttraumatic memory difficulties.

Id. at 2.

down his left arm.[14] In February 2017, he saw another doctor about his neck pain, and an MRI found a "[d]isc herniation at C6-C7." [15] In April 2017, Plaintiff then sought more treatment for his back pain.[16] In his records from this visit, the doctor writes that Plaintiff presented with "low back pain which was brought on after cutting tree limbs and dragging them to the road."[17] For the remainder of 2017, Plaintiff received even more treatment for his neck and back injuries.[18]

"An employer owes damages for maintenance and cure to any seaman who suffers injury during his employment on a vessel, regardless of fault."[19] The obligation of a shipowner to pay maintenance and cure is "deep-rooted in maritime law and is an incident or implied term of a contract for maritime employment." [20] In the *McCorpen* case, however, the Fifth Circuit held that an employer is relieved of this obligation when the seaman knowingly or fraudulently conceals a pre-existing illness from the shipowner.[21] To prevail on the *McCorpen* defense, "an employer must show that (1) the claimant intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection exists between the withheld information and the injury complained of in the lawsuit."[22] This Court will address each element in turn.

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[14] Doc. 29-2 at 18 (testifying about this visit to the emergency room).
[15] Doc. 29-7 at 11 ("PT STATES HE'S HAVING A LOT OF PAIN IN HIS NECK."). *Id.* at 14.
[16] *See* Doc. 29-8 at 6.
[17] *Id.*
[18] *See* Doc. 29-9; Doc. 29-7. *See also* Doc. 29-2 at 19 (testifying about a back injury in September 2017).
[19] Foret v. St. June, LLC, Civil Action No. 13–5111, 2014 WL 4539090, at *2 (citing Johnson v. Cenac Towing, Inc., 544 F.3d 296, 301 (5th Cir.2008)).
[20] McCorpen v. Cent. Gulf S. S. Corp., 396 F.2d 547, 548 (5th Cir. 1968).
[21] *Id.*
[22] Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 171 (5th Cir. 2005).

(1) Intentional Concealment

Where, as here, the seaman was not required to undergo a pre-employment physical or medical interview, "the rule is that a seaman must disclose a past illness or injury only when in his own opinion the shipowner would have considered it a matter of importance."[23] "This Court has recognized that in determining whether a seaman is of the opinion that elements of his medical history are considered material by his employer, consideration should be given to his employment history."[24] When a plaintiff has extensive experience in the industry, he "should be familiar with expectations of potential employers regarding the disclosure of past medical history."[25] Notably, to satisfy the "intentional concealment" prong of the *McCorpen* defense, the Court need not make a finding of subjective intent.[26]

Plaintiff Parchmont began working offshore in 2001.[27] In the ten years preceding his employment with Defendants, Plaintiff was consistently employed by maritime companies.[28] Plaintiff, therefore, should have known that employers in the industry would be interested in learning of his pre-existing back and neck injuries.[29] Indeed, in his briefing, Plaintiff explains that before beginning a job in June 2017, he underwent a physical examination and was asked about his medical history.[30] Further, Plaintiff specifically testified that maritime employers "want to know your medical history."[31] Based on this, the Court finds that Defendants have established intentional concealment.

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[23] *McCorpen*, 396 F.2d at 548.
[24] *Foret*, 2014 WL 4539090, at *4 (citing Kathryn Rae Towing, Inc. v. Buras, No. 11–2936, 2013 WL 85210, at * 4 (E.D. La. Jan. 7, 2013)).
[25] *Id.*
[26] *Id.* at *3.
[27] *See* Doc. 29-2 at 3–4.
[28] Doc. 29-3 at 3–4.
[29] *See Foret*, 2014 WL 4539090, at *4.
[30] Doc. 34 at 5.
[31] Doc. 29-2 at 12–13.

Plaintiff emphasizes that he passed a physical test for an employer in June 2017. He avers that he "disclosed information about his medical history" to this employer and was hired for the job after doing so.[32] He attaches a one-page document called a "Medical Determination" that declares him "Fit for Duty."[33] He argues that because he was declared fit for duty at that time, he believed he did not need to disclose his medical history to Defendants in January 2018. The evidence Plaintiff highlights, however, is insufficient to create an issue of fact on whether Plaintiff should have known in January 2018 that Defendants "would have considered [his past injuries] a matter of importance."[34] Plaintiff fails to show that he fully disclosed his medical history to the employer in June 2017. He points to deposition testimony in which he says that "to the best of [his] knowledge," he was truthful about his medical condition and history" with this prior employer.[35] The Court is dubious of this assertion.[36] Nonetheless, Plaintiff saw Dr. Santos Ruiz Cordero about his back pain as late as September 2017 and November 2017.[37]

Further, as the Court previously noted, a finding of subjective intent is not required. Regardless of what Plaintiff believed based on a prior disclosure to a different employer, he should have known that in January 2018 that Defendants would have been interested in the same kind of information. He had even more reason to know in March 2018 when he visited Dr. Cordero again.[38] This was only three months before Plaintiff was mobilized for his first

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[32] Doc. 34 at 5.
[33] Doc. 34-3.
[34] *McCorpen*, 396 F.2d at 548.
[35] Doc. 34-2 at 3.
[36] Elsewhere in his deposition, Plaintiff stated that had Defendants asked for his medical history, he "probably would have told them." Doc. 29-2 at 12.
[37] Doc. 29-7 at 3, 6.
[38] *Id.* at 1.

assignment.[39] In his notes from the visit, Dr. Cordero wrote that Plaintiff reported muscle spasms on occasion and needed medicine for his cervicalgia and lumbago.[40] Overall, the records show that Plaintiff's neck and back pain was ongoing and that it warranted disclosure to Defendants.

(2) Materiality

For the *McCorpen* defense to apply, the concealed or nondisclosed facts of a plaintiff's medical history must be material to the defendant's decision to hire the plaintiff.[41] The Fifth Circuit has held that a plaintiff's "history of back injuries is the exact type of information sought by employers."[42] This Court has held that neck injuries are material as well.[43]

The record shows that Plaintiff Parchmont had a significant history of neck and back injuries. Further, Defendants provide the Court with a declaration from Anthony Hanley, the employee who made the decision to hire Plaintiff to work for Defendants.[44] He states that "[d]ue to the physical nature of the job, Parchmont would not have been hired without a medical release had CLS known of his history of pre-existing back and neck injuries."[45] Plaintiff argues that because Defendants did not inquire into his medical history, this information must not have been material to their decision to hire him.[46] This

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[39] *See* Doc. 29-4.
[40] *Id.*
[41] *See Brown*, 410 F.3d at 171.
[42] *Id.* at 174. *See also* Jauch v. Nautical Servs., Inc., 470 F.3d, 207, 212–13 (5th Cir. 2006) ("Past instances of back injury, some severe enough to require extensive treatment, are certainly facts material to [a defendant's] decision to hire [a plaintiff].").
[43] *Foret*, 2014 WL 4539090, at *5 ("Plaintiff's pre-existing injuries to his back and neck are clearly extreme and extensive, and it is apparent that the concealment of facts regarding these injuries was material to Defendant's decision to hire Plaintiff."); Parker v. Jackup Boat Serv., LLC, 542 F. Supp. 2d 481, 494 (E.D. La. 2008) ("Parker's prior neck injury is the exact type of information sought by an employer like Trinity.").
[44] Doc. 29-4.
[45] *Id.* at 2.
[46] Doc. 34 at 8.

Court, however, has specifically rejected this argument.[47] Accordingly, this Court finds that the "materiality" prong is met.[48]

(3) Connection Between Injuries

Finally, Defendants must show a connection between the non-disclosed injuries and the injuries complained of here. "To establish this connection, it is sufficient to show that the previous injury and the new injury occurred in the same location on the body."[49] Indeed, Plaintiff Parchmont does not dispute this factor, and the Court finds that it is satisfied, given that Plaintiff's prior injuries and his current injuries concern his neck and his back.

Because Defendants have satisfied the three elements of the *McCorpen* defense, this Court holds that Defendants are entitled to summary judgment on Plaintiff's maintenance and cure claims.

CONCLUSION

For the foregoing reasons, Defendants' Joint Motion for Partial Summary Judgment Regarding Plaintiff's Claim for Maintenance and Cure (Doc. 29) is **GRANTED**. Plaintiff's claim against Defendants for maintenance and cure is **DISMISSED WITH PREJUDICE**.

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[47] *Foret*, 2014 4539090, at *5 ("This court has held that a plaintiff's past medical history is material to an employment decision even when no medical evaluation is required of the plaintiff and even when the plaintiff is not required to answer questions about his physical condition or history.") (citing *Kathryn Rae Towing*, 2013 WL 85210, at *4).

[48] The Court rejects Plaintiff's attempt to rely on *Luwisch v. American Marine Corp.*, CIVIL ACTION NO. 17-3241, 2018 WL 3111931 (E.D. La. June 25, 2018). As Plaintiff notes, the *Luwisch* court rejected a company's declaration that stated that the plaintiff would not have been hired had he disclosed his medical history. *Id.* at *1. In that case, however, the company had sent the plaintiff a hiring packet that included a health questionnaire. *Id.* at *2. The questionnaire asked about prior injuries. *Id.* The plaintiff completed only the first few pages of the packet and returned it to the employer without the health questionnaire. *Id.* The company then hired the plaintiff anyway. *Id.* Denying summary judgment, the court "[found] it significant that AMC hired Luwisch without having obtained the complete packet." *Id.* The *Luwisch* case, therefore, is easily distinguishable from the instant case.

[49] Smith v. Diamond Servs. Corp., 133 F. Supp. 3d 846, 851 (E.D. La. 2015).

New Orleans, Louisiana this 24th day of June, 2020.

JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE