2025 SUPPLEMENT TO
CASES AND MATERIALS
ON
MARITIME PERSONAL INJURY AND DEATH

By

John F. Unger

AQUA LOG, INC., a Georgia corporation,

Plaintiff-Appellant,

versus

LOST AND ABANDONED PRE-CUT LOGS AND RAFTS OF LOGS, lying on the bottom of a navigable river within one (1) river mile of a point located at 31 degrees 04.157 minutes north latitude and 84 degrees 30.746 minutes west longitude,

Defendant-Appellee,

STATE OF GEORGIA,

Claimant-Appellee.

No. 11-15078

D.C. Docket No. 1:07-cv-00160-WLS

AQUA LOG, INC., a Georgia corporation,

Plaintiff-Appellant,

versus

LOST AND ABANDONED PRE-CUT LOGS AND RAFTS OF LOGS, lying on the bottom of a navigable river within one (1) river mile of a point located at 30 degrees 50.536' North Latitude and 84 degrees 44.725' West Longitude,

Defendant-Appellee,

STATE OF GEORGIA,

Claimant-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

(February 15, 2013)

Before TJOFLAT, COX Circuit Judges, and MOTZ,* District Judge.

COX, Circuit Judge:

These cases present a question that is almost as old as the doctrine of admiralty jurisdiction itself. As Justice Daniel posed it in 1857, "[T]he inquiry is naturally suggested, what are navigable waters?" *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 320 (1857) (Daniel, J., dissenting). Today, we answer that question as follows: a waterway is navigable for admiralty-jurisdiction purposes if, in its present state, it is capable of supporting commercial activity.

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* Honorable J. Frederick Motz, United States District Judge for the District of Maryland, sitting by designation.

I. FACTS & PROCEDURAL HISTORY

These consolidated appeals concern segments of two Georgia waterways—a two river-mile stretch of the Flint River and a one river-mile stretch of Spring Creek. The Flint River segment is bounded by a bridge at State Highway 37 at Newton, Georgia at its northern end and Bainbridge, Georgia at its southern end. The Flint River empties into Lake Seminole, which lies on the border between Georgia and Florida. The Flint River south of Bainbridge is currently used in interstate commerce, but the two river-mile stretch at issue here is not currently used in interstate commerce. Spring Creek is a tributary of the Flint River. (References in this opinion to the Flint River and Spring Creek should be understood as only addressing the two river-mile stretch of the Flint River and the one river-mile stretch of Spring Creek at issue in these cases.)

Historically, commercial vessels used both the Flint River and Spring Creek for transportation. The parties agree that the Flint River was used to transport commercial vessels and that Spring Creek was capable of transporting commercial vessels. Although currently there is no commercial activity on these waterways, the parties agree that the Flint River and Spring Creek can, in their present states, transport commercial vessels loaded with freight in the regular course of trade for at least part of the year.

During the late nineteenth century and early twentieth century, loggers transported their commercially harvested logs by floating them down rivers. Inevitably, some of the logs sank to the bottom. Today, there is an increased demand for these sunken logs because they produce superior furniture, flooring, and musical instruments. Such submerged logs are at the heart of this appeal.

Aqua Log, a company that finds, removes, and sells submerged logs, has located a number of submerged logs that have been abandoned by their original owners at the bottom of the Flint River and Spring Creek. Aqua Log estimates that there are hundreds of submerged logs at the bottoms of the waterways.

Aqua Log, through its president, has located and removed two logs from the Flint River, using the Flint River to transport the logs. It has also removed one log from Spring Creek, using Spring Creek to transport that log. Aqua Log wishes to remove all of the submerged logs and sell them.

So, in August 2007, Aqua Log, invoking the court's admiralty[1] jurisdiction, brought three in rem actions[2] seeking a salvage award for the logs or, in the alternative, an award of title to the logs based on the American Law of Finds. The

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[1] The terms "admiralty" and "maritime" are "virtually synonymous." Bryan Garner, *A Dictionary of Modern Legal Usage* 29 (2d ed. 1995). We therefore use the terms interchangeably.

[2] Case No. 11-15060 and Case No. 11-15076 involve the Flint River, while Case No. 11-15078 involves Spring Creek.

State of Georgia intervened and claimed ownership of the logs. Georgia moved for summary judgment, arguing that the court lacks subject-matter jurisdiction because the Flint River and Spring Creek are not navigable waters. The district court agreed and granted summary judgment in favor of Georgia. Specifically, the court held that a waterway is only navigable for admiralty jurisdiction purposes when there is evidence of present or potential commercial activity on that waterway. Finding that no commercial activity currently occurs on the Flint River and Spring Creek and that Aqua Log failed to present evidence of any planned commercial activity, the court determined that it lacked subject-matter jurisdiction and granted summary judgment in favor of Georgia. Aqua Log appeals.

II. ISSUES ON APPEAL

This appeal presents two issues: first, whether the district court erred in requiring evidence of present or planned commercial activity on a waterway for it to be considered navigable for admiralty-jurisdiction purposes; and second, whether the Flint River and Spring Creek are navigable waterways.

III. STANDARD OF REVIEW

Georgia raised the issue of subject-matter jurisdiction in its motion for summary judgment. Subject-matter jurisdiction, however, is more appropriately addressed in a motion to dismiss pursuant to Federal Rule of Civil Procedure

12(b)(1). As a result, we will treat the district court's grant of summary judgment for lack of subject-matter jurisdiction as a dismissal under Rule 12(b)(1). *See United States v. Blue Cross & Blue Shield of Ala., Inc.*, 156 F.3d 1098, 1101 n.7 (11th Cir. 1998) (treating a district court's grant of summary judgment for lack of subject-matter jurisdiction as a dismissal under Rule 12(b)(1)). We review de novo the district court's dismissal for lack of subject-matter jurisdiction. *Broward Gardens Tenants Ass'n v. U.S. Envtl. Prot. Agency*, 311 F.3d 1066, 1072 (11th Cir. 2002).

IV. CONTENTIONS OF THE PARTIES

Aqua Log contends that the district court applied the wrong test to determine navigability and asks us to adopt a test that defines navigable waters as those waters that are merely capable of being used for commercial purposes. If we adopt that test, Aqua Log contends, then the Flint River and Spring Creek are navigable waterways, and the district court has subject-matter jurisdiction.

Georgia, on the other hand, urges us to adopt the district court's test for navigability—that a waterway is navigable only if it currently supports commercial activity or if there is evidence of planned commercial activity on that waterway. And because the Flint River and Spring Creek do not currently support commercial

activity and no such activity is planned, the district court properly concluded that the waterways are not navigable and that it lacked subject-matter jurisdiction.

V. DISCUSSION

The Constitution delegates jurisdiction over admiralty cases to the federal courts. U.S. Const. art. III, § 2. This power is codified in 28 U.S.C. § 1333(1), which gives Article III courts "original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction." Federal admiralty jurisdiction extends to all navigable waters. *Ex parte Garnett*, 141 U.S. 1, 15, 11 S. Ct. 840, 843 (1891); Grant Gilmore, Jr. & Charles L. Black, *The Law of Admiralty* 31–32 (2d ed. 1975) ("[T]he admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce."). Thus, for a court to have admiralty jurisdiction, the body of water in question must be navigable. Both Aqua Log and Georgia agree that for the court to have admiralty jurisdiction in these in rem actions, the waterways where the res (the submerged logs) are located must be navigable.

Aqua Log seeks a salvage award for the submerged logs or, in the alternative, title to the logs. Aqua Log contends that if the court does not have admiralty jurisdiction, then it will not be able to pursue its claims, which are

unique to maritime law. For the court to have admiralty jurisdiction, the Flint River and Spring Creek must be navigable. Thus, we must decide (A) what test applies to determine the navigability of a waterway for admiralty-jurisdiction purposes and (B) whether the Flint River and Spring Creek meet that test. We address each issue in turn.

A.

We first consider what test applies to determine if a body of water is navigable for admiralty-jurisdiction purposes.[3] The parties have not called to our attention any Eleventh Circuit precedent addressing this issue.

The district court defined navigable waters as those waters with evidence of present or potential commercial activity. Relying on *Seymour v. United States*, 744 F. Supp. 1161 (S.D. Ga. 1990), the court reasoned that the purpose of admiralty jurisdiction is to promote and protect commercial activity and that, in the absence of such commercial activity, the federal interest in protecting and promoting commercial activity no longer exists. And so, according to the district

[3] We note that the term "navigable" has different meanings in different contexts. *Kaiser Aetna v. United States*, 444 U.S. 164, 170–72, 100 S. Ct. 383, 388–89 (1979). In this case, we are concerned only with term as it used to establish the limits of the jurisdiction of the federal courts over admiralty and maritime cases.

court, admiralty jurisdiction should extend only to those waterways with present or planned commercial activity.

The district court's opinion is well-reasoned, but we respectfully disagree with the court's holding. And, we are not writing on a clean slate. We are bound by the Fifth Circuit's decision in *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. Apr. 1981), *aff'd sub nom. Foremost Ins. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654 (1982). The Fifth Circuit decided *Richardson* on April 2, 1981, and under our precedent, Fifth Circuit cases decided before October 1, 1981, bind us. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

In *Richardson*, the Fifth Circuit addressed whether a tort claim based on a collision between two pleasure boats on a waterway that was "seldom, if ever, used for commercial activity" fell within the federal courts' admiralty jurisdiction. 641 F.2d at 315–16. The court noted that for admiralty jurisdiction to exist in a tort case, two requirements must be met: (1) there must be a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement) and (2) the tort must have occurred on navigable waters (the location requirement). *Id.* at 315. Concluding that both requirements had been met, the Fifth Circuit held that the district court had admiralty jurisdiction over the tort claim. *Id.* at 316. The court determined that the nexus requirement had been met

because boats "are engaged in traditional maritime activity when a collision between them occurs on navigable waters." *Id.* As to the location requirement, the court concluded that the tort occurred on navigable waters even though the waterway was seldom, if ever, used for commercial activity. *Id.* Specifically, the court said:

> We note additionally from the record that the place where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. . . . It would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery. . . . If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction.

Id. We are bound by this holding.[4] And the fact that *Richardson* considered whether admiralty jurisdiction extends to a tort case does not change this conclusion. Whether in a tort case or in a salvage case, the waterway at issue must be navigable.

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[4] The Fifth Circuit's definition of navigability is a holding. A holding is both the result of the case "and those portions of the opinion necessary to that result." *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (quoting *Seminole Tribe of Fla. v. Florida.*, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129 (1996)). The Fifth Circuit concluded that the district court erroneously dismissed the tort case for lack of subject-matter jurisdiction. To reach this result, it had to determine that both requirements for admiralty jurisdiction over tort cases—the nexus and location requirements—were met.

Neither Georgia nor the district court undertakes to distinguish this holding in *Richardson*.[5] Instead, Georgia and the district court rely on cases from three of our sister circuits that they argue support a test for navigability that requires evidence of present or potential commercial activity. Specifically, they point to the Seventh Circuit's decision in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) (en banc), the Eighth Circuit's decision in *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), and the Ninth Circuit's decision in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975). Georgia and the district court read these cases as adopting a test for navigability that requires current commercial activity. But each case also contains language that suggests they adopt a test for navigability that looks to whether the waterway at issue is simply capable of supporting commercial activity. *See Livingston*, 627 F.2d at 169–70 ("[T]he concept of 'navigability' in admiralty is properly limited to describing a *present capability* of waters to sustain commercial shipping." (emphasis added)); *Chapman*, 575 F.2d at 151 ("We hold that a recreational boating accident does not give rise to a claim within the admiralty jurisdiction when it occurs on waters that . . . are not in fact used for commercial navigation and are *not susceptible* of such use in their present

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[5] While we agree with the district court that *Richardson* primarily focused on the nature of the action and actors, *Richardson* nevertheless addressed the character of the water where the tort occurred and we are bound by that holding.

state." (emphasis added)); *Adams*, 528 F.2d at 439 ("A waterway is navigable provided that it is used or *susceptible of being used* as an artery of commerce." (emphasis added)).

Nevertheless, even if these cases are understood to mean what the district court and Georgia suggest, there is substantial precedent to the contrary in our sister circuits. *See Cunningham v. Dir., Office of Workers' Comp. Programs*, 377 F.3d 98, 108 (1st Cir. 2004) (noting that for admiralty-jurisdiction purposes, navigability is understood to describe a present capability of a waterway to sustain commerce); *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2d Cir. 1999) (looking to whether the waterway is "presently used, or is presently capable of being used, as an interstate highway for commercial trade" in determining whether it is navigable); *Price v. Price*, 929 F.2d 131, 134 (4th Cir. 1991) (adopting a test that considers whether the body of water at issue is capable of supporting commercial activity); *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983) (considering whether the waterway "is used or capable or susceptible of being used as an interstate highway for commerce" when deciding whether it is navigable).

On appeal, Georgia argues that a test for navigability that looks to whether there is evidence of current or planned commercial activity on the waterway strikes the appropriate balance between protecting commercial maritime activity and

respecting the ability of the states to regulate their own affairs by not applying substantive maritime law (which applies when admiralty jurisdiction is invoked) in the absence of actual commercial activity.

While sound policy reasons support the test proposed by Georgia, the navigability test announced in *Richardson* is supported by equally sound policy. A test for navigability that looks to whether a waterway is capable of supporting commercial activity promotes and encourages maritime commerce.

The primary focus of maritime law is to protect and encourage commercial maritime activity. *See Sisson v. Ruby*, 497 U.S. 358, 367, 110 S. Ct. 2892, 2898 (1990) ("The fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S. Ct. 2654, 2658 (1982))). When admiralty jurisdiction is invoked, a uniform body of federal maritime law applies. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206, 116 S. Ct. 619, 623 (1996) ("With admiralty jurisdiction . . . comes the application of substantive maritime law." (quoting *E. River S.S. Corp. v. Transamercia Delavel Inc.*, 476 U.S. 858, 864, 106 S. Ct. 2295, 2298–99 (1986))). This body of law serves to protect commercial activity by ensuring that uniform rules of conduct are in place. *Exec. Jet Aviation, Inc. v. City*

of Cleveland, 409 U.S. 249, 269–70, 93 S. Ct. 493, 505 (1972). The Supreme Court has said:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. Finding admiralty jurisdiction when a waterway is capable of supporting commercial activity creates a "climate conducive to commercial maritime activity." *Finneseth*, 712 F.2d at 1046. That is, commercial activity could begin on such a waterway and immediately have uniform rules in place without having to determine whether commercial activity currently takes place on that waterway.

Moreover, a test for navigability that requires actual commercial activity is unpredictable and is therefore not conducive to maritime commerce. If actual commercial activity is the test, the application of substantive maritime law becomes contingent on the presence or absence of commercial activity. *Price*, 929 F.2d at 133–34 ("Rules governing conduct on navigable waters cannot remain uniform or have any certainty if their applicability is dependent on whether, on any

given day, commercial maritime activity is being conducted on the waters."). A test that requires evidence of actual or likely commercial activity fails to provide the predictability that encourages maritime commerce. And predictability in the courts is valuable.

We are mindful that the *Richardson* test may expand admiralty jurisdiction into waterways that may never be used for commercial maritime activities. However, the broad federal interests in protecting and promoting maritime commerce justify this potential encroachment. "If the waterway is capable of being used in commerce, that is a sufficient threshold" to conclude that it is navigable for admiralty-jurisdiction purposes. *Richardson*, 641 F.2d at 316.

B.

We next address whether the Flint River and Spring Creek are capable of supporting commercial activity and are therefore navigable waters. We easily answer this question because both Aqua Log and Georgia agree that the Flint River and Spring Creek are capable of supporting commercial activity. (*See* No. 11-15078, Dkt. 43-1 at 3; No. 11-15076, Dkt. 60-11 at 2; No. 11-15060, Dkt. 65-19 at 2.) Therefore, we conclude that these are navigable waters for admiralty-jurisdiction purposes.

VI. CONCLUSION

Because the segments of the Flint River and Spring Creek at issue in these cases are capable of supporting commercial activity, they are navigable waters for admiralty-jurisdiction purposes. We therefore hold that the district court erred in concluding that the waterways are not navigable and dismissing these cases for lack of subject-matter jurisdiction on that ground.[6] Accordingly, we reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[6] The district court decided it lacked subject-matter jurisdiction solely on the basis that the Flint River and Spring Creek are not navigable waters. We express no opinion on whether there are any other requirements necessary for its claims to fall within federal admiralty jurisdiction.

SUPREME COURT OF THE UNITED STATES

No. 11–626

FANE LOZMAN, PETITIONER *v.* THE CITY OF RIVIERA BEACH, FLORIDA

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

[January 15, 2013]

JUSTICE BREYER delivered the opinion of the Court.

The Rules of Construction Act defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U. S. C. §3. The question before us is whether petitioner's floating home (which is not self-propelled) falls within the terms of that definition.

In answering that question we focus primarily upon the phrase "capable of being used." This term encompasses "practical" possibilities, not "merely . . . theoretical" ones. *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 496 (2005). We believe that a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water. And we consequently conclude that the floating home is not a "vessel."

I

In 2002 Fane Lozman, petitioner, bought a 60-foot by 12-foot floating home. App. 37, 71. The home consisted of a house-like plywood structure with French doors on three sides. *Id.*, at 38, 44. It contained a sitting room, bedroom,

closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. *Id.*, at 45–66. An empty bilge space underneath the main floor kept it afloat. *Id.*, at 38. (See Appendix, *infra*, for a photograph.) After buying the floating home, Lozman had it towed about 200 miles to North Bay Village, Florida, where he moored it and then twice more had it towed between nearby marinas. In 2006 Lozman had the home towed a further 70 miles to a marina owned by the city of Riviera Beach (City), respondent, where he kept it docked. Brief for Respondent 5.

After various disputes with Lozman and unsuccessful efforts to evict him from the marina, the City brought this federal admiralty lawsuit *in rem* against the floating home. It sought a maritime lien for dockage fees and damages for trespass. See Federal Maritime Lien Act, 46 U. S. C. §31342 (authorizing federal maritime lien against vessel to collect debts owed for the provision of "necessaries to a vessel"); 28 U. S. C. §1333(1) (civil admiralty jurisdiction). See also *Leon* v. *Galceran*, 11 Wall. 185 (1871); *The Rock Island Bridge*, 6 Wall. 213, 215 (1867).

Lozman, acting *pro se*, asked the District Court to dismiss the suit on the ground that the court lacked admiralty jurisdiction. See 2 Record, Doc. 64. After summary judgment proceedings, the court found that the floating home was a "vessel" and concluded that admiralty jurisdiction was consequently proper. Pet. for Cert. 42a. The judge then conducted a bench trial on the merits and awarded the City $3,039.88 for dockage along with $1 in nominal damages for trespass. *Id.*, at 49a.

On appeal the Eleventh Circuit affirmed. *Riviera Beach* v. *That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F. 3d 1259 (2011). It agreed with the District Court that the home was a "vessel." In its view, the home was "capable" of movement over water and the owner's subjective intent to remain

moored "indefinitely" at a dock could not show the contrary. *Id.*, at 1267–1269.

Lozman sought certiorari. In light of uncertainty among the Circuits about application of the term "capable" we granted his petition. Compare *De La Rosa* v. *St. Charles Gaming Co.*, 474 F. 3d 185, 187 (CA5 2006) (structure is not a "vessel" where "physically," but only "theoretical[ly]," "capable of sailing," and owner intends to moor it indefinitely as floating casino), with *Board of Comm'rs of Orleans Levee Dist.* v. *M/V Belle of Orleans*, 535 F. 3d 1299, 1311–1312 (CA11 2008) (structure is a "vessel" where capable of moving over water under tow, "albeit to her detriment," despite intent to moor indefinitely). See also 649 F. 3d, at 1267 (rejecting views of Circuits that "'focus on the intent of the shipowner'").

II

At the outset we consider one threshold matter. The District Court ordered the floating home sold to satisfy the City's judgment. The City bought the home at public auction and subsequently had it destroyed. And, after the parties filed their merits briefs, we ordered further briefing on the question of mootness in light of the home's destruction. 567 U. S. ___ (2012). The parties now have pointed out that, prior to the home's sale, the District Court ordered the City to post a $25,000 bond "to secure Mr. Lozman's value in the vessel." 1 Record, Doc. 20, p. 2. The bond ensures that Lozman can obtain monetary relief if he ultimately prevails. We consequently agree with the parties that the case is not moot.

III

A

We focus primarily upon the statutory phrase "capable of being used . . . as a means of transportation on water." 1 U. S. C. §3. The Court of Appeals found that the home

was "capable" of transportation because it could float, it could proceed under tow, and its shore connections (power cable, water hose, rope lines) did not "'rende[r]'" it "'practically incapable of transportation or movement.'" 649 F. 3d, at 1266 (quoting *Belle of Orleans*, *supra*, at 1312, in turn quoting *Stewart*, 543 U. S., at 494). At least for argument's sake we agree with the Court of Appeals about the last-mentioned point, namely that Lozman's shore connections did not "'render'" the home "'practically incapable of transportation.'" But unlike the Eleventh Circuit, we do not find these considerations (even when combined with the home's other characteristics) sufficient to show that Lozman's home was a "vessel."

The Court of Appeals recognized that it had applied the term "capable" broadly. 649 F. 3d, at 1266. Indeed, it pointed with approval to language in an earlier case, *Burks* v. *American River Transp. Co.*, 679 F. 2d 69 (1982), in which the Fifth Circuit said:

> "'No doubt the three men in a tub would also fit within our definition, and one probably could make a convincing case for Jonah inside the whale.'" 649 F. 3d, at 1269 (brackets omitted) (quoting *Burks*, *supra*, at 75).

But the Eleventh Circuit's interpretation is too broad. Not *every* floating structure is a "vessel." To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not "vessels," even if they are "artificial contrivance[s]" capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so. Rather, the statute applies to an "artificial contrivance . . . capable of being used . . . *as a means of transportation on water*." 1 U. S. C. §3 (emphasis added). "[T]ransportation" involves the "conveyance (of things or persons) from one place to

another." 18 Oxford English Dictionary 424 (2d ed. 1989) (OED). Accord, N. Webster, An American Dictionary of the English Language 1406 (C. Goodrich & N. Porter eds. 1873) ("[t]he act of transporting, carrying, or conveying from one place to another"). And we must apply this definition in a "practical," not a "theoretical," way. *Stewart, supra*, at 496. Consequently, in our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

B

Though our criterion is general, the facts of this case illustrate more specifically what we have in mind. But for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism. 649 F. 3d, at 1269. Its hull was unraked, *ibid.*, and it had a rectangular bottom 10 inches below the water. Brief for Petitioner 27; App. 37. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land. *Id.*, at 40. Its small rooms looked like ordinary nonmaritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows. *Id.*, at 44–66.

Although lack of self-propulsion is not dispositive, *e.g.*, *The Robert W. Parsons*, 191 U. S. 17, 31 (1903), it may be a relevant physical characteristic. And Lozman's home differs significantly from an ordinary houseboat in that it has no ability to propel itself. Cf. 33 CFR §173.3 (2012) ("Houseboat means a *motorized* vessel . . . designed primarily for multi-purpose accommodation spaces with low

freeboard and little or no foredeck or cockpit" (emphasis added)). Lozman's home was able to travel over water only by being towed. Prior to its arrest, that home's travel by tow over water took place on only four occasions over a period of seven years. *Supra,* at 2. And when the home was towed a significant distance in 2006, the towing company had a second boat follow behind to prevent the home from swinging dangerously from side to side. App. 104.

The home has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for "transportation on water."

C

Our view of the statute is consistent with its text, precedent, and relevant purposes. For one thing, the statute's language, read naturally, lends itself to that interpretation. We concede that the statute uses the word "every," referring to "*every* description of watercraft or other artificial contrivance." 1 U. S. C. §3 (emphasis added). But the term "contrivance" refers to "something contrived for, or employed in contriving to effect a purpose." 3 OED 850 (def. 7). The term "craft" explains that purpose as "water carriage and transport." *Id.,* at 1104 (def. V(9)(b)) (defining "craft" as a "vesse[l] . . . for" that purpose). The addition of the word "water" to "craft," yielding the term "watercraft," emphasizes the point. And the next few words, "used, or capable of being used, as a means of transportation on water," drive the point home.

For another thing, the bulk of precedent supports our conclusion. In *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19 (1926), the Court held that a wharfboat was *not* a "vessel." The wharfboat floated next to a dock; it was used to transfer cargo from

ship to dock and ship to ship; and it was connected to the dock with cables, utility lines, and a ramp. *Id.*, at 21. At the same time, it was capable of being towed. And it was towed each winter to a harbor to avoid river ice. *Id.*, at 20–21. The Court reasoned that, despite the annual movement under tow, the wharfboat "was not used to carry freight from one place to another," nor did it "encounter perils of navigation to which craft used for transportation are exposed." *Id.*, at 22. (See Appendix, *infra*, for photograph of a period wharfboat).

The Court's reasoning in *Stewart* also supports our conclusion. We there considered the application of the statutory definition to a dredge. 543 U. S., at 494. The dredge was "a massive floating platform" from which a suspended clamshell bucket would "remov[e] silt from the ocean floor," depositing it "onto one of two scows" floating alongside the dredge. *Id.*, at 484. Like more traditional "seagoing vessels," the dredge had, *e.g.*, "a captain and crew, navigational lights, ballast tanks, and a crew dining area." *Ibid.* Unlike more ordinary vessels, it could navigate only by "manipulating its anchors and cables" or by being towed. *Ibid.* Nonetheless it did move. In fact it moved over water "every couple of hours." *Id.*, at 485.

We held that the dredge was a "vessel." We wrote that §3's definition "merely codified the meaning that the term 'vessel' had acquired in general maritime law." *Id.*, at 490. We added that the question of the "watercraft's use 'as a means of transportation on water' is . . . practical," and not "merely . . . theoretical." *Id.*, at 496. And we pointed to cases holding that dredges ordinarily "served a waterborne transportation function," namely that "in performing their work they carried machinery, equipment, and crew over water." *Id.*, at 491–492 (citing, *e.g.*, *Butler* v. *Ellis*, 45 F. 2d 951, 955 (CA4 1930)).

As the Court of Appeals pointed out, in *Stewart* we also wrote that §3 "does not require that a watercraft be used

primarily for that [transportation] purpose," 543 U. S., at 495; that a "watercraft need not be in motion to qualify as a vessel," *ibid.*; and that a structure may qualify as a vessel even if attached—but not "permanently" attached—to the land or ocean floor. *Id.*, at 493–494. We did not take these statements, however, as implying a universal set of sufficient conditions for application of the definition. Rather, they say, and they mean, that the statutory definition *may* (or may not) apply—not that it *automatically must* apply—where a structure has some other *primary* purpose, where it is stationary at relevant times, and where it is attached—but not permanently attached—to land.

After all, a washtub is normally not a "vessel" though it does not have water transportation as its primary purpose, it may be stationary much of the time, and it might be attached—but not permanently attached—to land. More to the point, water transportation was not the *primary purpose* of either *Stewart's* dredge or *Evansville's* wharfboat; neither structure was "in motion" at relevant times; and both were sometimes attached (though not permanently attached) to the ocean bottom or to land. Nonetheless *Stewart's* dredge fell within the statute's definition while *Evansville's* wharfboat did not.

The basic difference, we believe, is that the dredge was regularly, but not primarily, used (and designed in part to be used) to transport workers and equipment over water while the wharfboat was not designed (to any practical degree) to serve a transportation function and did not do so. Compare *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625 (1887) (floating drydock not a "vessel" because permanently fixed to wharf), with *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 535 (1995) (barge sometimes attached to river bottom to use as a work platform remains a "vessel" when "at other times it was used for transportation"). See also *ibid.* (citing *Great Lakes*

Dredge & Dock Co. v. *Chicago*, 3 F. 3d 225, 229 (CA7 1993) ("[A] craft is a 'vessel' if its purpose is to some reasonable degree 'the transportation of passengers, cargo, or equipment from place to place across navigable waters'"); *Cope*, *supra*, at 630 (describing "hopper-barge," as potentially a "vessel" because it is a "navigable structure[,] used for the purpose of transportation"); cf. 1 Benedict on Admiralty §164, p. 10–6 (7th rev. ed. 2012) (maritime jurisdiction proper if "the craft is a navigable structure intended for maritime transportation").

Lower court cases also tend, on balance, to support our conclusion. See, *e.g.*, *Bernard* v. *Binnings Constr. Co.*, 741 F. 2d 824, 828, n. 13, 832, n. 25 (CA5 1984) (work punt lacking features objectively indicating a transportation function not a "vessel," for "our decisions make clear that the mere capacity to float or move across navigable waters does not necessarily make a structure a vessel"); *Ruddiman* v. *A Scow Platform*, 38 F. 158 (SDNY 1889) (scow, though "capable of being towed . . . though not without some difficulty, from its clumsy structure" just a floating box, not a "vessel," because "it was not designed or used for the purpose of navigation," not engaged "in the transportation of persons or cargo," and had "no motive power, no rudder, no sails"). See also 1 T. Schoenbaum, Admiralty and Maritime Law §3–6, p. 155 (5th ed. 2011) (courts have found that "floating dry-dock[s]," "floating platforms, barges, or rafts used for construction or repair of piers, docks, bridges, pipelines and other" similar facilities are not "vessels"); E. Benedict, American Admiralty §215, p. 116 (3d rev. ed. 1898) (defining "vessel" as a "'machine adapted to transportation over rivers, seas, and oceans'").

We recognize that some lower court opinions can be read as endorsing the "anything that floats" approach. See *Miami River Boat Yard, Inc.* v. *60' Houseboat*, 390 F. 2d 596, 597 (CA5 1968) (so-called "houseboat" lacking self-propulsion); *Sea Village Marina, LLC* v. *A 1980 Carlcraft*

Houseboat, No. 09–3292, 2009 WL 3379923, *5–*6 (D NJ, Oct. 19, 2009) (following *Miami River Boat Yard*); *Hudson Harbor 79th Street Boat Basin, Inc.* v. *Sea Casa*, 469 F. Supp. 987, 989 (SDNY 1979) (same). Cf. *Holmes* v. *Atlantic Sounding Co.*, 437 F. 3d 441 (CA5 2006) (floating dormitory); *Summerlin* v. *Massman Constr. Co.*, 199 F. 2d 715 (CA4 1952) (derrick anchored in the river engaged in building a bridge is a vessel). For the reasons we have stated, we find such an approach inappropriate and inconsistent with our precedents.

Further, our examination of the purposes of major federal maritime statutes reveals little reason to classify floating homes as "vessels." Admiralty law, for example, provides special attachment procedures lest a vessel avoid liability by sailing away. 46 U. S. C. §§31341–31343 (2006 ed. and Supp. IV). Liability statutes such as the Jones Act recognize that sailors face the special "'perils of the sea.'" *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354, 373 (1995) (referring to "'vessel[s] in navigation'"). Certain admiralty tort doctrines can encourage shipowners to engage in port-related commerce. *E.g.*, 46 U. S. C. §30505; *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U. S. 249, 269–270 (1972). And maritime safety statutes subject vessels to U. S. Coast Guard inspections. *E.g.*, 46 U. S. C. §3301.

Lozman, however, cannot easily escape liability by sailing away in his home. He faces no special sea dangers. He does not significantly engage in port-related commerce. And the Solicitor General tells us that to adopt a version of the "anything that floats" test would place unnecessary and undesirable inspection burdens upon the Coast Guard. Brief for United States as *Amicus Curiae* 29, n. 11.

Finally, our conclusion is consistent with state laws in States where floating home owners have congregated in communities. See Brief for Seattle Floating Homes Association et al. as *Amici Curiae* 1. A Washington State

environmental statute, for example, defines a floating home (for regulatory purposes) as "a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed." Wash. Rev. Code Ann. §90.58.270(5)(b)(ii) (Supp. 2012). A California statute defines a floating home (for tax purposes) as "a floating structure" that is "designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling," and which (unlike a typical houseboat), has no independent power generation, and is dependent on shore utilities. Cal. Health & Safety Code Ann. §18075.55(d) (West 2006). These States, we are told, treat structures that meet their "floating home" definitions like ordinary land-based homes rather than like vessels. Brief for Seattle Floating Homes Association 2. Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and for nonlawyers alike. And that consideration here supports our conclusion.

D

The City and supporting *amici* make several important arguments that warrant our response. First, they argue against use of any purpose-based test lest we introduce into "vessel" determinations a subjective element—namely, the owner's intent. That element, they say, is often "unverifiable" and too easily manipulated. Its introduction would "foment unpredictability and invite gamesmanship." Brief for Respondent 33.

We agree with the City about the need to eliminate the consideration of evidence of subjective intent. But we cannot agree that the need requires abandonment of all criteria based on "purpose." Cf. *Stewart*, 543 U. S., at 495 (discussing transportation purpose). Indeed, it is difficult,

if not impossible, to determine the use of a human "contrivance" without some consideration of human purposes. At the same time, we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose. That is why we have referred to the views of a reasonable observer. *Supra,* at 1. And it is why we have looked to the physical attributes and behavior of the structure, as objective manifestations of any relevant purpose, and not to the subjective intent of the owner. *Supra,* at 5–6. We note that various admiralty treatises refer to the use of purpose-based tests without any suggestion that administration of those tests has introduced too much subjectivity into the vessel-determination process. 1 Benedict on Admiralty §164; 1 Admiralty and Maritime Law §3–6.

Second, the City, with support of *amici,* argues against the use of criteria that are too abstract, complex, or open-ended. Brief for Respondent 28–29. A court's jurisdiction, *e.g.*, admiralty jurisdiction, may turn on application of the term "vessel." And jurisdictional tests, often applied at the outset of a case, should be "as simple as possible." *Hertz Corp.* v. *Friend,* 559 U. S. ___, ___ (2010) (slip op., at 1).

We agree with the last-mentioned sentiment. And we also understand that our approach is neither perfectly precise nor always determinative. Satisfaction of a design-based or purpose-related criterion, for example, is not always sufficient for application of the statutory word "vessel." A craft whose physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations. For example, an owner might take a structure that is otherwise a vessel (even the *Queen Mary)* and connect it permanently to the land for use, say, as a hotel. See *Stewart, supra,* at 493–494. Further,

changes over time may produce a new form, *i.e.*, a newly designed structure—in which case it may be the new design that is relevant. See *Kathriner* v. *Unisea, Inc.*, 975 F. 2d 657, 660 (CA9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull").

Nor is satisfaction of the criterion always a necessary condition, see Part IV, *infra*. It is conceivable that an owner might *actually use* a floating structure not designed to any practical degree for transportation as, say, a ferry boat, regularly transporting goods and persons over water.

Nonetheless, we believe the criterion we have used, taken together with our example of its application here, should offer guidance in a significant number of borderline cases where "capacity" to transport over water is in doubt. Moreover, borderline cases will always exist; they require a method for resolution; we believe the method we have used is workable; and, unlike, say, an "anything that floats" test, it is consistent with statutory text, purpose, and precedent. Nor do we believe that the dissent's approach would prove any more workable. For example, the dissent suggests a relevant distinction between an owner's "clothes and personal effects" and "large appliances (like an oven or a refrigerator)." *Post*, at 8 (opinion of SOTOMAYOR, J.). But a transportation function need not turn on the size of the items in question, and we believe the line between items being transported from place to place (*e.g.*, cargo) and items that are mere appurtenances is the one more likely to be relevant. Cf. Benedict, American Admiralty §222, at 121 ("A ship is usually described as consisting of the ship, her tackle, apparel, and furniture . . .").

Finally, the dissent and the Solicitor General (as *amicus* for Lozman) argue that a remand is warranted for further factfinding. See *post*, at 10–12; Brief for United States as *Amicus Curiae* 29–31. But neither the City nor Lozman

makes such a request. Brief for Respondent 18, 49, 52. And the only potentially relevant factual dispute the dissent points to is that the home suffered serious damage during a tow. *Post*, at 10–11. But this would add support to our ultimate conclusion that this floating home was not a vessel. We consequently see nothing to be gained by a remand.

IV

Although we have focused on the phrase "*capable* of being used" for transportation over water, the statute also includes as a "vessel" a structure that is *actually* "used" for that transportation. 1 U. S. C. §3 (emphasis added). And the City argues that, irrespective of its design, Lozman's floating home was *actually* so used. Brief for Respondent 32. We are not persuaded by its argument.

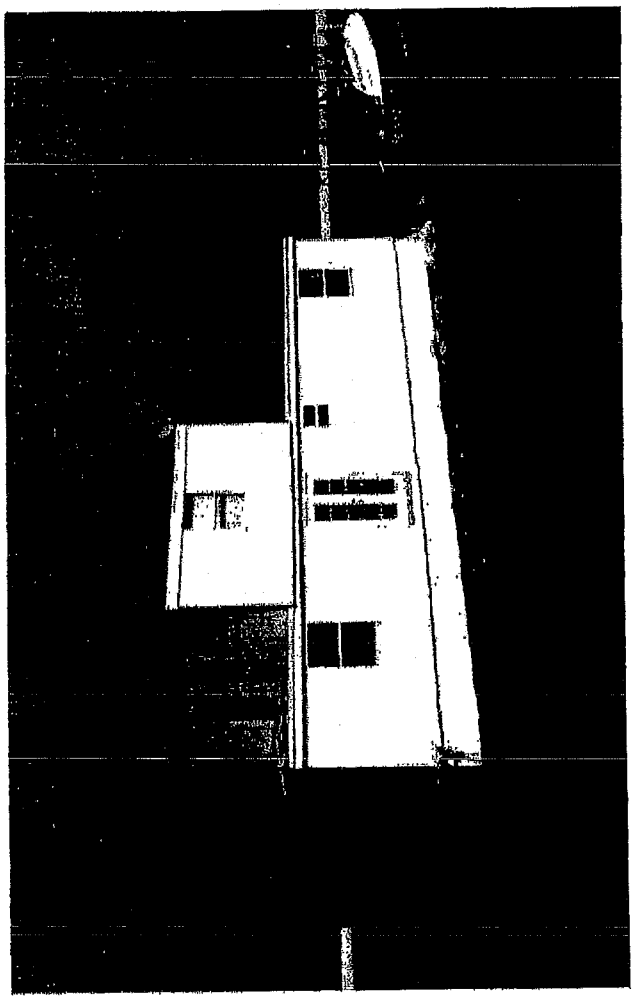
We are willing to assume for argument's sake that sometimes it is possible actually to use for water transportation a structure that is in no practical way designed for that purpose. See *supra*, at 12–13. But even so, the City cannot show the actual use for which it argues. Lozman's floating home moved only under tow. Before its arrest, it moved significant distances only twice in seven years. And when it moved, it carried, not passengers or cargo, but at the very most (giving the benefit of any factual ambiguity to the City) only its own furnishings, its owner's personal effects, and personnel present to assure the home's safety. 649 F. 3d, at 1268; Brief for Respondent 32; Tr. of Oral Arg. 37–38. This is far too little *actual* "use" to bring the floating home within the terms of the statute. See *Evansville*, 271 U. S., at 20–21 (wharfboat not a "vessel" even though "[e]ach winter" it "was towed to [a] harbor to protect it from ice"); see also *Roper* v. *United States*, 368 U. S. 20, 23 (1961) ("Unlike a barge, the S. S. *Harry Lane* was not moved in order to transport commodities from one location to another"). See also *supra*, at 6–11.

V

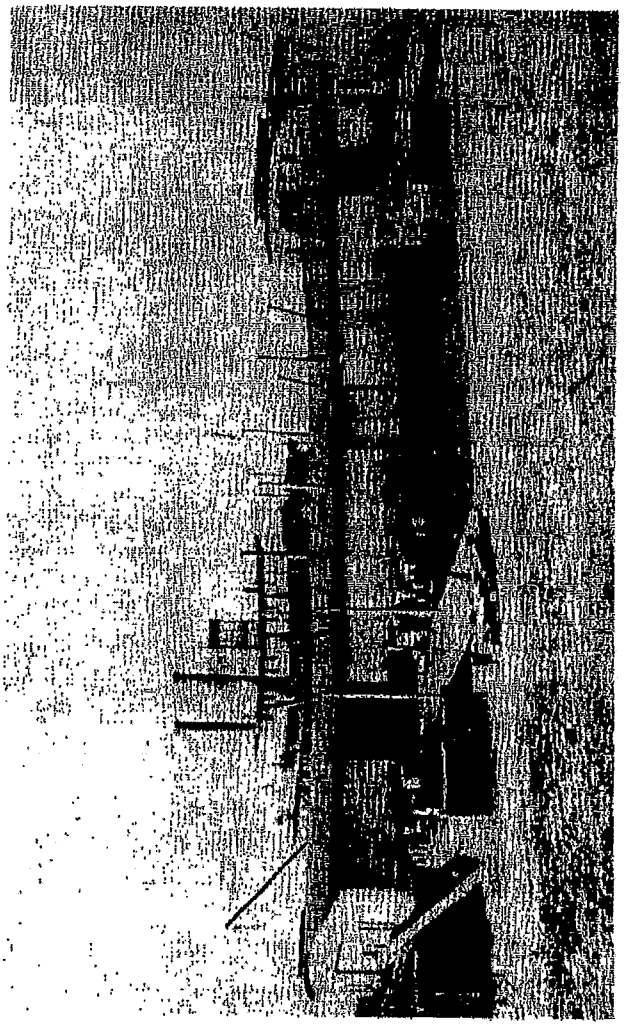
For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

APPENDIX



Petitioner's floating home. App. 69.



50- by 200-foot wharf boat in Evansville, Indiana, on Nov. 13, 1918. H. R. Doc. No. 1521, 65th Cong., 3d Sess., Illustration No. 13 (1918).

MICHAEL NORWOOD, Plaintiff,

v.

NABORS OFFSHORE CORPORATION, Defendant.

Civil Action No. H-15-3219.

United States District Court, S.D. Texas, Houston Division.

January 21, 2016.

MEMORANDUM OPINION & ORDER

GRAY H. MILLER, District Judge.

Pending before the court is plaintiff's motion to remand (Dkt. 7) filed by Michael Norwood against defendant Nabors Offshore Corporation ("Nabors"). After reviewing the motion, the pleading, the response, and the applicable law, the court is of the opinion that the motion should be DENIED.

I. BACKGROUND

On September 25, 2015, Norwood filed his original complaint in state court asserting a claim under the Jones Act for alleged injuries incurred while aboard the Super Sundowner XXI ("SS21") Dkt. 7, Ex. 1 at 2-3. On November 2, 2015, Nabors removed the lawsuit to this court. Dkt. 1. Nabors asserts that Norwood is not a seaman under the Jones Act because the SS21 is not a vessel; therefore, the Outer Continental Shelf Lands Act ("OCSLA") applies to this suit and federal jurisdiction is proper. *Id.* On December 2, 2015, Norwood filed a motion to remand. Dkt. 7. On January 6, 2016, Nabors filed its response. Dkt. 12. Norwood has not filed a reply to Nabors's response.

II. LAW & ANALYSIS

"It is axiomatic that Jones Act suits may not be removed from state court because 46 U.S.C. App. § 688 (the Jones Act) incorporates the general provisions of the Federal Employers' Liability Act, including 28 U.S.C. § 1445(a), which in turn bars removal." *Lackey v. Atl. Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993). "[W]hile federal courts ordinarily look only to the plaintiffs' pleadings in determining whether a Jones Act claim has been stated, defendants may pierce the pleadings to show that the Jones Act claim has been fraudulently pleaded to prevent removal." *Id.* In order to prevent remand, "[t]he removing party must show that there is no possibility that plaintiff would be able to establish a cause of action." *Id.*

In order to establish liability under the Jones Act, Plaintiff must be a seaman. 46 U.S.C. § 30104(a). The Supreme Court has established a two-prong test for determining seaman status:

> First, . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its missions . . . Second, . . . 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.

Chandris, Inc. v. Lastis, 515 U.S. 347, 368, 115 S. Ct. 2172 (1995).

"In order to establish Jones Act jurisdiction, plaintiff must show that at the time of his injury he was a seaman on a vessel; if not, his remedy for injuries sustained as a worker on a fixed platform is under the

Longshoremen's and Harbor Workers' Act." Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108, 1109 (5th Cir. 1980). The Fifth Circuit's decision in *Billings* is directly on point. In *Billings*, the court held that the plaintiff was not a Jones Act seaman where his primary responsibilities concerned drilling operations on a fixed platform. *Id.* at 1110. Here, Norwood claims that he sustained injuries while working on the SS21 on April 21, 2015. Dkt. 7, Ex. 1 at 3. In its response to the motion to remand, Nabors asserts that the SS21 is a drilling rig attached to Marathon Oil's fixed platform in the Gulf of Mexico on the Outer Continental Shelf. Dkt. 12 at 6. In support of this contention, Nabors attached the affidavit of Lawrence Holmes, Field Support Superintendent for Nabors, who states that the SS21 is a platform rig and that "[a]t all times relevant to the incident that made the basis of this lawsuit, Nabors' Rig SS21 was attached to Marathon Oil's Lobster Platform, a fixed platform attached to the seabed." Dkt. 12, Ex. 2 at 2. Norwood has not presented any evidence to contradict Holmes's affidavit or otherwise responded to Nabors's assertion that the SS21 is a workover rig attached to a fixed platform. Instead, Norwood cites to *Manuel v. P.A.W. Drilling & Well Serv., Inc.*, in support of his contention that all workover rigs are vessels. Dkt. 7 at 5 (citing 135 F.3d 344, 351 (5th Cir. 1998)). In *Manuel*, the workover rig "consisted of a portable truck-mounted workover rig owned by P.A.W. that was driven onto the deck of a leased barge and bolted into place" and "was assembled to transport the workover rig and its attendant equipment from place to place across the navigable waters." *Id.* at 346, 351. This case is inapposite because, unlike the workover rig in *Manuel*, the SS21 was not permanently attached to a vessel while conducting its drilling operations. In fact, the SS21 is unable to move unless it is removed by a crane and placed on a vessel for transport. Dkt. 12 at 8. It is well settled that fixed platforms are not vessels, and workers injured on them are not covered under the Jones Act. *See* Billings, 618 F.2d at 1109.

III. CONCLUSION

Norwood has failed to plead a Jones Act claim. Accordingly, Norwood's motion to remand (Dkt. 7) is DENIED.

5

CAUSE NO. 2008-09408

JOSEPH NOLFO, JR.	§	IN THE DISTRICT COURT OF
	§	
VS.	§	
	§	
PETROBRAS AMERICA, INC., SCHLUMBERGER TECHNOLOGY CORPORATION, AND TRANSOCEAN OFFSHORE DEEPWATER DRILLING, INC.	§	HARRIS COUNTY, TEXAS
	§	
	§	
	§	
	§	333RD JUDICIAL DISTRICT

DEFENDANTS' PROPOSED JURY CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence *unless you are otherwise instructed.* If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

DEFINITIONS AND INSTRUCTIONS

JONES ACT—NEGLIGENCE

Joseph Nolfo has asserted a Jones Act negligence claim against defendant, Schlumberger Technology Corporation, only. Joseph Nolfo bears the burden of proving each of the following things by a preponderance of the evidence:

First, that at the time of his injury he was acting in the course of his employment as a seaman employed by Schlumberger Technology Corporation;

Second, that Schlumberger Technology Corporation was negligent; and

Third, that Schlumberger Technology Corporation's negligence was the legal cause of the injury sustained by plaintiff.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person [or corporation] would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. ***Rodway v. Amoco Shipping Co.***, 491 F.2d 265, 267 (1st Cir.1974); ***Connolly v. Farrel***

Lines, Inc., 268 F.2d 653, 655 (1st Cir.1959). Negligence may consist either in doing something that a reasonably careful person [or corporation] would not do under similar circumstances, or in failing to do something that a reasonably careful person [or corporation] would do under similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence; the employer does not guarantee a seaman's safety.

JONES ACT - CAUSATION

For purposes of a Jones Act claim, negligence is a "legal" cause of injury if it plays any part in bringing about or actually causing the injury. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause.

Not every injury that follows an accident necessarily results from it. The accident must be the cause of the injury. In determining causation, a different rule applies to the Jones Act claim.

Under the Jones Act, for both Schlumberger Technology Corporation's negligence, if any, and Joseph Nolfo's comparative negligence, if any, an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part.

ORDINARY NEGLIGENCE

Joseph Nolfo has asserted an "Ordinary Negligence" claims against Defendants, Petrobras America, Inc. and Transocean Offshore Deepwater Drilling, Inc. Ordinary negligence means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

ORDINARY CARE

"Ordinary Care" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances. The fact that an accident may have happened does not alone permit you to infer that it was caused by negligence or that anyone was at fault.

PROXIMATE CAUSE

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result there from. There may be more than one proximate cause of an event.

COMPARATIVE NEGLIGENCE

Defendants contend that Joseph Nolfo was himself negligence and that such negligence was a legal cause of his injury. This is a defensive claim and the burden of proving this claim is upon the defendants, who must establish by a preponderance of the evidence:

First, that Joseph Nolfo was also negligent; and

Second, that Joseph Nolfo's negligence was a legal cause of his injury.

The court has already defined "negligence" and "legal cause" and the same definitions apply here.

UNSEAWORTHINESS

Joseph Nolfo alleges that the FALCON 100 was unseaworthy and that the unseaworthy condition was a proximate cause of his injuries, if any.

A shipowner owes to every member of the crew employed on its vessel the absolute duty to keep and maintain the ship and all decks and passageways, appliances, gears, tools, parts, and equipment of the vessel in a seaworthy condition at all times. A seaworthy vessel is one that is reasonably fit for its intended use. The duty to provide a seaworthy vessel is absolute because the owner may not delegate that duty to anyone. Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. If an owner does not provide a seaworthy vessel – a vessel that is reasonably fit for its intended use – no amount of care or prudence excuses the owner.

The duty to provide a seaworthy vessel includes a duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task.

However, the owner of a vessel is not required to furnish an accident-free ship. He need only furnish a vessel and its appurtenances that are reasonably fit for their intended use and a crew that is reasonably adequate for their assigned tasks.

The shipowner is not required to provide the best appliances and equipment or the finest of crews on his vessel. He is only required to provide gear that is reasonably proper and suitable for its intended use and a crew that is reasonably adequate. The occurrence of an accident standing alone does not allow you to infer that the vessel was unseaworthy.

If you find that the vessel was unseaworthy, then you must also consider whether that unseaworthy condition was a proximate cause of the Plaintiff's injuries, if any. The Plaintiff has the burden of showing not merely that the unseaworthy condition was a cause of the injury, but that such condition was a proximate cause of it. This means that the Plaintiff must prove that the condition in question played a substantial part in bringing about or actually causes his injury and that the injury was either a direct result or a reasonably probable consequence of the condition.

DAMAGES

Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, for it is only actual damages—what the law calls compensatory damages—that are recoverable. However, compensatory damages are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury, tangible and intangible. They are an attempt to make Joseph Nolfo whole, or to restore him to the position he would have been in if the accident had not happened.

You should consider the following elements of damages, to the extent you find that Joseph Nolfo has established such damages by a preponderance of the evidence: physical pain and suffering including physical disability, impairment, and inconvenience, and the effect of the injuries and inconvenience on the normal pursuits and pleasures of life; mental anguish and feelings of economic insecurity caused by disability; income loss in the past; impairment of earning capacity or ability in the future, including impairment in the normal progress in the Joseph Nolfo's earning capacity due to his physical condition; past medical expenses; the reasonable value, not exceeding actual cost to Joseph Nolfo, of medical care that you find from the evidence will be reasonably certain to be required in the future as a proximate result of the injury in question.

In determining the amount of future loss, you should compare what Joseph Nolfo's health, physical ability and earning power were before the accident with what they are now; the nature and severity of his injuries; the expected duration of his injuries; and the extent to which his condition may improve or deteriorate in the future. The objective is to determine the injuries effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find Joseph Nolfo will probably suffer in the future. In that connection, you should consider Joseph Nolfo's work life expectancy, taking into account his occupation, his habits, his past health record, state of health at the time of the accident and his employment history. Work life expectancy is that period of time that you expect Joseph Nolfo would have continued to work, given his age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You may award a sum to compensate Joseph Nolfo reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find defendants' negligence has caused him to suffer and will probably cause him to suffer in the future. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

Defendants are not liable for Joseph Nolfo's pain or impairment caused by a pre-existing condition. But if you find that defendants negligently caused further injury or aggravation to a pre-existing condition, Joseph Nolfo is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by defendants' negligence, the defendants are liable for all Joseph Nolfo's injuries.

Any award you make to Joseph Nolfo is not subject to income tax; neither the state nor the federal government will tax it. Therefore, you should determine the amount of damages without considering the effect of taxes upon it.

MAINTENANCE AND CURE

Joseph Nolfo has asserted a Maintenance and Cure claim against defendant, Schlumberger Technology Corporation, only. Joseph Nolfo's claim is that, as a seaman, he is entitled to recover Maintenance and Cure. This claim is separate and independent from both the Jones Act and the unseaworthiness claims of Joseph Nolfo. You must decide this claim separately from your determination of his Jones Act and unseaworthiness claims.

Maintenance and Cure is a seaman's remedy. It has already been determined in this case that plaintiff is a Jones Act seaman. You then must now determine if he is entitled to maintenance and cure.

Maintenance and cure provides a seaman, who is disabled by injury or illness while in the service of the ship, medical care and treatment, and the means of maintaining himself, while recuperating.

A seaman is entitled to maintenance and cure even though he was not injured as a result of any negligence on the part of his employer or any unseaworthy condition of the vessel. To recover maintenance and cure, Joseph Nolfo need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part. The injury or illness need not be work related, it need only occur while the seaman is in the service of the ship. And maintenance and cure may not be reduced because of any negligence on the part of Joseph Nolfo.

The "cure" to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus. However, the employer does not have a duty to provide cure for any period of time during which a seaman is hospitalized at the employer's expense. *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293, 1973 AMC 2465 (5th Cir.1973).

Maintenance is the cost of food and lodging, and transportation to and from a medical facility. A seaman is not entitled to maintenance for that period of time that he is an inpatient in any

hospital, because the cure provided by the employer through hospitalization includes the food and lodging of the seaman. *Id.*

An employer is relieved of the obligation to pay maintenance and cure if it is furnished by others at no expense to the seaman. *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), rehearing denied 370 U.S. 965, 82 S.Ct. 1578, 8 L.Ed.2d 834 (1962); *Johnson v. United States,* 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468 (1948); *Marine Drilling, Inc. v. Landry,* 302 F.2d 127 (5th Cir.1962); *Gauthier v. Crosby Marine Service,* 536 F.Supp. 269, 1982 AMC 2885 (E.D.La.1982), affirmed 752 F.2d 1085, 1985 AMC 2477 (5th Cir.1985).

A seaman is entitled to receive maintenance and cure from the date he leaves the vessel until he reaches the point of what is called "maximum medical improvement" or "maximum cure." *Farrell v. United States,* 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949). Maximum medical improvement or maximum cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. *Pelotto v. L& N Towing Co.,* 604 F.2d 396, 400, 1981 AMC 1047 (5th Cir.1979). Thus, if it appears that a seaman's condition is incurable, or that the treatment will only relieve pain but will not improve a seaman's physical condition, he has reached maximum medical improvement or maximum cure. The obligation to provide maintenance and cure usually ends when qualified medical opinion is to the effect that maximum possible cure has been accomplished. *Holmes v. J.Ray McDermott & Co.,* 734 F2d 1110, 1985 AMC 2024 (5th Cir.1984).

If you decide that Joseph Nolfo is entitled to maintenance and cure, you must determine when the employer's (Schlumberger Technology Corporation) obligation to pay maintenance began, and when it ends. One factor you may consider in determining when the period ends is the date when the seaman resumed his employment, if he did so. However, if the evidence supports a finding that economic necessity forced the seaman to return to work prior to reaching maximum medical improvement or maximum cure, you may take that finding into consideration in determining when the period for maintenance and cure ends.

If you find that Joseph Nolfo is entitled to an award of damages under either the Jones Actor unseaworthiness claims, and if you award him either lost wages or medical expenses, then you may not award him maintenance and cure for the same period of time. That is because Joseph Nolfo may not recover twice for the same loss of wages or medical expenses. However, Joseph Nolfo may also be entitled to an award of damages for failure to pay maintenance and cure when it was due.

A shipowner who has received a claim for maintenance and cure is entitled to investigate the claim. However, if after investigating the claim, the shipowner unreasonably rejects the claim for maintenance and cure, he is liable for both the maintenance and cure payments he should have made, and any compensatory damages caused by his unreasonable failure to pay. Compensatory damages may include any aggravation of Joseph Nolfo's condition because of the failure to provide maintenance and cure.

Thus, you may award compensatory damages because the shipowner failed to provide maintenance and cure if you find by a preponderance of the evidence that:

1. The plaintiff was entitled to maintenance and cure;

2. It was not provided;

3. The defendant acted unreasonably in failing to provide maintenance and cure; and

4. The failure to provide the maintenance and cure resulted in some injury to the plaintiff.

LOSS OF FUTURE EARNINGS

In considering damages for loss of future earnings, there are two particular factors you must consider. First, you should consider loss after income taxes; that is, you should determine the actual or net income that Joseph Nolfo has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes. You must determine only Joseph Nolfo's net earnings after tax. This is so because any award you may make here is not subject to income tax. The federal or state government will not tax any amount which you award on this basis.

Second, an amount to cover a future loss of earnings is more valuable to Joseph Nolfo if he received the amount today than if he received the same amount in the future. Therefore, if you decide to award plaintiff an amount for lost future earnings, you must discount it to present value by considering what return would be realized on a relatively risk free investment.

MENTAL ANGUISH

Mental anguish must be proven by evidence of a substantial disruption in the Plaintiff's daily routine or evidence of a high degree of mental pain and distress. Mere disappointment, anger, resentment, or embarrassment alone are insufficient to establish mental anguish.

QUESTION 1:

Did the negligence, if any, as defined above of those named below cause the incident in question? Answer "yes" or "no" for each of the following:

Schlumberger Technology Corporation _____

Petrobras America, Inc. _____

Transocean Offshore Deepwater Drilling, Inc. _____

Joseph Nolfo _____

If, in Question No. 1, you have answered that more than one of those named below were negligent and that negligence caused the incident in question, then answer the following question. Otherwise, do not answer the following question.

QUESTION 2:

What percentage of the negligence as defined that caused the incident in question do you find to be attributable to each of those found by you, in answer to Question No. 1, to have been negligent? The percentages must total 100%. The percentages must be expressed in whole numbers. The negligence to a person or entity named below is not necessarily measured by the number of acts or omissions found. The percentage attributable to a person or entity named below need not be the same percentage attributable to that person or entity answering another question:

(a)	Schlumberger Technology Corporation	_____ %
(b)	Petrobras America, Inc.	_____ %
(c)	Transocean Offshore Deepwater Drilling, Inc.	_____ %
(d)	Joseph Nolfo	_____ %
	TOTAL	100 %

QUESTION 3:

Did the unseaworthiness, if any, of the FALCON 100 or the negligence, if any, of Joseph Nolfo, cause the incident in question. Answer "yes" or "no" for each of the following:

(a) FALCON 100 [Transocean Offshore Deepwater Drilling, Inc.; _____

(b) Joseph Nolfo _____

If, in answer to Question 3, you have answered that the unseaworthiness of the FALCON 100 and the negligence of Joseph Nolfo both caused the incident in question, then answer the following question. Otherwise, do not answer the following question.

QUESTION 4:

What percentage of the unseaworthiness of the FALCON 100 and the negligence of Joseph Nolfo that caused the incident in question do you find to be attributable to each of those found by you, in answer to Question 3, to have been unseaworthy or negligent? The percentages must total 100%. The percentages must be expressed in whole numbers.

The negligence to a person or entity named below is not necessarily measured by the number of acts or omissions found. The percentage attributable to a person or entity named below need not be the same percentage attributable to that person or entity answering another question:

(a)	FALCON 100 [Transocean Offshore Deepwater Drilling, Inc.	_____ %
(b)	Joseph Nolfo	_____ %
	TOTAL	100 %

QUESTION 5:

If you answered "Yes" to Question 1 or Question 3, what sum of money do you find to be the total amount of the Joseph Nolfo's damages in connection with his **RIGHT SHOULDER ONLY** (without adjustment by application of any percentages you may have given in answer to Question 4)?

In determining the amount of damages below, do not include:

1. any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question;

2. any amount for any condition not resulting from the occurrence in question; or

3. any amount resulting from an aggravation of Joseph Nolfo's underlying condition.

(a)	Net lost wages and benefits to the date of trial	$_____
(b)	Net lost wages and benefits in the future [reduced to present value]	$_____
(c)	Medical and hospital expenses incurred in the past	$_____
(d)	Medical and hospital expenses to be incurred in the future	$_____
(e)	Physical and emotional pain and mental anguish	$_____
(f)	Maintenance	$_____
(g)	Cure	$_____

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10399
Non-Argument Calendar

D.C. Docket No. 1:14-cv-23460-KMW

DOROTHY JACKSON,

Plaintiff-Appellant-
Cross Appellee,

versus

NCL AMERICA, LLC,

Defendant-Appellee-
Cross Appellant,

PRIDE OF AMERICA SHIP HOLDING, LLC,

Defendant.

Appeals from the United States District Court
for the Southern District of Florida

(April 10, 2018)

Before ED CARNES, Chief Judge, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

While on a cruise ship, Dorothy Jackson slipped on an onion peel and fell. She brought several claims under maritime law against Norwegian Cruise Line America. After a bench trial, the district court ruled in her favor on one claim and in Norwegian's favor on the others. Jackson appeals, and Norwegian cross-appeals.

I.

Jackson was a utility hand on a Norwegian cruise ship. On November 16, 2012, a day before Jackson's five-month contract ended, she and a coworker, Erroll Davis, were walking along one of the ship's corridors to get food at the crew mess. Although passengers could access the corridor, they did not have access to it on the day of the incident. As Jackson was walking and writing down her address to give to Davis, she slipped on an onion peel on the ground near the ship's garbage disposal area. Neither Jackson nor Davis saw the onion peel before Jackson slipped and fell. Davis picked up the onion peel, which he said "looked fresh," and threw it away. Jackson went to the ship's infirmary and reported pain in her right shoulder, lower back, and right hip. As scheduled, she disembarked the vessel the following day to return to her home in New Orleans, Louisiana.

Less than a week later, a Norwegian employee emailed Jackson to coordinate her return to work in late January. After Jackson told him that she needed to see a doctor before she could return, he directed her to contact an employee from Norwegian's medical department, which Jackson failed to do. Jackson hired an attorney who advised her to see a local physician, which she did. Over a month later Jackson hired a new attorney, and he advised her to see a different physician, Dr. James Butler. Norwegian advised Jackson's attorney[1] on multiple occasions that: "[W]e have arranged for your client to see a number of highly qualified physicians. If your client instead elects to see other physicians at your urging or otherwise, [Norwegian] will reimburse at its usual costs for such treatment that is medically necessary, to the point of maximum medical cure."

From 2013 to 2016, Jackson had two right knee surgeries, a left knee surgery, a right shoulder surgery, and a back surgery. All of the surgeries were performed by a physician chosen by Jackson (Dr. Butler), who was not within Norwegian's network. Norwegian reimbursed Jackson at its network rate for the three knee surgeries and the shoulder surgery, as well as her office visits and physical therapy. It refused to reimburse her for the back surgery. Norwegian explained that Jackson had failed to disclose during her application process her

[1] Unless otherwise noted, all references to Jackson's "attorney" are to the second attorney.

previous back pain. Norwegian argued that the back surgery was related to that undisclosed condition, and as a result, it was not obligated to pay for it.

Jackson sued Norwegian, asserting claims of Jones Act negligence, unseaworthiness, maintenance, and cure. After a bench trial, the district court entered judgment in favor of Jackson on the cure claim, although it limited her recovery to the rate that Norwegian would have paid for her back surgery had a physician in its network performed the surgery. It ruled in favor of Norwegian on the remaining three claims. This is Jackson's appeal and Norwegian's cross-appeal.[2]

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[2] With a few exceptions not applicable here, we can review only final judgments of district courts. See 28 U.S.C. § 1291. The parties filed their notices of appeal after the district court issued its "Final Judgment" but before it issued its order denying Jackson's postjudgment motion for prejudgment interest. Because the district court has resolved that postjudgment motion, its "Final Judgment" is now final enough to give us jurisdiction to review it. Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides that:

> If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Among the motions listed in Rule 4(a)(4)(A) is a motion "to alter or amend the judgment under Rule 59" of the Federal Rules of Civil Procedure. Fed. R. App. P. 4(a)(4)(A)(iv). "[A] postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion." Osterneck v. Ernst & Whinney, 489 U.S. 169, 177, 109 S. Ct. 987, 992 (1989). As a result, the parties' notices of appeal became effective when the district court issued its order disposing of Jackson's postjudgment motion for prejudgment interest, Fed. R. App. P. 4(a)(4)(B)(i); see Stansell v. Revolutionary Armed Forces of Colom., 771 F.3d 713, 745–46 (11th Cir. 2014) ("[A] notice of appeal filed during the pendency of a Rule 59 motion is simply suspended."); Narey v. Dean, 32 F.3d 1521, 1524 (11th Cir. 1994) ("[U]nder [Federal Rule of Appellate Procedure] 4(a)(4) . . . , an otherwise timely notice of appeal filed before the disposition of a Rule 59 motion is not voided but instead merely lies dormant while the motion is pending, and the notice of appeal becomes effective as of the date of the order disposing of the Rule 59 motion."). We have jurisdiction over this appeal.

II.

"After a bench trial, we review the district court's conclusions of law de novo and the district court's factual findings for clear error." Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230 (11th Cir. 2009). "A finding of fact is clearly erroneous when the entirety of the evidence leads the reviewing court to a definite and firm conviction that a mistake has been committed." Dresdner Bank AG v. M/V Olympia Voyager, 446 F.3d 1377, 1380 (11th Cir. 2006).

III.

A.

Jackson first contends that the district court erred by ruling that she failed to present sufficient evidence on her negligence claim. To succeed on her negligence claim, Jackson had to prove that Norwegian had actual or constructive notice of the purported dangerous condition, that is, the onion peel on the ground. Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989). Jackson argues that the district court erred in ruling that she failed to present sufficient evidence of Norwegian's notice of the dangerous condition. She asserts that the onion peel must have been dropped by a fellow crewmember, and because the crewmember created the dangerous condition, Norwegian had actual notice of it.

Even if, as Jackson claims, a crewmember dropped the onion peel and created the dangerous condition, that does not establish that Norwegian had notice

of it. Norwegian must have had "actual or constructive notice of the risk-creating condition." See Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990) (quoting Keefe, 867 F.2d at 1322). We have rejected the position that notice can be imputed to a shipowner merely because the shipowner created the dangerous condition, reasoning that such a rule would obviate Keefe's requirement that the shipowner have notice of the risk-creating condition.[3] See id. at 1359.

Jackson presented no evidence of Norwegian's actual notice of the onion peel and instead relied on the testimony that neither she nor Davis dropped the onion peel, and that the ship's passengers did not have access to the area where Jackson fell. That circumstantial evidence, without more, does not provide sufficient evidence that Norwegian knew about the dangerous condition. Because Jackson failed to provide sufficient evidence that Norwegian had actual notice of the dangerous condition, and because she concedes that "concepts of constructive notice have no place in this case," the district court did not err in concluding that Jackson failed to present sufficient evidence of Norwegian's negligence.[4]

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[3] In this Court's Sorrels decision we applied a standard like the one Jackson proposes, see Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1287 (11th Cir. 2015), but we did so because the defendant did not "take issue with [the] standard," and we explicitly did not "pass[ ] on its correctness." Id.

[4] Jackson contends in the alternative that she need not prove notice because Norwegian's negligence "arose from the negligent act of a fellow crewmember in dropping the onion peel on the floor of the vessel in an area exclusively used by the crew." She fails to cite any binding precedent from this circuit applying or accepting such a rule. In any event, she failed to present sufficient evidence that a fellow crewmember negligently dropped the onion.

B.

Norwegian contends that the district court erred by ruling in favor of Jackson on her cure claim because, it argues, it should have prevailed on its affirmative defense under McCorpen v. Cent. Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968). Jackson argues that the district court got it right on her cure claim, except that it erred by limiting her recovery for medical expenses to Norwegian's network rates.

1.

To establish a McCorpen defense, Norwegian had to show that (1) Jackson intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to its decision to hire her; and (3) a connection exists between the withheld information and the injury complained of in this lawsuit. Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 171 (5th Cir. 2005) (citing McCorpen, 396 F.2d at 548–49). Norwegian contends that, although the district court correctly found that it satisfied the first two elements of the McCorpen defense, the court erred in ruling that Norwegian failed to meet the third element — the "connection" element — by applying that element too rigidly. Norwegian cites the Fifth Circuit's Brown decision and asserts that it "need only show that the prior and present injuries affect the same location on the body." Because

Jackson's injuries "affect the same body part," Norwegian insists that "the requisite connection is established."

We disagree. In the Brown decision, the evidence showed that the plaintiff failed to tell his employer that he had previously suffered a lumbar strain with possible disc herniation at the L4-L5 and L5-S1 spinal segments. Id. at 176. At trial the plaintiff's expert witness acknowledged that the "prior back strains were to the same lumbar-spine region as [the plantiff's] current back problem." Id. (emphasis added). In discussing the third element of the McCorpen defense, the court cited several decisions where a causal link was established because the preexisting injuries were in the "exact" same area as the injuries complained of in the lawsuit. Id. at 176–77. The court also cited two decisions where a causal link was not established. See id. at 177 n.9. In one of them, the employer failed to show "that the claimant in fact suffered from a preexisting condition or disability. [The employer] merely showed that the claimant complained of back pain on a prior occasion." Id. (quotation marks omitted). In the other one, the employer failed to show "that the claimant's preexisting disability was identical or similar, and there was no evidence of a previous similar diagnosis." Id. (quotation marks omitted). The Brown court found those two cases distinguishable and held that, because the plaintiff's "injuries were to the same location of the lumbar spine, the causal link between the concealed information and the new injury was

established." Id.; see also Meche v. Doucet, 777 F.3d 237, 249 (5th Cir. 2015) (holding that the "connection" element was satisfied where the plaintiff "aggravated his pre-existing lumbar illness").

The record shows that as early as 2008 Jackson had seen doctors concerning pain in her lower back. The notes from her December 2008 doctor's visit indicate that an X-ray of Jackson's lumbar spine "show[ed] some evidence of degenerative disk disease at L2-L3 and L3-L4." After she fell in September 2012, Jackson sought treatment for the back injury she suffered from the fall. An MRI report from May 2013 noted disc bulges at L2-L3 and L3-L4. But notably that report also indicated disk herniation at L4-L5 and L5-S1, and Jackson's December 2015 hospital records show that she was diagnosed with and underwent surgery for lumbar disk herniation at L4-L5 and L5-S1.

Given that evidence, along with the expert testimony about Jackson's medical conditions and surgeries, the district court did not clearly err in finding that "there is no compelling evidence of a connection between Jackson's pre-2012 back pain, which all agree w[as] recurrent and degenerative in nature, and the hernia[ted disks] for which Dr. Butler performed surgery." Although the two injuries do not have to be identical, Brown, 410 F.3d at 176, simply showing that Jackson's previous pain and her injury from the fall affect the same body part without more specificity does not suffice, see id. at 176–77. Because Norwegian

failed to show a connection between Jackson's degenerative disk issues at L2-L3 and L3-L4 and her disk herniation at L4-L5 and L5-S1, the district court did not err in concluding that Norwegian failed to satisfy the third element of the McCorpen defense. As a result, it did not err in ruling in favor of Jackson on her cure claim.

2.

Jackson contends that the district court erred in limiting her recovery on her cure claim to Norwegian's network rates. Maritime law provides that "if a seaman . . . seeks his own private physician rather than another chosen by the employer he forfeits only that amount of compensation, if any, that would have been saved if he had received the necessary care from the employer's doctor . . . ." Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1134 (5th Cir. 1981).[5] Jackson argues that because "there is no evidence that [she] or her attorney were ever advised of [Norwegian's] recommended physician," the district court "committed a clear error of fact" in concluding that she sought "private medical care in lieu of or instead of some care offered by" Norwegian. That is not correct.

The evidence shows that on November 24, 2012, in response to an email from an employee of Norwegian's personnel department, Jackson informed Norwegian for the first time that she was still hurting from her fall and needed

[5] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

medical care. That employee directed her to contact an employee from Norwegian's medical department, but Jackson never did. Instead, she hired an attorney (the first attorney) who told her to go to a doctor at a local clinic. She did and that doctor cleared her to go back to work. She then hired a new attorney who advised her to see Dr. Butler, a physician at a different clinic. The new attorney also directed her not to speak with anyone from Norwegian.

The evidence also shows that on December 4, 2012 the cruise ship sent Jackson's medical records to a Norwegian crew claims manager. On December 13, the claims manager emailed an employee from Health Systems International, a company that "worked with [Norwegian] to help provide and arrange medical care for crew members," to schedule an appointment for Jackson and to advise the company that Jackson had retained an attorney. At trial Norwegian's representative testified that the employee from Health Systems International arranged an appointment for Jackson with an orthopedic surgeon, Dr. Shackleton. And a January 4, 2013 email from a Health Systems International employee to the Norwegian crew claims manager reflects that the employee had tried for "weeks" to contact Jackson about her appointment but was unable to reach her.

On January 18, 2013, Jackson's attorney instructed Norwegian "not to correspond directly with Ms. Jackson any further, and that the law firm would be taking on the scheduling and coordination of her medical care, and they would be

forwarding information to the company." Norwegian's representative testified that it responded to the attorney's letter and informed him that "if Ms. Jackson elected to treat with her own doctors we would reimburse those costs, and that we would do so up to our network rate."[6] He also stated that he "believe[d] Ms. Jackson never attended her appointment with Dr. Shackleton" because "she had obtained counsel who advised [Norwegian that counsel] would make the arrangements for [her] medical care."

The upshot is that Jackson, following the advice of her attorneys, chose not to speak with Norwegian and instead to seek treatment with her own private physicians. She did that despite the fact that Norwegian told her attorney that "if she picked a doctor more expensive than the doctors that Norwegian selected for her, . . . she would be responsible for the difference in that pay." Based on the evidence in the record, we are not left with a definite and firm conviction that the district court made a mistake in determining that Jackson sought private medical care instead of medical care offered by Norwegian. See Dresdner Bank, 446 F.3d at 1380.

AFFIRMED.

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[6] That Jackson or her attorneys did not know the name of the doctor in Norwegian's network is of no moment. Health Systems International attempted to contact Jackson for weeks to inform her of her appointment with Dr. Shackleton, and Norwegian repeatedly advised Jackson's attorney that Norwegian had its own in-network doctors and was willing to offer "any further assistance [it] could provide."

Court of Appeal of Louisiana,Third Circuit.

Adrienne STERMER v. ARCHER–DANIELS–MIDLAND COMPANY, et al.

No. 15–811.

Decided: February 24, 2016

Court composed of JOHN D. SAUNDERS, ELIZABETH A. PICKETT, and JOHN E. CONERY, Judges. Georges M. Legrand, Adam P. Sanderson, Mouledoux, Bland, Legrand & Brackett LLC, New Orleans, LA, for Defendants–Appellants, American River Transportation Co. Agrinational Insurance Company. Lawrence N. Curtis, Lawrence N. Curtis, LTD., A Professional Law Corporation, Lafayette, LA, for Plaintiff–Appellee, Adrienne Stermer.

Employer appeals the trial court's award of $309,174 in attorney fees to plaintiff's attorney for work performed to secure payment of maintenance and cure to his client. In answer to appeal, employee claims attorney fees for work done on the trial on remand and on this appeal, requests ninety percent of the court costs on remand be assessed to defendant, asks for additional court costs not awarded by the trial court on remand to be assessed, and prays he be awarded attorney fees for work done on this appeal. For the following reasons, we affirm the trial court's judgment in its entirety, award $10,000 in attorney fees to employee for work done on appeal, and assess all costs of this appeal to employer.

FACTS AND PROCEDURAL HISTORY

Adrienne Stermer sued her employer, ARTCO, its insurer, Agrinational Insurance Company, and Archer–Daniels–Midland Company, owner of the M/V COOPERATIVE ENTERPRISE and ARTCO's parent company (hereinafter referred to collectively as "ARTCO"), alleging that she was a seaman injured through the negligence of her employer on October 9, 2007, while working in the service of the M/V COOPERATIVE ENTERPRISE, and that she was entitled to damages under the Jones Act. Ms. Stermer further alleged that the vessel was unseaworthy, that she was improperly dismissed, and that her dismissal constituted a retaliatory discharge by ARTCO. She further claimed that ARTCO unreasonably refused to pay her maintenance and cure after she was injured, and that she was thereby entitled to punitive damages and attorney fees. ARTCO rigorously defended the suit and, from the beginning, took the position that the claim was fraudulent and that Ms. Stermer did not sustain an injury while in the service of the vessel. Following a hotly contested bench trial, the trial court made the following awards on the Jones Act claim:

In thorough written reasons for judgment, the trial court also determined that ARTCO's refusal to pay Ms. Stermer maintenance and cure for two and one-half years following her injury was arbitrary and capricious and awarded her $300,000 in punitive damages and $150,000 in attorney fees. It dismissed her claims of unseaworthiness and retaliatory discharge, finding she did not prove those claims.

On appeal, this court affirmed the trial court's judgment on the Jones Act claim and its determination that Ms. Stermer was entitled to $300,000 in punitive damages for ARTCO's arbitrary and capricious failure to pay maintenance and cure. The original panel also affirmed the trial court's finding that Ms. Stermer was entitled to attorney fees for arbitrary and capricious failure to pay maintenance and cure, but reversed the award of $150,000 in attorney fees, as no analysis was made by the trial court as to how it arrived at the amount awarded. The original panel remanded the matter "for the trial court to consider the traditional factors pertinent to an award of attorney fees and determine the appropriate amount of attorney fees for work performed by Ms. Stermer's counsel in the trial court." The original panel awarded Ms. Stermer $10,000 in attorney fees for work performed by her attorneys on the original appeal, plus all costs of that appeal. Stermer v. Archer–Daniels–Midland Co., 14–147 (La.App. 3 Cir. 6/4/14), 140 So.3d 879. ARTCO filed a writ application with the supreme court which was denied. Stermer, 14–1434 (La.10/24/14), 151 So.3d 603. Except for the amount of attorney fees owed, that judgment is now final.

On remand, the trial court[1] awarded Ms. Stermer $309,174 in attorney fees and court costs in the amount of $1,037.15, plus "all court costs assessed against [Ms. Stermer] by the Clerk of Court, subject to a credit for those costs already reimbursed or paid by [ARTCO]." ARTCO appealed the trial court's award, and Ms. Stermer answered the appeal.

ASSIGMENTS OF ERROR

ARTCO assigns two errors with the trial court's judgment:

1. The district court erred in awarding plaintiff [attorney fees] for time spent after maintenance and cure benefits were commenced by ARTCO.

2. The district court erred in allocating the time spent by plaintiff's counsel on the prosecution of maintenance and cure benefits and other claims.

Ms. Stermer answered the appeal and requests that we modify and amend the trial court's judgment as follows:

1. The district court failed to consider, and thus the award of attorney fees below, should be increased to include the time spent by the Plaintiff–Appellee establishing and protecting her right to an attorney's fee award;

2. The district court failed to consider, and thus the award of costs below, should be increased to include ninety percent (90%) of the costs incurred by the Plaintiff–Appellee in prosecuting this action in the district court;

3. In addition, Plaintiff–Appellee requests that this Honorable Court make an award for [attorney fees] for the work performed by her attorneys on this appeal.

Standard of Review

We review the factual conclusions of the trial court's judgment in this matter pursuant to the manifest error standard of review. Menard v. Lafayette Ins. Co., 09–1869 (La.3/16/10), 31 So.3d 996. In Menard, the supreme court restated the importance of this doctrine explaining: "The manifest error doctrine is not so easily broached. Rarely do we find a reasonable basis does not exist in cases with opposing views." Id. at 1011. The court noted:

[I]t is not hard to prove a reasonable basis for a finding, which makes the manifest error doctrine so very difficult to breach, and this is precisely the function of the manifest error review. [I]t should be a rare day finding a manifest error breach when two opposing views are presented to the trier of fact."

Id.

More recently in Hayes Fund For The Frist United Methodist Church of Welsh, LLC v. Kerr–McGee Rocky Mountain, LLC, 14–2592 (La.12/08/15), —— So.3d ——, the supreme court reiterated the duty of appellate courts in a manifest error review and stated in pertinent part:

In all civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard, which precludes the setting aside of a trial court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. Cenac v. Public Access Water Rights Ass'n, 02–2660, p. 9 (La.6/27/03), 851 So.2d 1006, 1023. Thus, a reviewing court may not merely decide if it would have found the facts of the case differently. Hall v. Folger Coffee Co ., 03–1734, p. 9 (La.4/14/04), 874 So.2d 90, 98. Rather in reversing a trial court's factual conclusions with regard to causation, the appellate court must satisfy a two-step process based on the record as a whole: there must be no reasonable factual basis for the trial court's conclusion, and the finding must be clearly wrong. Stobart v. State through Dept. of Transp. and Development, 617 So.2d 880, 882 (La.1993).

This test requires a reviewing court to do more than simply review the record for some evidence, which supports or controverts the trial court's findings. The court must review the entire record to determine whether the trial court's finding was clearly wrong or manifestly erroneous. Parish Nat. Bank v. Ott, 02–1562, pp. 7–8 (La.2/25/03), 841 So.2d 749, 753–54. The issue to be resolved on review is not whether the judge or jury was right or wrong, but whether the judge's or jury's factfinding conclusion was a reasonable one. Rosell v. ESCO, 549 So.2d 840, 844 (La.1989); Canter v. Koehring Co., 283 So.2d 716, 724 (La.1973).

Id. at p. 4.

Errors of law, however, are reviewed de novo. See Foti v. Holliday, 09–93 (La.10/30/09), 27 So.3d 813. Accordingly, when reviewing an issue of law, we "render[ ] judgment based on the record without deference to the legal conclusions of the lower courts." Id. at 817.

Assignment of Error One—Entitlement to Attorney Fees After Payment of Maintenance and Cure Under Protest

An award of attorney fees for an employer's failure to pay maintenance and cure is appropriate only when an employer's failure or refusal to pay maintenance and cure is found to be "callous and recalcitrant, arbitrary and capricious, or willful, callous and persistent." Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir.1987) (abrogated on other grounds by Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir.1995)(en banc)). The trial court so found, a panel of this court affirmed that finding on original appeal, Stermer, 140 So.3d 879, and that issue is now res judicata. See La.R.S. 13:4231.

However, ARTCO argued to the trial court, as it does here, that when it paid all the maintenance and cure owed Ms. Stermer on April 19, 2010, "under protest," and kept those payments current, her claim for attorney fees was limited to the time period preceding the date of its "payment under protest." It now asserts that the trial court's award for work performed by Ms. Stermer's attorney after that date constitutes an error of law. We disagree and hold that the attorney fees award was set pursuant to a limited remand and was decided in well-articulated factual findings by the trial court which must be reviewed using the manifest error standard. See Hayes, —— So.3d ——.

Pursuant to our remand order, the trial court reviewed the jurisprudential factors involved in setting attorney fees and set attorney fees at $309,174. The award was based on the "lodestar method."[2] The trial court on remand accepted plaintiff's counsel's testimony and his reconstructed time sheets as credible, found that $300.00 was a reasonable hourly rate, and found that ninety percent of counsel's work reflected in plaintiff's reconstructed time sheets for counsel and associate counsel on that issue was a fair apportionment of time. Based on a finding of 988.30 total hours spent on all issues, a $300.00 hourly rate, and a ninety percent time allocation, the trial court on remand awarded $309,174 in attorney fees for ARTCO's arbitrary and capricious failure to timely pay maintenance and cure.

It is important to note that maintenance and cure is an ancient, equitable recovery made available to seaman who fall ill or are injured in the service of the ship. In Vaughn v. Atkinson, 369 U.S. 527, 531–32, 82 S.Ct. 997, 1000 (1962), the Supreme Court discussed the history and interpretation of maintenance and cure and provided:

Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery. The policy underlying the duty was summarized in Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528, 58 S.Ct. 651, 653, 82 L.Ed. 993:

'The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in Harden v. Gordon, C.C., Fed.Cas.No. 6047: The protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.'

Admiralty courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards.' Id., at 529, 58 S.Ct. at 654. We noted in Augilar v. Standard Oil Co., 318 U.S. 724, 730, 63 S.Ct. 930, 933, 934, 87 L.Ed. 1107, that the shipowner's liability for maintenance and cure was among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor 'narrowly confined.' Id., at 735, 63 S.Ct. at 936. When there are ambiguities or doubts, they are resolved in favor of the seaman. Warren v. United States, 340 U .S. 523,. 71 S.Ct. 432, 95 L.Ed. 503.

It is undisputed that on April 19, 2010, prior to the original trial on the merits, ARTCO tendered all past due maintenance and cure and stipulated that it would continue to pay maintenance and cure, but with a reservation of rights to contest the issue at trial. Plaintiff reached maximum medical cure on May 9, 2011. At the time of trial in September of 2013, defendants' had paid all outstanding maintenance and cure, which totaled approximately $56,000.

Counsel for the plaintiff argues that the defendants' decision to pay maintenance and cure two years and five months after the accident was not done out of concern for the plaintiff. Payment of the outstanding maintenance and cure was prompted by the deposition of Ms. Stermer, taken in March 2010, and the United States Supreme Court case of Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404, 424, 129 S.Ct. 256, 2575 (2009), which held that a seaman was entitled to the recovery of punitive damages for the "willful and wanton disregard of its maintenance and cure obligations," reversing contrary decisions. In tendering maintenance and cure "under protest," Ms. Stermer argues that ARTCO was simply trying to shield itself from a punitive damages and an attorney fees claim.

However, as found by the trial court on remand, once ARTCO made a payment of past due maintenance and cure and continued to pay pursuant to their stipulation until final cure, but with a reservation of rights to litigate the underlying issue of entitlement to those benefits at trial, the plaintiff still had the obligation to prove up all the elements necessary to recover maintenance and cure. Ms. Stermer had to prove at trial that she was injured in the service of the ship, that she required medical treatment based on that injury, that she was unable to work, and that she was, therefore, entitled to maintenance and cure from date of injury through final cure, plus punitive damages and attorney fees for arbitrary and capricious failure to pay maintenance and cure. In order to prevail on the Jones Act claim, she also was required to prove that she sustained an injury due to the negligence of her Jones Act employer, as well as medical causation of her treatment and disability for the Jones Act claim, plus proof of all damages sought.

ARTCO put up a stout defense, contending from the outset and through initial appeal that there was no accident, no injury, that plaintiff's claims were fraudulent, and that she was not entitled to any recovery whatsoever. The record shows that Ms. Stermer's counsel put on more than sufficient evidence to prove that his client did, indeed, sustain an injury in the service of the vessel. He hired experts on both the negligence and medical causation issues, and successfully prosecuted his client's claims, achieving an excellent result. Ms. Stermer received an award of $636,000 on the Jones Act claim.

Not only did Ms. Stermer's counsel prove entitlement to maintenance and cure, but he was able to put on sufficient evidence such that the original trial court found that ARTCO was arbitrary

and capricious in failing to timely pay maintenance and cure and Ms. Stermer was awarded an additional $300,000 in punitive damages for failure to timely pay maintenance and cure, which resulted in a $936,000 total award, affirmed on original appeal. We quote with approval from the original trial court's excellent written reasons on the punitive damages and attorney fees issue:

ARTCO attempts to avoid any obligation to pay maintenance and cure by claiming, that the accident was a fraud and no injuries were suffered by Stermer while she was in the service of the vessel. This court finds that the (sic) ARTCO has failed to provide evidence of any fraud on the part of Stermer, except for the statements of two supervisors of Stermer who said they did not see her fall. Further, fault or liability plays no role in the determination of an employer's maintenance and cure obligation. Stermer was aboard the ENTERPRISE 24 hours a day–7 days a week-for the 17 days prior to her evaluation and treatment at Western Baptist Hospital. Until her accident, she performed her duties (work) without complaints of pain or inability to perform. After her accident, the symptoms of her injury manifested themselves, i.e. pain, swelling, and the inability to perform her work. This court agrees with Stermer that no evidence exists to indicate where, other than the ENTERPRISE, that Stermer may have suffered from two sprained wrists and a sprained ankle significant enough to warrant narcotic pain medication, splints to both wrists and an air cast on her ankle.

Moreover, a vessel owner is obligated to investigate a claim before denying or terminating benefits Vaughan, 369 U.S. at 530–31, 533, and may refuse to pay maintenance and cure only "if diligent investigation indicates that the seaman's claim is not legitimate." Morales v. Garijak, 829F.2d 1355, at 1360 (5 Cir.1987); and McWilliams v. Texaco, 781F.2d 514 at 518–20 (5 Cir. [ ]1986). Stermer alleges that ARTCO's investigation into this matter, was anything but "diligent," because Bartlett made the decision to label this case fraudulent and call Stermer a liar without having talked face-to-face with a single witness and relying on the statements of two supervisory employees who were primarily responsible for ensuring that Stermer had a safe place to work. ARTCO took this position as early as October 19, 2007, ten (10) days post-accident, when it sent a letter to Stermer stating that it had conducted its investigation. ARTCO maintained that there was no accident and Stermer had sustained no injury.

Additionally, ARTCO had the initial medical report from Western Baptist Hospital of October 17, 2007, stating that Stermer had a bilateral hand and wrist sprain and right ankle sprain, and placed her hands and wrist in splints; various medical reports of Dr. Darrell L. Henderson beginning with his initial examination of Stermer, including his recommendation for a full wrist fusion of the right wrist on February 11, 2008; the medical report of Dr. Larry Ferachi, ARTCO's chosen doctor to examine Stermer, who agreed with Dr. Henderson's recommendation for surgery on June 8, 2009; and the information from ARTCO's engineer, David Glisson, that he had fallen as a result of the bump that took place on October 9, 2007.

Despite all of the above, ARTCO refused to pay maintenance and cure or medical expenses until April 19, 2010, which was two and one-half (2.5) years after the accident and over ten (10) months after the medical report of its own physician, Dr. Ferachi, and numerous demands for maintenance and cure and medical expenses. Dr. Henderson opined that the wrist injury to

Stermer was not a pre-existing injury, and Dr. Ferachi stated that it was a pre-existing injury that was aggravated. In any regards, maintenance and cure applies in both situations.

The court can understand ARTCO's refusal to pay maintenance and cure at the onset of this case, but fails to understand why ARTCO waited an additional ten (10) months after Dr. Ferachi's report before paying same, even under protest. The question that continues to come up is "how did she receive the injuries if she had if she did not receive them in this accident," i.e. two sprained wrists and a sprained ankle. She was on this vessel 24 hours a day, 7 days a week for 17 days before she was seen at Western Baptist Hospital with no prior complaints or an inability to work. There was no evidence of Stermer getting onto the tug, ENTERPRISE, with the injuries diagnosed by Western Baptist Hospital, and no complaints by Sterner of pain, no swelling of wrists and/or ankle, and no inability to perform her duties prior to the accident.

Despite medical and other evidence, ARTCO continued to deny the claim for maintenance and cure of Stermer through the trial in this matter even though it paid Stermer under protest beginning on April 19, 2010, which was two and one-half (2.5) years post-accident and ten (10) months after receiving Dr. Ferachi's medical report that plaintiff required surgery.

Relying on Weeks [Marine, Inc. v. Bowman, 2004 WL 2609967 (E.D.La.2004)], this court finds that ARTCO acted arbitrarily and capriciously in denying Stermer maintenance and cure for her injuries. Accordingly, Stermer is entitled to punitive damages and attorney fees from ARTCO.

At the original trial, defendant was successful only in defending the unseaworthiness claim and the wrongful discharge claim. These issues did not affect the overall result.

As we previously indicated, the purpose of the remand was to take evidence on the attorney fee issue, if needed, articulate a review of the factors provided by law for making an award of attorney fees, find an equitable award of attorney fees in this particular case, and express reasons for ruling thereon. The Supreme Court in Vaughn, held that reasonable attorney fees could be awarded as damages when a seaman had to hire an attorney to recover maintenance and cure. It further specifically held that when there are ambiguities and doubts, they are resolved in favor of the seaman. See Vaughn, 369 U.S. 527.

The trial court on remand, as ordered by this court, "considered the traditional factors pertinent to an award of attorney fees," in its determination of "the appropriate amount of attorney fees for work performed by Ms. Stermer's counsel in the trial court." Stermer, 140 So.3d at 889. In so doing, the trial judge applied the following factors to be taken into consideration when determining the reasonableness of attorney fees, as cited in State, Dept. of Transp. and Development v. Williamson, 597 So.2d 439, 442 (La.1992):

(1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8)

intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge.[3]

The trial court on remand diligently and thoroughly prepared for the hearing. In its well-articulated oral reasons for ruling, the trial judge on remand stated that it had reviewed the entire original trial transcript, all the briefs submitted and all the cases cited in the briefs submitted by both counsel, plus had done independent research on the legal issues. The trial court obviously put a lot of time and thought into preparation for the hearing.

To the point at issue, the trial court on remand clearly rejected defendant ARTCO's argument that no attorney fees were owed after it tendered payment of maintenance and cure under protest:

One other thing I want to address . and that is the defense's position that after the date that they paid maintenance and cure, that the plaintiff is not entitled to any attorney fees after that date, because the claim for attorney fees should only be related to the pursuit of maintenance and cure, and once maintenance and cure is paid, there's no more maintenance and cure to secure and therefore, no attorney fees are due.

Let me start, Mr. Legrand, by telling you I don't buy it. Let me tell you why I don't buy it, and then I'm going to give you an opportunity, briefly, to convince me otherwise. The reason I don't buy it is this: Your position is "We paid maintenance and cure. No attorney fees are due after the date we paid maintenance and cure." Two things: 1) you paid it under protest. Now I'm going to assume, Mr. Legrand that you paid it under protest so you could reserve the right to argue whether or not maintenance and cure was actually due. And, in fact, the defense in your case, as I appreciate, when I read the record, was "we don't believe anything happened aboard this vessel, we don't believe there was any incident aboard this vessel, we don't believe she got injured in any way aboard this vessel," and you presented evidence to that effect and you presented testimony to that effect. So, I'm assuming that it was paid under protest so that you could reserve your right to argue that she was not entitled to it, otherwise, there would be no reason to pay under protest.

Having been an attorney for thirty-one years and involved in many times doing things under protest, it was reserving your right to litigate that issue down the line.

Further, I think that in order for your argument to hold weight, I would have to ignore what the Court of Appeals told you about attorney fees that it awarded to Mr. Curtis, or to the plaintiff, for the work on appeal. The Court of Appeal indicated that the plaintiff was entitled to fees to defend and uphold the maintenance and cure that she already got. If I take that logic and I apply it to your argument, it holds the same. They' re entitled to attorney fees to defend and uphold the maintenance and cure they got.

In addition, they are intertwined and you argue that the plaintiff is not entitled to any fees, trying to prove that maintenance and cure was arbitrarily withheld. That is very disingenuous in my mind. First of all, they can't get attorney fees. They can't be awarded unless it's found that

maintenance and cure was withheld, and that the reasons for doing so are found to be arbitrary and capricious. So, when you paid it, or your client, you did not stipulate "not only did we not pay it timely, we're arbitrary and capricious for doing so." Had you done that, I would buy your argument that from that date forward no attorney fees are due, because there's nothing left to prove, you're going to get them, except the amount; however, you didn't do that, your client didn't do that, and it was their right not to, but as a result, that's where I stand.

(Emphasis added.)

The issue of entitlement to attorney fees for work done in "proving up" the claim at trial after a "conditional tender" of maintenance and cure, but with a "reservation of rights" to contest entitlement to maintenance and cure at trial, appears to be res nova.

In light of the factual findings stated on the record by the trial court on remand and the lack of contrary jurisprudence on this specific issue, finding no manifest error, we affirm the trial court's decision on remand to award attorney fees for arbitrary and capricious failure to pay maintenance and cure for all work done in this case and do not restrict the award to work done prior to the conditional tender of maintenance and cure by ARTCO. See Hayes, ——So.3d ——. Such a decision is in keeping with the liberal interpretation in maintenance and cure cases involving injured seamen as expressed by Vaughn and its progeny. See Vaughn, 369 U.S. 527.

Assignment of Error Number Two

ARTCO also challenges the amount of the $309,174 award of attorney fees set by the trial court on remand claiming that even if plaintiff was entitled to an award for all work done on the case, and not simply for work done until defendant conditionally tendered maintenance and cure, the total award is excessive and an abuse of discretion. ARTCO argues that the trial court on remand failed to properly allocate the time counsel spent on the maintenance and cure issue at trial as opposed to the other more complicated issues in this case.

Ms. Stermer's counsel argued in the trial court on remand, and again on appeal, that the work he did on the entire case was so "intertwined" that he was unable to break down his time sheets such that the time spent solely on the maintenance and cure issue could be clearly separated from time spent in preparation and trial of the entire case. ARTCO claims that it was plaintiff's burden to do so, and that the trial court was clearly wrong in assessing a ninety percent time factor to the maintenance and cure issue in assessing attorney fees for failure to pay maintenance and cure. Again, we review this claim under the manifest error standard as most recently articulated in Hayes.

On remand, the trial court was charged with the task of awarding an "equitable fee" based on all of the facts and circumstances of the case, and in accordance with the relevant factors discussed in the jurisprudence. Williamson, 597 So.2d at 442. Based on the trial court's assessment of plaintiff counsel's credibility and acceptance of his time sheets as reasonable, the trial court did just that and fully explained its reasons for the fee set.

We agree that all of counsel's work was "intertwined" in the sense that in proving the Jones Act claim, the plaintiff necessarily also had to prove entitlement to maintenance and cure. He had to prove that his client was, in fact, injured in the service of the ship, disabled, and needed medical treatment as a result of her work related injury.

Under the manifest error rule, we must give deference to the original trial court's ruling that punitive damages and attorney fees were due because of defendant's arbitrary and capricious failure to pay maintenance and cure when due. As a corollary, we must also give due deference to the excellent work by the trial court on remand and his vast discretion in accepting plaintiff attorney's testimony as credible on the total hours spent and the appropriate hourly rate, as well as its finding that ninety percent of counsel's total time should be allocated to the maintenance and cure issue in order to arrive at the total award. That finding is fully supported by the factual record in this case, as well as the jurisprudence on this issue.

In Clausen v. Icicle Seafoods, Inc., 174 Wash.2d 70, 82, 272 P.3d 827 (3/15/12), cert. denied —— U.S. ——, 133 S.Ct. 199 (2012), the court, on an almost identical issue, stated:

The trial court estimated that 90 percent of the attorneys' time was spent on issues related to maintenance and cure and accordingly, reduced total fees and costs by 10 percent. The court recognized that maintenance and cure issues were present from the beginning of the case and that 12 out of 14 witnesses testified about those issues.

See also Diesler v. McCormack Aggregates Co., 54 F.3d 1074 (1995); Williams v. Kingston Shipping Co. Inc., 925 F.2d 721 (1991).

While it can be legitimately argued that allocation of time in this case is high, we are nevertheless constrained by the manifest error rule. There is considerable evidence in the record allowing a reasonable fact finder to make such a conclusion, especially in light of the jurisprudence approving a high allocation of time when, as here, the issues are attorney fees for arbitrary and capricious failure to pay maintenance and cure. Based on all the circumstances of this case, we affirm the factual findings of the trial court on remand as to the proper allocation of time and as to the computation used, and affirm its finding that an award of $309,174 in attorney fees is equitable under the facts and circumstances of this case. See Hayes, ——So.3d ——; Clausen, 174 Wash.2d 70; Diesler, 54 F.3d 1074.

Answer To Appeal

Plaintiff answered this appeal seeking attorney fees for preparing and trying the issue on remand in the trial court, and for again defending the attorney fee issue on this appeal. Additionally, plaintiff also answered the appeal requesting that this court assess ninety percent of the court costs associated with the trial court remand hearing to the defendants.

However, our review of the record leads us to conclude that the trial court on remand did assess those specific court costs proven by counsel to have been incurred and associated with the original trial as expressed in its ruling. The judgment further taxed all clerk of court costs not

previously paid by defendant to ARTCO. The trial court's findings on the cost issue are likewise within its discretion and are affirmed.

The trial court on remand did not award attorney fees for the work done in preparation and trial of the attorney fees issue on remand, as he had not been asked to do so. Our review of the record indicates that counsel for Ms. Stermer apparently did not specifically request attorney fees for his continued work in preparation and trial of the remand. He was asked specifically at the close of the hearing whether there were any other issues for the court to decide, and responded there were not. Moreover, he prepared the judgment which likewise did not assess attorney fees for the work on remand. Therefore, the failure of counsel for Ms. Stermer to request from the trial court attorney fees for work done on remand resulted in any claim for an award of attorney fees for work on the remand issue to be abandoned. Uniform Rules—Courts of Appeal, Rule 2–12.4.

We award $10,000 in attorney fees for work done on this appeal based on our review of the record, and an estimation of counsel's time successfully defending the trial court's judgment on this appeal. See Vaughn, 369 U.S. 527; Hayes, ——So.3d ——.

CONCLUSION

The judgment of the trial court is affirmed in all respects. This court awards counsel for Adrienne Stermer $10,000 in attorney fees for work performed on appeal. Costs of this appeal are assessed to ARTCO, Agrinational Insurance Company, and Archer–Daniels–Midland Company.

AFFIRMED.

I concur with the majority's conclusions that the trial court did not err with regard to its award of court costs and that Ms. Stermer is not entitled to an award of attorney fees for work performed by her attorney on remand. I respectfully dissent, however, with regard to the majority's conclusion that Ms. Stermer is entitled to attorney fees for work performed in the trial court after ARTCO instituted payment of maintenance and cure benefits.

On remand, ARTCO argued that Ms. Stermer is only entitled to an award of attorney fees for work her counsel performed that was directly related to securing the payment of her maintenance and cure benefits and that she is not entitled to attorney fees for work performed after it began paying her benefits. Ms. Stermer counters ARTCO's contention, arguing that she is entitled to attorney fees throughout the trial and on appeal because in order to preserve her maintenance and cure benefits, she had to continuously work to prove that she was entitled to the benefits and that ARTCO's refusal to pay was callous, arbitrary, and capricious.

As noted by the majority, the issue of attorney fees for work performed in the trial court was remanded "to allow the trial court to receive evidence of what an appropriate award of attorney fees is in this case and to award attorney fees commensurate with said evidence." Stermer v. Archer–Daniels–Midland Co., 14–147, p. 15 (La.App. 3 Cir. 6/4/14), 140 So.3d 879, 889, writ denied, 12–766 (La.5/18/18), 89 So.2d 1197 (emphasis added). Accordingly, the trial court was

to determine an appropriate award of attorney fees for work performed by Ms. Stermer's attorney in the trial court.

The purpose of maintenance and cure is "to provide a seaman with food and lodging when he becomes sick or injured in the ship's service." Vaughan v. Atkinson, 369 U.S. 527 82 S.Ct. 997 (1962). The benefits are intended to protect seamen and to induce employers to protect the safety and health of seamen working for them. Id.

"The payment of maintenance and cure prior to suit does not constitute a waiver of any defenses which might be asserted." Thurman v. Patton–Tully Transp. Co., 619 So.2d 879, 881 (La.App. 3 Cir.1993) (citing Hokanson v. Maritime Overseas Corp., 1974 AMC 948 (E.D.La.1974)). See also, Kuebel v. Dep't of Wildlife & Fisheries, 08–18 (La.App. 4 Cir. 4/15/09), 14 So.3d 20, writ denied, 09–1083 (La.9/4/09), 17 So.3d 964, overruled on other grounds, Fulmer v. Dep't of Wildlife & Fisheries, 10–2779 (La.App.7/1/11), 68 So.3d 499 (State's waiver of sovereign immunity to action); Martinez v. Abdon Callais Offshore, LLC, (E .D. La. 6/10/09), 2009 WL 1649736. Furthermore, pursuant to McCorpen v. Cent. Gulf S.S. Corp., 396 F.2d 547, 549 (5th Cir.1968), cert. denied, 393 U.S. 894, 89 S.Ct. 223 (1968), a seaman is not entitled to maintenance and cure if his employer establishes that the seaman "knowingly concealed material medical information [and] there is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage" when he applied for employment. The McCorpen defense can be raised at any time.

Pursuant to Thurman, 619 So.2d 879, and McCorpen, 396 F.2d 547, an employer always has the right to defend a claim for maintenance and cure benefits. The fact that an employer pays maintenance and cure benefits but contends the benefits are not owed does not entitle a seaman to recover attorney fees. A seaman is only entitled to attorney fees if the employer refused to pay the benefits and the refusal to pay is "callous and recalcitrant, arbitrary and capricious, or willful, callous and persistent." Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir.1987) (abrogated on other grounds by Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir.1995) (en banc)). It logically follows, therefore, that although an employer initially refused to pay maintenance and cure benefits and its refusal was "callous and recalcitrant, arbitrary and capricious, or willful, callous and persistent," but then paid all outstanding benefits and thereafter continued to pay all benefits timely, it is liable only for attorney fees for the period of time during which the benefits were not paid. Otherwise, the employer is subjected to continued penalties for failure to pay maintenance and cure although it instituted payment of the benefits. This would reduce and/or eliminate an employer's incentive to pay maintenance and cure if the employer finds the seaman's claim questionable.

The majority concludes that notwithstanding the fact that ARTCO began paying Ms. Stermer maintenance and cure benefits in April 2010, it paid those benefits "under protest"; therefore, Ms. Stermer is entitled to recover attorney fees for work performed by her attorney throughout the trial-court phase of this litigation. The designation of the payment "under protest" has no legal significance whatsoever. An employer who pays maintenance and cure benefits from the date of injury has the legal right to litigate the issue of whether the claimant is entitled to those benefits throughout the entire trial without designating the payments "under protest" and cannot be assessed with attorney fees. Whether the payments are made is the issue. Payment of

maintenance and cure "under protest" does not afford the employer any more rights or subject the seaman to any additional burden.

For these reasons, I dissent from the majority's affirmation of the trial court's award of attorney fees for work performed by Ms. Stermer's attorney after ARTCO began paying maintenance and cure benefits.

I agree with the majority's acceptance of the trial court's methodology for calculating the attorney fees ARTCO owes Ms. Stermer, but I would calculate attorney fees based on Ms. Stermer's attorney's itemized bill with an ending date of May 5, 2010. As of that date, the maintenance and cure benefits had been received by Ms. Stermer's attorney, documentation concerning the benefits had been verified by the attorney, and the benefits had been distributed to Ms. Stermer. Accordingly, I would award $60,210 in attorney fees which represents 90% of the itemized attorney fees through May 5, 2010, at a rate of $300 per hour.

FOOTNOTES

1. We note that the issue of attorney fees was tried before a different trial judge than the one who presided over the trial on the merits because the initial trial judge retired before the matter was remanded for a trial on attorney fees and costs and a new judge was elected in that court section.

2. The Louisiana Supreme Court in Covington v. McNeese State Univ., 12–2182 pp. 5–6, (La.5/7/13), 118 So.3d 343, 348 (emphasis added), in defining "lodestar method" of calculating attorney fees stated:The U.S. Supreme Court established in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), that the initial estimate of a reasonable attorney fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, otherwise known as the "lodestar method." A "reasonable hourly rate" is to be calculated according to the prevailing market rates in the relevant community. Blum v. Stenson, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). "The amount of the fee, of course, must be determined on the facts of each case." Hensley, 461 U.S. at 429, 103 S.Ct. at 1937.

3. The court in Williamson noted that the factors for a determination of a reasonable attorney fee award were derived from Rule 1.5(a) of the Rules of Professional Conduct.

CONERY, Judge.

PICKETT, J., concurs in part, dissents in part, and assigns reasons.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 4, 2013 Decided: June 25, 2013)

Docket No. 12-834-cv

JOHN PADILLA,

Plaintiff-Appellee,

CHRISTOPHER B. CUPAN,

Plaintiff,

v.

MAERSK LINE, LIMITED,

Defendant-Appellant.

Before: B.D. PARKER, LOHIER, and CARNEY, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Leisure, *J.*) in favor of a class of seafarers, discharged from service on Maersk ships due to illness or injury. Plaintiffs sought, as part of unearned wages, overtime pay that they would have earned from the time of their discharge until the end of their respective voyages. The district court ruled that the seafarers were entitled to such pay. We affirm.

AFFIRMED.

JOHN J. WALSH, Freehill, Hogan & Mahar, LLP, New York, NY, *for Defendant-Appellant.*

DENNIS M. O'BRYAN, O'Bryan Baun Karamanian, Birmingham, MI, *for Plaintiff-Appellee.*

BARRINGTON D. PARKER, *Circuit Judge*:

Defendant-Appellant Maersk Line, Limited ("Maersk") appeals from a judgment of the United States District Court for the Southern District of New York (Leisure, *J.*) granting summary judgment in favor of a class of seafarers, discharged from service on Maersk ships due to illness or injury. These seafarers sought, and the district court granted, as part of unearned wages, overtime pay that they would have earned from the time of their discharge until the end of their respective voyages. It is not disputed that seafarers on Maersk voyages regularly received substantial overtime payments. Indeed, by Maersk's own calculations, overtime payments regularly exceeded each class member's base wages. The principal issue on this appeal is whether unearned wages recoverable by ill or disabled seafarers under general maritime law include overtime pay that they would have earned had they completed their voyages.

On October 30, 2006, John Padilla began his contract as Chief Cook aboard a Maersk vessel, the MAERSK ARKANSAS. His voyage was scheduled to end on February 26, 2007. However, on Nov. 6, 2006, Padilla sustained an abdominal injury, was relieved of service at the Port of Salalah in Oman and discharged as unfit for duty. The Particulars of Engagement and Discharge indicated that, at the time of his discharge, Padilla was entitled to the balance of his earned wages, which included six days of regular pay plus thirty-four hours of overtime pay.

Maersk voluntarily paid Padilla unearned wages at his base pay rate, along with "maintenance and cure,"[1] for the duration of his contract, but declined to pay him overtime wages. In May 2007, Padilla sued on behalf of himself and a proposed class of similarly situated seafarers

[1] "Maintenance" is the cost of lodging and food and "cure" is medical treatment.

seeking the overtime pay he would have earned on his voyage had he not been injured. As noted above, it is uncontested that prior to his injury, Padilla, like other class members, routinely earned substantial overtime in excess of 100% of base income.

The district court addressed the merits of Padilla's individual claim prior to considering class certification. Padilla moved for summary judgment, which the court granted in March 2009. Padilla contended that his entitlement to unearned wages was governed by general maritime law. Maersk did not seriously contest this proposition but argued that the collective bargaining agreement between Padilla's union and Maersk limited his recovery to unearned wages excluding overtime. The district court correctly concluded that the application of general maritime law could be limited, but not abrogated, in collective bargaining agreements. Turning to the Standard Freightship Agreement ("CBA"), the collective bargaining agreement between Padilla's union, Seafarers International Union, and Maersk, the district court concluded that the CBA did not address the inclusion of overtime pay in the calculation of Padilla's unearned wages. The court then held that unearned wages include overtime pay where the seafarer reasonably expected to earn overtime pay on a regular basis throughout his service in an amount that was not speculative and would have earned it "but for" an illness or injury. The district court found that Padilla satisfied this test and awarded him $13,478.40 in overtime pay.

The case was reassigned to Hon. Richard M. Berman, who, in October 2010, certified a class of seamen who suffered illness or injury while in service aboard Maersk ships and who, after discharge, were paid unearned wages, maintenance and cure until the end of their voyage, but were not paid overtime wages as part of unearned wages. After further proceedings, in January 2012, the court awarded damages to the class in the amount of $836,819.40. Following this award and after

Maersk filed an appeal in this court, Maersk sought to amend the judgment on two separate occasions. In July 2012, the court granted Maersk's first motion to amend to remove from the class two seamen who had filed separate suits. Shortly thereafter, but well after the end of the period allowed for filing a motion under Fed. R. Civ. P. 59(e), Maersk moved to amend the judgment again, this time to remove fifteen officers from the class. Maersk argued that the employment benefits of these officers were governed by a separate collective bargaining agreement, the American Maritime Officers Union Collective Bargaining Agreement ("AMOU CBA"), which expressly limited unearned pay to "benefits/wages only." The district court denied the motion finding that it was untimely, concerned with "wholly independent grounds" from those that led to the amended judgment and that Maersk failed to show "excusable neglect" for its delay in seeking the additional amendment.

On appeal, Maersk argues principally that the class is not entitled to overtime pay because overtime is not encompassed within the definition of "unearned wages" under general maritime law. Padilla argues that, given that overtime was a substantial and routine component of the seafarers' compensation, they were entitled to overtime payments because, under general maritime law, they must be placed in the same position they would have been in had they not been injured or disabled. We agree with Padilla.

We review *de novo* a district court's grant of summary judgment, construing the evidence in the light most favorable to the non-movant, asking whether there is a genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 300 (2d Cir. 2003).

DISCUSSION

Under general maritime law, seamen who have become ill or injured while in a ship's service have the right to receive maintenance and cure from the owner of the vessel. *Ammar v. United States*, 342 F.3d 133, 142 (2d Cir. 2003). In addition, a seaman is entitled to recover unearned wages, the wages he would have earned if not for the injury or illness. *Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 315 (2d Cir. 1990) ("When a seaman is injured during his employment on a ship, the ship operator is liable not only for the seaman's maintenance and cure, but also for lost wages.") (citing *The Osceola*, 189 U.S. 158, 175 (1903)); *see also Griffin v. Oceanic Contractors, Inc.*, 664 F.2d 36, 39 (5th Cir. 1981) ("The right of an injured seaman to recover unearned maintenance-wages-cure (M-W-C) under the general maritime law of the United States until either (1) the end of the voyage or (2) the end of the contractual period of employment is well established.") (citing *The Osceola*, 189 U.S. at 175), *rev'd on other grounds*, 458 U.S. 564, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982). While Padilla bears the burden of proving his right to maintenance and cure, claims for these are construed expansively and doubts regarding a shipowner's liability for maintenance and cure should be resolved in favor of the seamen. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962); *Breese v. AWI, Inc.*, 823 F.2d 100, 104 (5th Cir. 1987).

As the district court correctly recognized, while the entitlement to unearned wages arises under general maritime law, rates for unearned wages may be defined and modified in collective bargaining agreements, *see Ammar*, 342 F.3d at 146-47, and Maersk contends that the CBA should control our interpretation of the unearned wages issue. The CBA at issue here was between large parties well-equipped to represent and protect their respective interests. Under these circumstances, the appropriate accommodation between federal maritime law and federal common law for the

enforcement of collective bargaining agreements is to allow unionized seamen to bargain for the rights and privileges they prefer in exchange for limitations on various components of compensation so long as the negotiations are legitimate and the seamen's interests are adequately protected. *Id.* In light of these considerations, our responsibility is to determine the actual terms agreed to by the parties to the CBA and not to impose a limitation where none was intended or agreed to. *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 131 (2d Cir. 2005). Consequently, as the Ninth Circuit held in *Lipscomb v. Foss Mar. Co.*, 83 F.3d 1106, 1109 (9th Cir. 1996), only if the CBA expressly provides for a different computation of the seafarers' remedies does it modify the general maritime law. Here, however, the CBA does not limit the availability of unearned wages and so we must apply general maritime law.

Because much of Padilla's income was derived from overtime compensation, the district court awarded him overtime pay as part of his unearned wages, reasoning that Padilla was entitled to recover in full the compensation that he would have earned "but for" his injury. We agree with this approach. The record reflects that it was the custom and practice for seafarers working for Maersk to derive substantial income from overtime compensation and that, consequently, such compensation was a common expectation of both the seamen and of Maersk. As noted, Padilla and other Maersk seafarers regularly earned 100% or more of their base pay in overtime wages. Significantly, the district court concluded that the calculation of the overtime Padilla would have worked was not speculative. *Cf. Griffin*, 664 F.2d at 40 (upholding the district court's decision to deny overtime because "[t]he actual amount of overtime was uncertain, and hence any inclusion of such would have been purely speculative"). In fact, the calculations of the overtime pay due to the class were essentially undisputed: a Maersk manager easily calculated each seaman's expectation of

his overtime from records of past work for Maersk. Thus we agree that the district court correctly applied the "but for" test.[2]

In reaching this conclusion, we align ourselves with the other circuits who apply the same test. *See Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122-24 (11th Cir. 1995) (holding that tips should be included in the measure of unearned wages because a seaman would have earned them but for his injury); *Lipscomb*, 83 F.3d at 1109 (concluding that accumulated time off is part of seaman's unearned wages under general maritime law); *Aksoy v. Apollo Ship Chandlers, Inc.*, 137 F.3d 1304, 1306 (11th Cir. 1998) (calculating unearned wages as average tip income plus guaranteed minimum wage); *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 346 (5th Cir. 1982) (holding that accumulated leave time is part of total wages and payable in addition to maintenance); *Shaw v. Ohio River Co.*, 526 F.2d 193, 199 (3d Cir. 1975) (same).

II.

Maersk also appeals the district court's decision denying its motion to amend the amended judgment under Rule 59(e) by removing the fifteen officers whose employment was governed by the AMOU CBA. The district court denied the motion because it was six months late, because it concerned "wholly independent grounds" from those that gave rise to a previously amended judgment and because Maersk's explanation that it "overlooked" the AMOU CBA did not constitute excusable neglect. On appeal, Maersk argues that the decision to amend the judgment on

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[2] Maersk also argues that by including overtime pay in "unearned wages" the district court expanded maritime remedies beyond those in the Jones Act, 46 U.S.C. § 30104, which permits the recovery of overtime only upon proof of negligence and a causal connection between the negligence and unseaworthiness and injury. According to Maersk, "a cause of action that existed before the Jones Act (unearned wages) survived the Jones Act, but damages permitted by the Jones Act (overtime wages) must be limited by the conditions in the Act." Appellant's Brief at 29. These arguments were not raised before the district court, and we decline to consider them here. *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("Entertaining issues raised for the first time on appeal is discretionary with the panel hearing the appeal.").

this substantive issue could have been made conveniently and without waste of judicial resources. Maersk also argues that "class actions by their nature should be treated differently under Rule 59 . . . [because] subclasses may emerge unexpectedly" and "may have to be decertified in light of the proceedings." Appellant's Brief at 38.

Maersk's arguments are unavailing. We review the denial of a motion to amend the judgment under Rule 59(e) for abuse of discretion. *See Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 150 (2d Cir. 2008). "A court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within a range of permissible decisions." *Johnson ex rel. United States v. Univ. of Rochester Med. Ctr.*, 642 F.3d 121, 125 (2d Cir. 2011). A motion to alter or amend a judgment under this rule must be filed no later than 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). Because Maersk did not meet this time limitation, its motion is considered under Rule 60(b) and Maersk must demonstrate "excusable neglect." *See Stevens v. Miller*, 676 F.3d 62, 67-68 (2d Cir. 2012); *Lora v. O'Heaney*, 602 F.3d 106, 111 (2d Cir. 2010). When assessing claims of "excusable neglect" we look to the following so-called *Pioneer* factors : "(1) the danger of prejudice to the [non-movant], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)) (quotation marks and brackets in original omitted).

Our Circuit focuses closely on the third *Pioneer* factor: the reason for the delay, including whether it was within the reasonable control of the movant. *Id.* The district court concluded that

Maersk did not offer a valid reason for its delay since Maersk stated only that its argument pertaining to the officers had been "overlooked" during the two-year period following class certification. Maersk offered no explanation as to why it did not raise the point that the officers were not entitled to overtime two months earlier when it made its first motion to amend the judgment to remove other plaintiffs. Because a delay attributable solely to a defendant's failure to act with diligence cannot "be characterized as 'excusable neglect'," we see no abuse of discretion by the district court in denying the motion. *Dominguez v. United States*, 583 F.2d 615, 617 (2d Cir. 1978).

CONCLUSION

For the foregoing reasons, we **affirm** the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 12, 2013
Lyle W. Cayce
Clerk

No. 12-30041

WALLACE BOUDREAUX,

Plaintiff - Appellant

v.

TRANSOCEAN DEEPWATER, INC.

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

Before HIGGINBOTHAM, CLEMENT, and HAYNES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Our prior opinion is vacated and withdrawn, and this opinion is substituted in its place.[1] This case presents the question of whether a Jones Act employer who successfully establishes a defense to liability for further maintenance and cure under *McCorpen v. Central Gulf Steamship Corp.*[2] is

[1] No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is DENIED.

[2] 396 F.2d 547 (5th Cir. 1968).

thereby automatically entitled to restitution for benefits already paid. The district court answered in the affirmative, creating a right of action never before recognized in maritime law. We reverse and render.

I.

Wallace Boudreaux began working for Transocean Deepwater, Inc. ("Transocean") in January 2005. He failed to disclose serious back problems in Transocean's pre-employment medical questionnaire, affirmatively answering "no" to several inquiries regarding any history of back trouble. Less than five months after his hire, Boudreaux claimed that he had injured his back while servicing equipment. As a consequence, Transocean paid the seaman maintenance and cure for nearly five years.

In April 2008, Boudreaux filed suit against Transocean, alleging a right to further maintenance and cure, seeking punitive damages for Transocean's alleged mishandling of past benefits, and asserting claims for Jones Act negligence and unseaworthiness. During discovery, Transocean obtained evidence of Boudreaux's pre-employment history of back problems. Transocean filed an unopposed motion for partial summary judgment on Boudreaux's claim for further benefits, invoking *McCorpen* as a defense to maintenance and cure liability. Under *McCorpen*, a vessel owner's obligation to pay maintenance and cure to an injured seaman terminates upon proof that the seaman, in procuring his employment, "intentionally" and "willfully" concealed a material medical condition causally linked to the injury later sustained.[3]

The district court granted Transocean's unopposed motion. Thereafter, Transocean filed a counterclaim to recover the maintenance and cure payments it had already made to Boudreaux. Transocean moved for summary judgment

[3] 396 F.2d at 549; *Johnson v. Cenac Towing Inc.*, 544 F.3d 296, 301 (5th Cir. 2008).

on the counterclaim, contending that its successful *McCorpen* defense automatically established its right to restitution under general maritime law. Prior to the district court's ruling on the motion, Transocean and Boudreaux reached a bracketed settlement that resolved Boudreaux's Jones Act negligence and unseaworthiness claims and left for decision only the viability of Transocean's proposed counterclaim for restitution. Under the settlement, Boudreaux was entitled to a lesser sum of money if the court recognized the counterclaim and a greater sum if it did not.

Though Transocean acknowledged that its restitution-via-*McCorpen* theory was novel, it urged the district court to fashion a new maritime right of action based on state law principles of fraud and unjust enrichment. In a thoughtful opinion, the district court agreed and awarded summary judgment to Transocean on its counterclaim, albeit without accepting Transocean's state-law theories. Boudreaux appeals.

II.

In light of the parties' bracketed settlement, this case turns on the purely legal question of whether a Jones Act employer who has paid maintenance and cure to a seaman injured in its employ is, upon successfully establishing a *McCorpen* defense to further liability, automatically entitled to a judgment against the seaman for benefits already paid. Transocean made a strategic decision not to litigate this case on its facts; rather, it asks this Court to hold that *any* employer who establishes a *McCorpen* defense is automatically entitled to restitution. We decline the invitation.

We begin with an overarching reality: the First Congress, convening in New York, created the federal district courts primarily in service of the maritime law, thereby continuing the British law of the sea. Under that comprehensive

body of jurisprudence, whose origins trace back to the middle ages, a seaman injured in his employ enjoys a right to maintenance and cure — a small daily stipend to pay for food, lodging, and basic medical care.[4] The right is intrinsic to the employment relationship and essentially unqualified: it cannot not be contracted away by the seaman,[5] does not depend on the fault of the employer,[6] and is not reduced for the seaman's contributory negligence.[7]

To be sure, it has always been the rule that a seaman can lose the right to maintenance and cure through gross misconduct. Traditionally, this exception was narrowly confined to "injuries or illnesses resulting from extreme drunkenness, brawls or the contraction of venereal disease."[8] In *McCorpen*, this Court clarified that the exception includes instances where a seaman procures his employment by "intentionally" and "fraudulently" concealing a material medical condition causally related to the injury later sustained.[9] The requisite quantum of proof under *McCorpen* is the same as that for fraud claims. But

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[4] 1 THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 6-28 (5th ed. 2012); *see also Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938) ("The maintenance exacted is comparable to that to which the seaman is entitled while at sea, and 'cure' is care, including nursing and medical attention during such period as the duty continues.").

[5] *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 279 (5th Cir. 2007) ("[M]aintenance and cure is an intrinsic part of the employment relationship, separate from the actual employment contract. . . . [it] cannot be contracted away.").

[6] *Calmar*, 303 U.S. at 527 ("The duty, which arises from the contract of employment, does not rest upon negligence or culpability on the part of the owner or master.").

[7] *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 379 (1918).

[8] 1B BENEDICT ON ADMIRALTY § 45 (Matthew Bender ed. 2012).

[9] *McCorpen*, 396 F.2d at 549. One of the earliest published cases to develop a *McCorpen*-esque defense to maintenance and cure liability is the Third Circuit's decision in *Lindquist v. Dilkes*. *See* 127 F.2d 21, 22–23 (3d Cir. 1941).

McCorpen never addressed the issue of restitution for benefits already paid.[10] Indeed, *McCorpen* itself is in tension with *Still v. Norfolk & Western Railway Co.*,[11] in which Justice Black clarified that a worker's fraud in procuring his employment does not vitiate the employment relationship, allowing him to maintain a suit for damages under the Federal Employers' Liability Act.[12] Courts including ours have since recognized that *Still*'s logic and congressionally rooted paternal policy applies with equal force to seamen.[13] Yet if the seaman's dishonesty does not terminate his status as seaman or his damages remedy, the right to maintenance and cure ought be an *a fortiori* case; after all, it is an essential part of the employment relationship — a down payment on damages that allows the seaman to subsist and pay for basic medical expenses in the

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[10] *See McCorpen*, 396 F.2d at 549; *see also Patterson v. Allseas USA*, 145 F. App'x 969, 970 (5th Cir. 2005) ("The issue of whether a shipowner may affirmatively recover maintenance and cure payments it makes to a seaman if the shipowner makes these payments before learning of the seaman's conduct was not before the court in *McCorpen* . . . we decline to decide this difficult *res nova* issue on this record.").

[11] 368 U.S. 35 (1961).

[12] *See id.* at 45 ("[T]he status of employees who become such through other kinds of fraud . . . must be recognized for purposes of suits under the Act. And this conclusion is not affected by the fact that an employee's misrepresentation may have, as is urged here, contributed to the injury or even to the accident upon which his action is based.").

[13] *See, e.g., Johnson*, 544 F.3d at 301–02 ("The Supreme Court's decision in *Still* makes clear that a seaman . . . is not barred from suit under the Jones Act because he conceals a material fact in applying for employment." (citations omitted) (internal quotation marks omitted)); *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005) ("The Supreme Court has effectively foreclosed any argument that misrepresentations in an application for employment might void the necessary employment relation.") (quoting *Reed v. Iowa Marine & Repair Corp.*, 143 F.R.D. 648, 651 (E.D. La. 1992)); *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 989–90 (9th Cir. 1987) ("Maintenance and cure . . . derives from a seaman's employment on a vessel . . . . The remedial nature of the Jones Act and maritime law requires a less technical, contractual definition of 'employee' than Sealand asks us to use.") (citing *Still*, 368 U.S. at 45)).

immediate aftermath of his injury.[14] Though the viability of the *McCorpen* defense cannot seriously be questioned at this late hour, Transocean's novel attempt to extend the defense into an affirmative right of recovery finds virtually no support, and we are not inclined to accede.[15]

The district court's concern with the egregious facts here is understandable, but the sweeping counterclaim it endorses would mark a significant retreat from our hoary charge to safeguard the well-being of seamen.[16] Already, even without fraud, an employer may offset any Jones Act damages recovered by the seaman to the extent they duplicate maintenance and cure previously paid.[17] This, if the employer "show[s] that the damages assessed against it have in fact and in actuality been previously covered."[18] As a fully developed Jones Act damages model duplicates, "in fact and in actuality," past payments for maintenance and cure, it is not clear that the current regime affords a dishonest seaman anything more than the sums to which he is already

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[14] *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 18 (1963) ("[R]emedies for negligence, unseaworthiness, and maintenance and cure . . . serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery.").

[15] In *Vitcovich v. Ocean Rover O.N.*, an unpublished memorandum decision, the Ninth Circuit sanctioned a restitution-via-*McCorpen* counterclaim; however, the decision is devoid of analysis. *See* 1997 WL 21205 (9th Cir. 1997). Courts that have meaningfully engaged with the proposed counterclaim's broader implications for maritime practice have rejected *Vitcovich*. *See Dolmo v. Galliano Tugs, Inc.*, 2011 WL 6817824, at *2 (E.D. La. 2011), *aff'd* 479 F. App'x 656 (5th Cir. 2012); *Hardison v. Abdon Callais Offshore, LLC*, 2012 WL 2878636, at *7 (E.D. La. 2012); *Am. River Transp. Co. v. Benson*, 2012 WL 5936535, at *5 (N.D. Ill. 2012); *Cotton v. Delta Queen Steamboat Co., Inc.*, 36 So. 3d 262 (La. Ct. App. 2010).

[16] *See Karim v. Finch Shipping Co. Ltd.*, 374 F.3d 302, 310 (5th Cir. 2004) ("[T]he protection of seamen was one of the principal reasons for the development of admiralty as a distinct branch of law." (citation omitted)).

[17] *See Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1171 (5th Cir. 1982).

[18] *Id.* at 1171 (internal quotation marks omitted).

entitled under *Still* — unless the damages recovery is insufficient to absorb the prior payments.[19] Yet we are urged to strike a new balance and allow an employer who establishes a *McCorpen* defense to automatically recover prior payments, without requiring the employer to prove duplication and regardless of the outcome of the primary suit. In cases where no damages are recovered, or the award is insufficient to offset the seaman's restitution liability, the employer would gain an affirmative judgment against the seaman. Although most likely uncollectible, the judgment would stand as a serious impediment to the seaman's economic recovery, and its threat would have a powerful *in terrorem* effect in settlement negotiations. The high-low settlement confected by the parties in this case evidences this effect, hinging on whether the risk factor of affirmative recovery will be allowed by this Court.

Transocean asks us to weigh again conflicting values — of protecting seamen from the dangers of the sea, and employers from dishonesty. But the existing regime hardly leaves employers powerless in the face of seaman fraud. Contrary to Transocean's suggestion, an employer is entitled to investigate a claim for maintenance and cure before tendering any payments to the seaman — without subjecting itself to liability for compensatory or punitive damages.[20]

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[19] We have recognized that cure payments are inherently duplicative of a Jones Act damages award for past medical expenses. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 361 (5th Cir. 1991). Maintenance payments also duplicate a lesser-included portion of a Jones Act recovery, as they compensate the seaman for the loss of fringe benefits (food and lodging) he would have enjoyed aboard the vessel had he not been injured. *See, e.g., Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 490 (5th Cir. 1985) (holding that a Jones Act damages award for lost compensation includes both wages and fringe benefits); *see also Averett v. Diamond Offshore Drilling Servs., Inc.*, 980 F. Supp. 855, 859 (E.D. La. 1997) ("[The seaman] has already received wages plus fringe benefits which included the food and lodging as part of his general damage award under the Jones Act and General Maritime Law. Thus, he is not entitled to recover this item under his maintenance and cure remedy.").

[20] *See Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987) ("Upon receiving a claim for maintenance and cure, the shipowner need not immediately commence payments; he is entitled to investigate and require corroboration of the claim. . . . A shipowner who is in

If the employer finds any "causal link" between the seaman's present injury and a concealed prexisting disability, it can bring suit under *McCorpen* and terminate its obligation to pay — even if the seaman's on-the-job accident (and the employer's negligence) contributed to the injury. And to the extent that the employer has already paid benefits, it is entitled to recoup them when there are damages to offset. In our view, this scheme achieves a fair reconciliation between protecting seamen in the wake of debilitating on-the-job injury and ensuring that shipowners can protect themselves from liability for sums attributable to concealed preexisting injuries. The scheme has held its own for decades and we are not so bold as to now claim a new view — one that the hundreds before us have either overlooked or rejected.

Today, we merely render explicit what has been implicit for many years: that once a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman's damages award — not by an independent suit seeking affirmative recovery. The case for exercising our extraordinary power to create a new right of action has not been made. There is only the change of advocates and judges, by definition irrelevant to the settling force of past jurisprudence — always prized but a treasure in matters maritime. This against the cold reality that the sea has become no less dangerous, and the seaman no less essential to maritime commerce.

III.

We REVERSE the district court's order awarding summary judgment to Transocean on its counterclaim and RENDER judgement for Boudreaux.

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fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the maintenance and cure[,] [not compensatory or punitive damages].").

EDITH BROWN CLEMENT, Circuit Judge, concurring in the judgment.

Transocean asks us to recognize a counterclaim for restitution upon a successful establishment of a *McCorpen* defense. While I believe that such a counterclaim is possible under maritime law and general equitable principles, *see Pizani v. M/V Cotton Blossom*, 669 F.2d 1084, 1089 (5th Cir. 1982) ("A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity." (quoting *The David Pratt*, 7 Fed. Cas. 22, 24 (D. Me. 1839)), the majority has expressed concern about recognizing this counterclaim wholesale with little in terms of caselaw to guide us.[1] Given the lack of precedent on this issue, the majority does not see this case as the ideal vehicle for evaluating the proposed counterclaim because it does not present sufficient information on the practical effect the claim would have on a seaman.

Although I concur in the judgment—if not the discussion of *Still v. Norfolk & Western Railway Co.*—I would recognize (not inconsistently with the majority opinion) that an employer may assert a counterclaim for maintenance and cure as a set-off to Jones Act damages when restitution will not result in an undue adverse impact on the seaman, and when maintenance and cure is not entirely duplicative of Jones Act damages. *Cf. Colburn v. Bunge Towing, Inc.*, 883 F.2d

[1] *But see Souviney v. John E. Graham & Sons*, No. 93-0479, 1994 WL 416643, at *5 (S.D. Ala. 1994) (unpublished) ("Because plaintiff intentionally concealed material facts about the very back injury for which he now seeks recovery against the defendant . . . as a matter of law, plaintiff is not entitled to receive maintenance and cure benefits. To the extent that such benefits have been paid by the defendant, the defendant is entitled to recover the amount of those benefits by way of judgment against the plaintiff."); *Quiming v. Int'l Pac. Enters., Ltd.*, 773 F. Supp. 230, 235-37 (D. Haw. 1990) (granting a counterclaim for $30,000 of maintenance and cure after defendants established that the plaintiff was never legally entitled to receive the benefits); *see also Bergeria v. Marine Carriers, Inc.*, 341 F. Supp. 1153, 1154-56 (E.D. Pa. 1972) ("In addition to our finding that [a] counterclaim [for improperly paid maintenance and cure] is cognizable within the maritime jurisdiction, it must also be allowed as a contractual set-off.").

372, 378 (5th Cir. 1989).[2] I see nothing in our caselaw at variance with this conclusion, and believe that it is necessary, especially in the wake of *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), for this court to be able to continue to promote the "combined object of encouraging marine commerce and assuring the well-being of seamen." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943).

[2] This is the result Boudreaux and Transocean sought by way of their bracketed settlement agreement. On the facts of this case, I would find recovery permissible.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2011

(Submitted: December 2, 2011 Decided: July 20, 2012)

Docket No. 10-5181-cv

RICHARD MESSIER,

Plaintiff-Appellant,

-v.-

BOUCHARD TRANSPORTATION,

Defendant-Appellee.

Before:

HALL, LYNCH, LOHIER, *Circuit Judges.*

Plaintiff-Appellant, a seaman, contracted lymphoma and sued his former employer, a tugboat operator, seeking *inter alia* maintenance and cure. Undisputed evidence establishes that the seaman had lymphoma during his maritime service. But it is also undisputed the disease did not present any symptoms at all until *after* his service. After concluding the disease did not "manifest" itself during the seaman's service, the district court granted summary judgment for the tugboat operator.

Because the seaman's illness indisputably occurred *during* his service, he is entitled to maintenance and cure regardless of when he began to show symptoms. We