ADMIRALTY PRACTICUM

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JOSEPH A. CALAMARI

ADMIRALTY LAW SOCIETY

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING OWNER OF DAMAGED VESSEL ATTORNEY FEES AS A SANCTION AGAINST TOWING VESSEL OWNER, NOR DID IT ABUSE ITS DISCRETION IN NOT FURTHER LOWERING ITS AWARD OF ATTORNEY FEES

Moench v. Marquette Transportation Company Gulf

F.3d (2016)

United States Court of Appeals for the Fifth Circuit

(Filed September 29, 2016)

The Fifth Circuit Court of Appeals held that the pre-casualty value of the vessel was determined to be $417,000 and that the cost to repair the vessel exceeded its pre-casualty value and was a constructive total loss. The Fifth Circuit also found that the tow owner's substantial rights were not affected by the district court's exclusion of expert testimony and that the district court did not abuse its discretion in awarding the owner of the damaged vessel fees, and did not abuse its discretion in not further lowering its award of attorney fees.

Plaintiff- Appellee George T. Moench filed suit against Marquette Transportation Company for damages the appellants' towing vessel caused Mr. Moench's private vessel after colliding with it.[1]

Moench's private vessel was located in a fleeting facility to protect it from expected flooding in Louisiana.[2] The river that the towing vessel floated on was encountering hostile tides, and the captain took a short coffee break and left the vessel's command to an on-duty deckhand who was supposed to be monitoring the situation.[3] However, when the captain returned, the river current had gotten worse and overwhelmed the towing vessel.[4] Therefore, out of the safety for the two barges in tow, the captain proceeded towards allision with the private vessel.[5] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier."[6] The allision saved damaging the two barges in tow, but the private vessel in turn was damaged.[7]

Moench asserted general maritime negligence and unseaworthiness claims against Marquette.[8] Moench's expert testified that the pre-casualty value of his vessel was between $850,000 to $1.5 million.[9] A pre-casualty value is the total value of an object before an unforeseen event harms the value like a natural disaster, shipwreck and the like. He testified that the replacement cost, less depreciation of the vessel was $5 million-$7.5 million.[10] In contrast, Marquette's first expert testified that the pre-casualty value was $50,000, the second expert

[1] *Moench v. Marquette Transportation Comp. Gulf.,* F.3d WL (5th Circuit 2016).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] BLACK'S LAW DICTIONARY (10th ed. 2014).
[7] *Moench v. Marquette Transportation Comp. Gulf.,* F.3d WL (5th Circuit 2016).
[8] *Id.*
[9] *Id.*
[10] *Id.*

testified that the pre-casualty value was $75,000-$100,000, and the third expert testified that the repair costs would total $120,000.[11]

The district court concluded the vessel was a constructive total loss,[12] that the pre-casualty value of the vessel was $417,000 and found that Marquette's handling of the case was an abuse of the process and bad faith.[13] Overall, it awarded Moench $295,436.09 that represented the pre-casualty value of the vessel, less the value of materials and equipment that Moench could have preserved following the allision.[14] It also found that reasonable attorneys fees should be awarded to Moench and that is also included in the number.[15]

On appeal, Marquette asserted that the district court erred in its constructive total loss determination, in refusing to allow Larry Strouse (Marquette's third expert) to opine on the vessel's pre-casualty value, and imposing attorneys fees as a sanction for its handling of the case and awarding the amount of fees.[16]

In terms of the constructive total loss determination the Fifth Circuit held that the pre-casualty figure of $417, 000 provided by the district court was valid, considering that court had the benefit of witnessing expert testimony on the price and value of the private vessel.[17] The private vessel was unique, therefore the calculations were based on purchase price and cost of materials and equipment to improve it, rather than comparable sales value.[18] The Fifth Circuit upheld the district court's determination that that the cost of repairing the severely damaged private vessel exceeded its pre-casualty value and, therefore, a constructive total loss was present.[19]

The Fifth Circuit then proceeded to discuss the exclusion of one of the recorded repair experts from testifying on the pre-casualty amount.[20] It declined to find issue with the district court's decision to not include testimony from the repairs expert on the pre-casualty amount of the private vessel.[21] A pre-casualty amount was not included in the repairs expert's report and even if he was made to testify as to an amount it would likely not change the outcome of the decision, but rather confirm the totals reached by Marquette's other experts.[22]

Finally, in assessing the attorneys fee award, the Fifth Circuit upheld the district court's findings that Marquette acted in bad faith when it continued to contest liability throughout the trial proceedings, despite having knowledge Moench was not involved in the allision, but rather Marquette's captain sole actions.[23] The district court was justified in issuing sanctions and was in their authority as the *Chambers* test indicates, "sanctions are warranted when a party

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[11] *Id.*
[12] A constructive total loss is an insurance term where the cost of a repair for an item is more than the current value of that item. BLACK'S LAW DICTIONARY (Online 2nd Ed.).
[13] *Moench v. Marquette Transportation Comp. Gulf.,* F.3d WL (5th Circuit 2016).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

knowingly or recklessly raises an objectively frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent."[24]

The attorneys fee calculation was based on the two-step lodestar test where, "a court must first calculate the lodestar amount by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers."[25] The court then has the freedom to decrease the amount based on the circumstances of the case. Marquette contended that the district court did not weigh the *Johnson* factors in this consideration, but the Fifth Circuit disagreed.[26] It cited the district court's processing of Marquette's objection to the initial fee request because the fees were disproportionate to the amount involved. It analyzed the results obtained and provided a consistent review of Moench's billing records to determine if some fees could be reduced or eliminated.[27] The district court, while finding there was liability to pay some fees, reduced some based on Marquette's objection.[28] The Fifth Circuit found that the district court's analysis was valid.[29]

The judgments of the district court were affirmed.[30]

Mike DeBenedetto
Class of 2017

[24] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123.
[25] *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998).
[26] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1995).
[27] *Moench v. Marquette Transportation Comp. Gulf.,* F.3d WL (5th Circuit 2016).
[28] *Id.*
[29] *Id.*
[30] *Id.*

THE LOCALITY AND RELATIONSHIP TEST BETWEEN AN INCIDENT AND MARITIME ACTIVITY FOR AN ADMIRALITY OR MARITIME CASE RELATED TO CONTRACTS AND TORTS MUST BE MET TO HAVE ORIGINAL FEDERAL JURISDICTION

Elke Specker v. Michael Kazma, an individual; Mako Shark Diving, LLC, a California limited liability company; Yellow Charter Boat, Inc., a California corporation; In Personem Cetus Specula, In Rem, Defendants
United States District Court, S.D. California
2016 WL 3924106
(Decided July 21, 2016)

The District Court denied the defendants' motions to dismiss for lack of subject matter jurisdiction, finding that the incident met the requirements of a locality and relationship test for maritime jurisdiction, and held that one defendant engaged in traditional maritime activity is all that is required in order to subject all defendants to maritime jurisdiction.

Plaintiff Elke Specker, who suffered a shark bite, brought a negligence action against defendants Michael Kazma; Mako Shark Diving, LLC ("Mako"); Yellow Charter Boat, Inc. ("Yellow Charter"); and Cetus Specula.[31] Kazma, the instructor; Mako, the instructor's company; and Yellow Charter, the company from whom Kazma charter the vessel; were named as in personam defendants while the vessel Cetus Specula was named as an in rem defendant.[32]

On June 13, 2015, Specker joined a shark diving expedition led by Kazma, on board the Cetus Specula.[33] Kazma hand-fed sharks while Specker filmed the expedition.[34] Specker claims that Kazma was intoxicated during the expedition, causing him to negligently lead the divers to an unsafe area of the water.[35] Specker claims that Kazma held the shark bait in a way as to lead a shark directly toward Specker.[36] As a result of the subsequent shark attack, Specker suffered serious injuries and disfigurement.[37] Specker did not claim that her injuries were the direct result of negligence of any of the in personam defendants.[38] She claimed that the Cetus Specula's negligence was the direct cause of her injuries by (1) having an instructor who was intoxicated; (2) creating an unsafe condition; (3) operating the vessel in an unsafe condition; and (4) not properly hiring and training the vessel's staff.[39]

Specker commenced this action on November 16, 2015. [40] On January 5, 2016, Yellow Charter and Cetus Specula filed an answer. [41] Kazma filed an answer on January 8, 2016. Kazma and Mako Shar Diving, LLC (collectively, Kazma) filed a motion to dismiss for lack of subject

[31] *Specker v. Kazma*, 2016 WL 3924106, at 1 (S.D. Ca. 2016).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 2.
[39] *Id*. at 1-2.
[40] *Id*. at 1.
[41] *Id*.

matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[42] Yellow Charter and Cetus Specula also filed a motion to dismiss under 12(b)(1), with Yellow Charter including a motion to dismiss under Rule 12(b)(6) for failure to state a claim.[43] Under Rule 12(b)(6), the motion must be made before the service of a responsive pleading.[44] However, Yellow Charter had already filed its answer.[45]

Under Rule 12(b)(1), the plaintiff has the burden of proving that jurisdiction exists on a motion to dismiss for lack of subject matter jurisdiction.[46] Federal courts have original jurisdiction to hear admiralty and maritime cases related to contracts and torts.[47] A plaintiff must meet the requirement of (1) a locality test; and (2) a relationship test to show a connection between the incident and maritime activity.[48] This relationship test includes (a) "'whether the incident has a potentially disruptive impact on maritime commerce,'" and (b) "'whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.'"[49]

The locality test requires that the activity happen "'in the place where the injury occurs.'"[50] In this case, Specker was bitten by a shark while in the water off the coast of California. Therefore, the locality test was satisfied.[51]

To satisfy the relationship test, the incident must be considered at an "'intermediate'" level of generality.[52] In this case, the court viewed the incident as "an injury suffered by a scuba diver in navigable waters after diving off a commercial vessel."[53]

The first step of the relationship test regards "'potential effects'" and "'whether the general features of the incident were likely to disrupt commercial activity.'"[54] When a scuba diver is injured in navigable waters, one potential effect is the diversion of another vessel to help the diver.[55] Another potential effect is the loss of a crewmember who must tend to the diver, leaving the crewmember unavailable for other duties.[56] This "potential effect" rule applies to recreational vessels.[57] The court in this case found that the "potential effects" step was satisfied since tending to Specker's injury had a potential impact on maritime commerce.[58]

The second step of the relationship test requires "'the tortfeasor's activity [to] be 'so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply.'"[59] The activity must be considered generally, but not so

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[42] *Id*.
[43] *Id*.
[44] *Id*. at 6.
[45] *Id*.
[46] *Id*. at 2.
[47] *Id*.
[48] *Id*.
[49] *Id*. (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)).
[50] *Id*. (quoting *Taqghadomi v. U.S.,* 401 F.3d 1080, 1084 (9th Cir. 2005)).
[51] *Id*.
[52] *Id*.at 3. (quoting *Grubart,* 513 at 538).
[53] *Id*. at 3.
[54] *Id*. (quoting *Grubart* 513 U.S. at 538).
[55] *Id*. at 3.
[56] *Id*.
[57] *Id*. *See, e.g.*, In re Mission Bay Jet Sports, LLC, 570 F. 3d 1124, 1129-30 (9th Cir. 2009).
[58] *Id*. at 4.
[59] *Id*. (quoting *Gruver v. Lesman Fisheries Inc*., 489 F.3d 978, 983 (9th Cir. 2007)).

generally to exclude the maritime context.[60] Kazma argues that Specker's activity should be considered as "'swimming with fish,'" but the court found that this only considers the activity immediately surrounding the shark attack.[61] If the activity was considered as just that of swimming with fish, it would not satisfy a relationship to a traditional maritime activity.[62] To satisfy the substantial relationship test, "all that is required is that one of the alleged tortfeasors be engaged in a traditional maritime activity, and that such activity is claimed to have been a proximate cause of the incident."[63]

Specker claimed that Kazma was negligent since he was intoxicated while feeding the sharks.[64] She claimed that the Cetus Specula was negligent by allowing Kazma to be intoxicated, "creating an unsafe condition, failing to operate safely, and failing to properly hire, train and supervise its crew."[65] Specker did not have a factual claim against Yellow Charter for its negligence.[66] However, the Cetus Specula, which transported Specker to the scene of the incident, was involved in traditional maritime activity. [67] Only one defendant engaged in traditional maritime activity is required in order to subject all defendants to maritime jurisdiction. [68] Specker's activity and injury was dependent on the relationship among the four defendants, as "she could not have participated in the activity if any four named parties were absent."[69]

The court denied Kazma's and Mako's motion to dismiss under Rule 12(b)(1), denied Cetus Specula's and Yellow Charter's motion to dismiss under Rule 12(b)(1), and denied Yellow Charter's motion to dismiss under Rule 12(b)(6).[70]

Mollie Galchus
Class of 2019

[60] *Id*. *See Gruver*, 489 F.3d at 986.
[61] *Id*. at 4.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 5.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*. at 5.
[70] *Id*. at 6.

A WATERWAY WITH ARTIFICIAL OBSTRUCTIONS THAT PREVENT COMMERCE DOES NOT SUFFICE AS NAVIGABLE WATERS NECESSARY TO INVOKE A FEDERAL COURT'S ADMIRALTY JURISDICTION

Youry Tunidor v Miami-Dade County
831 F.3d 1328
United States Court of Appeals for the Eleventh Circuit
(Filed August 3, 2016)

The Eleventh Circuit Court of Appeals held that the Coral Park Canal, due to artificial obstructions on the waterway, cannot support interstate commerce and was not navigable waters within the meaning of 28 U.S.C § 1333(1), upholding Miami-Dade County's motion to dismiss for lack of subject-matter jurisdiction

In July of 2013, Youry Tunidor ("Tunidor") suffered serious injuries while traveling as a passenger on a pleasure boat on the Coral Park Canal.[1] During its course of travel, the boat passed under the Coral Park Canal Bridge.[2] Passengers ducked their heads as the boat emerged on the south side of the bridge, however, Tunidor was struck on the head by a water pipe and was ejected from the boat into the canal.[3] The Coral Park Canal is a drainage canal that connects to the Tamimami Canal, which connects to the Miami River and eventually the Atlantic Ocean.[4] The Coral Park Canal Bridge contains a series of low-lying bridges, water pipes, and railroad tracks partially, which obstruct the waterway.[5] After this series of obstructions, a water control structure labeled S-25B prevents navigation from the western side of the structure to the Miami River, and features a sign which reads "DANGER – NO BOATING BEYOND THIS POINT."[6]

Tunidor brought suit against Miami-Dade County, who owned and operated the water line, in the district court for negligence.[7] Tunidor, on the grounds that the accident occurred on a navigable waterway, argued that the court had federal admiralty jurisdiction.[8] The county moved to dismiss Tunidor's claim for lack of subject-matter jurisdiction.[9] The United States District Court for the Southern District of Florida dismissed the action, and Tunidor appealed.[10]

28 U.S.C 1331(1) has two requirements that a complaint must satisfy in order to invoke federal court's admiralty jurisdiction: (1) there must be a significant relationship between the alleged wrong and the traditional maritime activity, which is the "nexus requirement" and (2) the tort must have occurred on navigable waters, which is the "location requirement."[11] "Navigability" requires that a body of water be capable of supporting commercial maritime

[1] *Tundidor v. Miami-Dade County*, 831 F.3d 1328 (11th Cir. 2016).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*. at 1331.
[9] *Id*.
[10] *Id*.
[11] *Id*.

activity.[12] Waters are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[13] Further, waterways constitute navigable waters within the meaning of the acts of Congress when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[14]

The main issue addressed by the court was whether a waterway with artificial obstructions that prevent commerce can satisfy the navigable waters requirement needed for federal admiralty jurisdiction. The County argued that since the Coral Park Canal does not have a navigable connection to any larger body of water, it cannot be said that Tunidor was traveling on a navigable waterway.[15] The court here agreed, reasoning that the Coral Park Canal is not navigable because the S-25B water control structure prevents vessels on the canal from traveling outside the State of Florida.[16] Because the Coral Park Canal cannot support interstate commerce, it cannot satisfy the location requirement of admiralty jurisdiction.[17]

The court stated it has been well established that when artificial obstructions on a waterway block interstate travel, the waterway cannot support admiralty jurisdiction.[18] Tunidor argued that the Coral Park Canal should be deemed navigable because it has a navigable connection to the Tamimami Canal, which historically served as a navigable waterway supporting commercial activity.[19] Tunidor cited several other decisions attempting to apply and endorse a test of historical navigability, however the court disputed his claims on the basis that his precedents did not involve admiralty jurisdiction.[20]

Moreover, the court claimed "the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical."[21] The court indicated that the purpose behind the grant of admiralty jurisdiction was "the protection and the promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law."[22] History from the debates at the Constitutional Convention suggested that much of the justification for federal civil jurisdiction in admiralty was the protection of merchants, notably foreign traders.[23] Therefore, applying federal admiralty jurisdiction to waters that do not support interstate commerce is contrary to the original purpose of the legislation.

Tunidor argued that even in the absence of support for his historical argument, the Coral Park Canal has a navigable connection to the Miami River with a minor portage around the water control structure. [24] However, the court noted that the basis for plaintiff's claims cited decisions

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[12] *Id*.
[13] *Id*. (quoting *The Daniel Ball,* 77 U.S 557 (1870)).
[14] *Id*.
[15] *Tunidor,* supra note 1.
[16] *Id.*
[17] *Id*. at 1332.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id.* at 1333 (quoting *Livingston*, 627 F.2d at 169).
[22] *Id*. (quoting *Adams*, 528 F.2d at 439).
[23] *Tunidor,* supra note 1.
[24] *Id*. at 1334.

dealing with the power of Congress and federal agencies, not admiralty jurisdiction.[25] A portage is neither a customary nor a practical means of carrying on interstate commerce.[26] Navigability requires that the body of water be capable of supporting *commercial* maritime activity, and "the possibility of recreational use assisted by multiple portages" is insufficient.[27] Tunidor also cited descriptions of the Tamimami Canal by a federal agency and a state agency, but neither is evidence that the Tamimami Canal is navigable for the purposes of admiralty jurisdiction.[28]

Accordingly, the Eleventh Circuit held that the plaintiff failed to prove that the Coral Park Canal would suffice as navigable waters, and affirmed the dismissal of Tunidor's complaint by the District Court.[29]

Daniel Randazzo
Class of 2019

[25] *Id*.
[26] *Id. at* 1334. (quoting *The Daniel Ball,* 77 U.S. 557, 563)
[27] *Id*. (quoting *LeBlanc* 198 F.3d 353, 360 (2d Cir 1999).
[28] *Tunidor,* supra note 1.
[29] *Id.*

VESSEL OWNER FACES POTENTIAL LIABILITY FOR ALLEGED FAILURE TO PROTECT SUPPLY VESSEL CAPTAIN FROM PIRATE ATTACK

Wren Thomas v. Chevron U.S.A.
United States Court of Appeals, Fifth Circuit
832 F.3d 586
(Filed August 11, 2016)

The United States Court of Appeals for the Fifth Circuit vacated, reversed, and remanded this case back to the Texas District Court, which had granted Chevron's motion for summary judgment after denying plaintiff's motion for leave to amend. The Fifth Circuit found the District Court erred in denying plaintiff's motion to amend and that plaintiff could proceed with his claims under general maritime and common law.

Plaintiff-Appellant Wren Thomas ("Thomas") filed suit in Texas state court under the Jones Act against Defendant-Appellee Chevron U.S.A. ("Chevron") for injuries he sustained during his capture and 18-day detainment by West African pirates in 2013.[1]

Thomas was the captain of a *C-Retriever* supply vessel owned by his primary employer, Edison Chouest Offshore, LLC ("Edison"), which supported Chevron's platform operations off the coast of Nigeria.[2] In his original complaint, Thomas alleged that he told both Edison and Chevron that he feared his vessel was particularly susceptible to pirate attacks given its age, lack of speed, and use of VHF radio to communicate its location.[3] After receiving threats from pirates in the spring of 2013, he asked Edison for a transfer, which was never given.[4]

In the fall of 2013, pirates threatened Edison's vessels at which point Edison advised its captains, including Thomas, to "stay very vigilant." Four days later, Edison assigned the *C-Retriever* to make a run through what Thomas described as "pirate-infested waters."[5] During that run, on October 22, 2013, pirates attacked Thomas' vessel off the coast of Nigeria. After surrendering, he was detained for 18 days at various "holding camps" where he states that he was malnourished and tortured. After being released, he maintains that he has suffered from PTSD, sleep disorders, and other medical problems.[6]

After Thomas filed suit in Texas state court seeking relief under the Jones Act, Chevron removed to United States District for the Southern District of Texas and filed a motion to dismiss under Rule 12(b)(6).[7] After the District Court converted Chevron's motion to dismiss to a motion for summary judgment, Thomas filed a supplemental brief requesting leave to amend his complaint and reclassify his Jones Act claims as "general maritime law and negligence claims."[8] The District court denied the motion believing such amendment would be "futile" as the

[1] *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 588 (5th Cir. 2016).
[2] *Id.* at 588.
[3] *Id.* at 589.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Id.
[8] *Id.* at 590.

proposed revised claims would "fail as a matter of law."[9] The District court subsequently granted Chevron's motion for summary judgment.[10]

On appeal, the Fifth Circuit reversed holding that the lower court abused its discretion granted leave to amend and that his amended complaint could proceed on remand. Applying a *de novo* standard of review to the case, the Fifth Circuit concluded that Thomas "provided a plausible basis for liability, noting that Chevron owed duties and obligations under maritime and general common law." The Fifth Circuit stated the "allegations are sufficient to suggest that the harm suffered by Thomas was reasonably foreseeable to Chevron and that Chevron consequently owed him a duty not to subject him to the conditions he encountered on his October 22, 2013 voyage . . . and Thomas's claim for relief is plausible on its face."[11]

Accordingly, the Fifth Circuit reversed the court's ruling on Thomas's motion for leave to amend, and the remanded the case for further proceedings.

James Kalcheim
Class of 2019

[9] *Id.*
[10] *Id.*
[11] *Id.* at 593.

EMPLOYED MUSICIAN ON PASSENGER CRUISE SHIP THAT SAILED FROM FLORIDA TO SEVERAL FOREIGN PORTS IS TRAVELING "ABROAD", UNDER GENERAL MARITIME LAW AND JONES ACT, AND MUST THEREFORE RESORT TO ARBITRATION PURSUANT TO HIS CONTRACT OF EMPLOYMENT.

Robert M. Alberts v. Royal Caribbean Cruises Ltd.
834 F.3d 1202
United States Court of Appeals for the Eleventh Circuit
(Decided August 23, 2016)

The Eleventh Circuit Court of Appeals upheld Royal Caribbean Cruise's motion to compel arbitration, after Alberts had initially commenced litigation, because Albert's work as a trumpeter "envisaged" or constituted working abroad.

Robert M. Alberts ("Alberts") was a musician, lead trumpeter, onboard a cruise ship called the Oasis of Seas, a Bahamian flagged vessel.[1] Oasis of Seas was one of the cruise ships operated by Royal Caribbean Ltd. ("Royal Caribbean").[2] Royal Caribbean is a Liberian corporation with its principal place of business in Florida.[3] The ship traveled two routes: a western route that stopped at the ports of Haiti, Jamaica, and Mexico and an eastern route that stopped at ports in the United States, Virgin Islands, Bahamas, and St. Maarten.[4] Alberts' work consisted of him playing his trumpet only when the ship was sailing the high seas.[5] Alberts signed two employment contracts, both of which contained the same arbitration clause.[6] The language of the clause read that all disputes, "be referred to and resolved exclusively by mandatory binding arbitration pursuant to The United Nations Conventions [*sic*] on the Recognition and Enforcement of Foreign Arbitral Awards."[7]

During one particular voyage, Alberts became ill.[8] He filed suit against Royal Caribbean for unseaworthiness and negligence, under general maritime law and the Jones Act.[9] He alleged that Royal Caribbean failed to provide him an adequate medical exam and failed to take his complaints seriously.[10] Royal Caribbean filed a motion to compel arbitration, which the district court granted.[11]

The Eleventh Circuit Court of Appeals applied the de novo standard of review.[12] This is a case of first impression on the matter of whether a seaman's work on a cruise ship in

[1] *Alberts v. Royal Caribbean Cruises, Ltd.,* 834 F.3d 1202, (11th Cir. 2016).
[2] *Id*. at 1203.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1204.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

international waters that calls on foreign ports constitutes "performance abroad" under the United Nations Convention and Enforcement of Foreign Arbitral Awards.[13]

The appeals court stated that the district court would be correct in granting Royal Caribbean's motion to compel provided four requirements were met.[14] The first requirement is that there must be an agreement in writing, as per the terms of the Convention.[15] The second requirement is that the agreement provides for the actual arbitration to take place within a territory that is a signatory to the Convention.[16] The third requirement is that the relationship arises out of a legal relationship, which is considered commercial.[17] The fourth requirement is that a party to the agreement cannot be an American, or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[18] Both parties agree that Alberts employment contract satisfies the first three requirements.[19]

The appeals court decision dealt primarily with whether Alberts' contract envisages performance abroad.[20] Alberts argued that "abroad" means being physically present in one or more foreign states.[21] Therefore, since he only played his trumpet while actually sailing in international waters, his contract did not envisage performance abroad.[22] Royal Caribbean's contention is that abroad means anywhere outside of a country.[23] Therefore, since Alberts only played his trumpet while sailing on international waters, and he never played while being physically present within a country, his contract did envisage performance abroad.[24]

The appeals court did not adopt either interpretation.[25] In determining what the term "abroad" actually means, the court looked to both non-binding and binding sources of law. The non-binding authority was a text titled, Reading Law 69, written by Antonin Scalia and Bryan A. Garner.[26] The passage from this particular text read, "words are to be understood in their ordinary, everyday meanings."[27] "Although most common English words have a number of dictionary definitions, one should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise."[28]

The court then examined case law to further its understanding of the term abroad.[29] In *United States v. Hutchins,* the Court held that a naval officer who traveled by steamer from San Francisco to New York was not traveling abroad because the term abroad must be examined by

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[13] 9 U.S.C. § 202.
[14] *Alberts*, supra note 1 at 1204.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* (quoting 9 U.S.C. § 202).
[19] *Alberts*, supra note 1 at 1204.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Antonin Scalia & Bryan A. Garner, *Reading Law* 69 (2012).
[28] *Id.*
[29] *Alberts*, supra note 1 at 1204.

the termini or "end point" of the journey, rather than by the route actually taken.[30] Hutchins was cited within a third source used by the court titled, *Ballentine's Law Dictionary 5*.[31] The text states that an officer is traveling abroad when he, "goes to a foreign port or from a foreign port to a home port, yet he is not so traveling when going from one place to another in the United States although it may take him upon the high seas."[32]

Accordingly, the Court affirmed the order compelling arbitration under United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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[30] *Id.* (quoting *United States v. Hutchins*, 151 U.S. 542, 14 S.Ct. 421, 38 L.Ed. 264 (1894)).
[31] *Ballentine's Law Dictionary* 5 (3d ed. 1969).
[32] *Id.*

HOUSING MODULE DESIGNED FOR USE ON TENSION LEG OFFSHORE OIL PLATFORM WAS NOT A VESSEL FOR LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT PURPOSES AND WHERE CLAIMANT'S EMPLOYMENT WAS LOCATED SOLELY ON LAND CLAIMANT WAS NOT ENTITLED TO COMPENSATION UNDER THE ACT

James Baker, Jr. v. Director, Office of Worker's Compensation Programs, United States Department of Labor; Gulf Island Marine Fabricators, L.L.C.
834 F.3d 542
United States Court of Appeals, Fifth Circuit.
(Filed on August, 2016*)*

The issue before the court was whether the Benefits Review Board (BRB) erred in its ruling that James Baker was not eligible for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Outer Continental Shelf Lands Act (OCSLA) following an injury that occurred during the construction of an offshore oil rig (Big Foot). The United States Court of Appeals, 5th Circuit affirmed the judgment of the BRB, holding that he was not a maritime employee for the purpose of recovering under the LHWCA, and that a significant nexus did not exist between his employment and the resource extraction activities occurring on the outer Continental Shelf, thereby precluding the claim for benefits under OCSLA.[1]

James Baker, Jr., a marine carpenter employed by Gulf Island Marine Fabricators, L.L.C., allegedly was injured while constructing the housing for the "tension leg offshore oil platform" Big Foot.[2] A hearing was held to determine if benefits could be claimed under the two Acts. An Administrative Law Judge denied benefits on the grounds that he was "not engaged in maritime employment," as Big Foot "was not a vessel" under the LHWCA.[3] Furthermore there was "no significant causal link between Baker's alleged injury and operations in the OCS," precluding benefits under the OCSLA.[4] Baker appealed this decision to the Benefits Review Board, which affirmed the ALJ's ruling. Baker then appealed to the United States Court of Appeals, 5th Circuit.

The Benefits Review Board must uphold the ruling of the judge if it is based on substantial evidence. Evidence is substantial if it is the kind that would "cause a reasonable person to accept the fact finding."[5]

The LHWCA first enacted in 1927 established a "federal workers' compensation scheme" for maritime workers.[6] In 1972 the Act's scope was expanded to incorporate workers injured during maritime activities "occurring on land near the water."[7] To meet this requirement the claimant must satisfy "situs" and "status" requirements.[8] Both parties stipulated that Baker

[1] *Baker v. Director, Office of Workers' Compensation Programs,* 834 F.3d 542, 544 (5th Cir. 2016).
[2] *Id*.
[3] *Id.*
[4] *Id.*
[5] *Id,* at 545. *(*citing *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 430 (5th Cir. 2009)).
[6] *Id.*
[7] *Id.*
[8] *Id.*

met the situs requirement as he was working at a maritime facility. But the issue still remained as to whether he met the status requirement of maritime employment as defined by U.S.C. section 902(3), which includes, but is not limited to, "ship repairman, shipbuilder, and ship-breaker."[9] The Supreme Court expanded this definition to include "activities that are integral or essential part of the loading, unloading, building, or repairing of a vessel."[10] The court then needed to determine whether Big Foot for the purposes of the LHWCA was a vessel.

The court agreed with the conclusion of the ALJ and the BRB that Big Foot is not a vessel. According to the Supreme Court the word "vessel" is to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."[11] This definition was then incorporated into the language of the LHWCA. The court found that Big Foot has no means of self-propulsion, no steering mechanism or rudder, and has an no raked bow.[12] Furthermore, Big Foot "is only intended to travel over water once in the next twenty years."[13] These facts would lead the reasonable observer to conclude that Big Foot was not a vessel meant to carry "people or things" over water.[14] Further reinforcing this is Big Foot's mission. Once in place over the outer Continental Shelf Big Foot would be anchored in place so as to conduct resource extraction from the shelf.

The court ruled that this determination is in line with existing precedent. The same court ruled in *Bernard v. Binnings Constr. Co. Inc* that a "work punt was not a vessel."[15] A work punt is floating structure that, although maneuverable around a maritime work site, "functioned as a work platform and was not designed for or engaged in the business of navigation."[16] Fundamental to the analysis of the *Bernard* court was the punt's lack of all "indicia of a structure designed for navigation such as "[a] raked bow," "means of self-propulsion," or "crew quarters or navigational lights"[17] Big Foot likewise lacked the "indicia" of a contrivance intended for navigation as it had no means of serving the purpose of transporting people or things over water. Therefore, as Baker's employment did not relate to a vessel, he is precluded from claiming benefits under the LHCWA.

Lastly, and more simply, the court determined whether a significant nexus existed between Baker's employment and the resource extraction projects at the outer Continental Shelf, thereby allowing him to claim benefit under OCSLA. The court concluded that no such nexus can be established. The OCSLA extends the coverage of the LHWCA to "injur[ies] occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the outer Continental Shelf."[18] Under the Supreme Court's ruling in *Valladolid v. Pac. Operations Offshore, LLP*, the nexus is established if the injured employee can "establish a significant causal link between the injury he suffered and his employer's on-OCS operations conducted for the

[9] *Id.*(citing 33 U.S.C. § 902(3))
[10] *Id*.
[11] *Id.* (citing 1 U.S.C. §3)
[12] *Baker*, supra note 142 at 545.
[13] *Id.* at 547.
[14] *Id.*
[15] *Id.* (citing *Bernard,* 741 F.2d at 830)
[16] *Baker*, supra note 142 at 547.
[17] *Id.* (citing *Bernard,* 741 F.2d at 832)
[18] *Id.* (citing 43 U.S.C. § 1333(3)(b))

purpose of extracting natural resources from the OCS."[19] Baker's injury occurred on dry land while constructing "the living and dining quarters for [Big Foot]," and therefore the court concluded that no significant nexus existed.[20] The court reasoned that Baker's employment activities were too "attenuated from future purpose of extracting natural resources from the OCS for the OCSLA to cover his injury."[21] All of Baker's employment occurred on dry land, while in *Valladolid* "the deceased" "spent ninety-eight percent of his time on an offshore drilling platform."[22] Furthermore Baker never traveled to the OCS, had no role in moving Big Foot into position over the OCS, nor will he have a role in operating Big Foot once in position.[23]

Accordingly, the Court affirmed the judgment of the ALJ preventing Baker from claiming benefits under the LHWCA, as he was not a maritime employee and under OCSLA, there was no nexus between his injury and resource extraction operations occurring at the OCS.

George Beck
Class of 2019

[19] *Id*, (citing *Valladolid v. Pac. Operations Offshore, LLP*, 132 S. Ct 680, 685 (2012))
[20] *Baker*, supra note 142 at 548.
[21] *Id.* at 549.
[22] *Id.*
[23] *Id.*

THE MARITIME DRUG LAW ENFORCEMENT ACT IS NOT UNCONSTITUTIONAL AND IS IN ACCORDANCE WITH THE FELONIES CLAUSE

United States of America v. *Carlington Cruickshank*
837 F.3d 1182
United States Court of Appeals for the Eleventh Circuit
(Decided September 20, 2016)

The Eleventh circuit rejected Cruickshank's claims that the MDLEA was unconstitutional; the United States State Department certification of jurisdiction was upheld and did not conflict with the Due Process Clause or Confrontation Clause; the element of mens rea was sufficient for the defendant's conviction; and the lower court erred by not providing minor-role sentencing reduction to the defendant.

On February 11, 2014, in the Caribbean Sea within international waters, the United States Coast Guard seized a vessel carrying 171 kilograms of cocaine.[1] On board was the defendant Carlton Cruickshank.[2] The United States of America charged the defendant with conspiracy to possess with intent to distribute cocaine while aboard a vessel and aiding and abetting possession with intent to distribute in violation of the Maritime Drug Law Enforcement Act ("MDLEA").[3] The defendant claims that he played no major role in the planning or logistics of the crime.[4]

The defendant appealed alleging that MDLEA is unconstitutional; that the court erred in denying his motion for judgment of acquittal from a lack of evidence proving mens rea; that establishing jurisdiction through a State Department certification was erroneous, and that the court should have granted him a minor role reduction as per U.S.S.G. §3B1.2(b).[5]

The Felonies Clause of the Constitution states that the power "[t]o define and punish Piracies and Felonies committed on the High Seas" lies with Congress.[6] Per the MDLEA, "a vessel without nationality" is "subject to the jurisdiction of the United States."[7] The MDLEA definition of a stateless vessel includes "a vessel aboard which the master individual makes a claim of registry that is denied by the nation whose registry is claimed."[8] The courts have "upheld extraterritorial convictions under . . . drug trafficking laws as an exercise of power under the Felonies Clause . . . because universal and protective principles support its extraterritorial reach."[9] Accordingly, the Court found that the MDLEA is authorized and is in accordance with the constitution.

The nexus between the certification of the jurisdiction and the Confrontation Clause is attenuated. Per the Eleventh Circuit Court: "A United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not

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[1] *United States v. Cruickshank*, 837 F.3d 1182, 1186-87 (11th Cir. 2016).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* (citing U.S.S.G. §3B1.2(b)).
[6] *Id.* (citing USCS Const. Art. I, § 8, Cl 10).
[7] *Id.* (quoting 46 U.S.C. § 70502(c)(1)(A), (d)(1)(A)).
[8] *Id.* (quoting *United States v. Campbell*, 743 F.3d 802, 809 (11th Cir. 2014).
[9] *Id.* (quoting *Campbell*, 743 F.3d at 809-10).

affect the guilt or innocence of a defendant."[10] The Court also held that to not decide a case with a jury trial and to not require a jurisdictional requirement as an element of the offense does not violate the Due Process Clause nor the Sixth Amendment.[11]

To establish mens rea, evidence must be sufficient so that a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt.[12] The court noted "[i]n rebutting the government's evidence, a defendant must do more than put forth a reasonable hypothesis of innocence, because the issue is whether a reasonable jury could have convicted, not whether a conviction was the only reasonable result."[13] Here, the court found the defendant's conviction reasonable because of Cruickshank's presence on the vessel.[14]

Minor role reduction may "provide a two-level decrease to a base offense level if a defendant was a minor participant in the criminal activity."[15] "A minor participant is 'who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.'"[16]

The court takes many factors into account to determine if a minor role reduction is applicable through a preponderance of the evidence.[17] They include but are not limited to: the defendant's knowledge and participation in planning and carrying out the crime, how much decision-making authority the defendant held, and how much the defendant would ultimately benefit if the crime had been successful.[18]

Here, the defendant did not load the drugs into the vessel, take part in planning or logistics of the crime, and had no authority over the quantity of narcotics being transported.[19] The Court held that the inferior court's conclusion to deny the minor role reduction was unreasonable and did not consider all the facts.[20] The inferior court mistook the quantity of narcotics seized as the sole basis to determine if minor role reduction was appropriate.[21] Accordingly, the defendants' appeal was upheld by the Eleventh Circuit Court because the inferior court clearly erred in denying him a minor role reduction.

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[10] *Id*. (quoting *Campbell*, 743 F.3d at 809).
[11] *Id*.
[12] *Id*. (citing *United States v*. *Beckles,* 565 F.3d 832, 840 (11th Cir. 2009)).
[13] *Id*. (quoting *Beckles,* 565 F.3d at 840-41).
[14] *Id*. at 1188.
[15] *Id*. (citing U.S.S.G §3B1.2(b)).
[16] *Id*. (citing U.S.S.G §3B1.2(b)).
[17] *Id*. (citing *Bernal-Benitez*, 594 F.3d at 1320).
[18] *Id*. at 1193-94. (citing *United States v*. *De Varon*, 175 F.3d 930, 942-43) (11th Cir. 1999)).
[19] *Id*.
[20] *Id*.
[21] *Id*. at 1195.

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