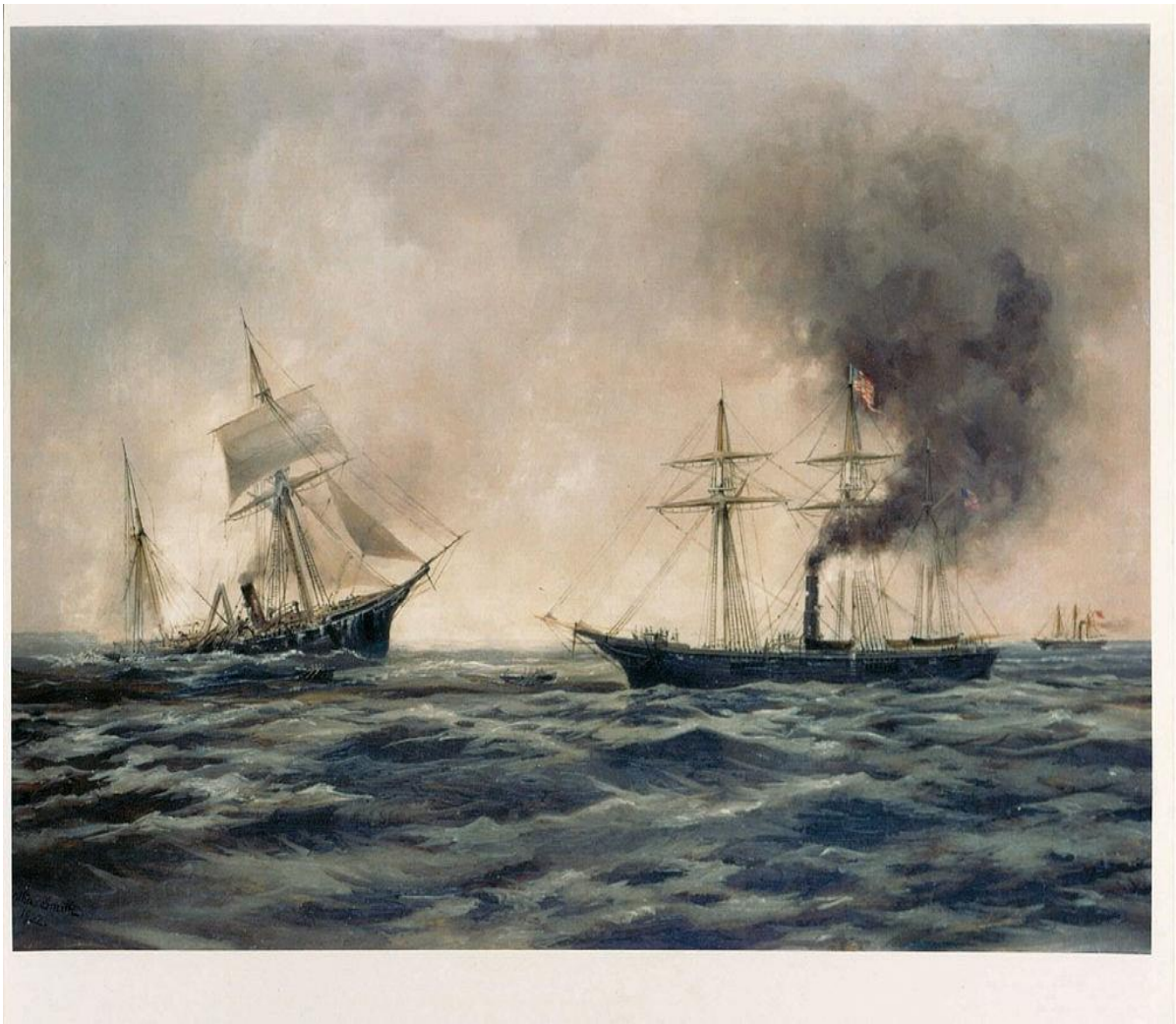
ADMIRALTY PRACTICUM



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JOSEPH A. CALAMARI
ADMIRALTY LAW SOCIETY

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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PURCHASERS OF DOMESTIC OCEAN CARGO SHIPPING SERVICES FAILED TO DEMONSTRATE ARTICLE III TO PROVIDE A SUFFICIENT BASIS FOR STANDING, WHEN ALLEGING THAT THE CABOTAGE PROVISIONS OF THE JONES ACT VIOLATED THE COMMERCE CLAUSE

Patrick Novak v. United States of America
United States Court of Appeals, Ninth Circuit
795 F.3d 1012
(Decided Feb. 19, 2015)

The United States Court of Appeals for the Ninth Circuit affirmed the government's motion to dismiss, holding that purchasers of domestic ocean cargo shipping services' who claimed that the Jones Act violated the Commerce Clause (1) established an injury for standing purposes that was not generalized, but failed to establish (3) causation, and (3) redressability, as the injuries may be present in the even in the absence of the Jones Act.

The Merchant Marine Act of 1920, more commonly known as the Jones Act, ensures the promotion and maintenance of American merchant marine and shipbuilding and repair facilities.[1] One provision, the act's cabotage or coastal shipping requirement, ensures that the United States domestic shipping industry stays exclusively within American hands.[2] Under this provision, all ships that carry cargo between two points in the United States, must be built within the United States, [3] and wholly owned by American Citizens.[4] This law has allowed the American cargo industries to thrive by providing it with complete protection from outside competition.[5] In 2010, more than 38,000 U.S. vessels were in service, which represented more than forty-one billion dollars in investment-authorized cargo. [6] However, many believe that this has come at an expense of inflated pricing.[7] For states that rely heavily on sea transport, such as the water-locked Hawaii, the Jones Act severely limits shipping alternatives.[8]

Patrick Novak and six other plaintiffs sued the United States, challenging the constitutionality of the Jones Act's cabotage provisions, which prohibit foreign competition in the domestic shipping market.[9] Plaintiffs claimed to have suffered pecuniary injury when they purchased shipping services on west coast Hawaiian routes that had artificially higher prices due

[1] Pub. L. No. 66-261, 41 Stat. 988 (1920).
[2] 1016
[3] 46 U.S.C.S. § 12112(a)(2)(A)
[4] 46 U.S.C.S. § 55102(b)(1)
[5] U.S.-Flag Waterborne Domestic Trade and Related Programs, U.S. Dep't Transp. Mar. Admin., http://www.marad.dot.gov/shipsshipping landing page/domestic shipping/Domestic Shipping.htm (last visited Oct. 31, 2015).
[6] *Id.*
[7] See, 161 CONG. REC. S372-02 (daily ed. Jan. 22, 2015) (statement of Sen. McCain) ("The U.S. Maritime Administration, MARAD, has found that the cost to operate U.S. flag vessels at $22,000 per day is about 2.7 times higher than foreign flag vessels--just $6,000 a day. There is no doubt that these inflated costs are eventually passed on to shipping customers.")
[8] See, 161 CONG. REC. S372-02 (daily ed. Jan. 22, 2015) (statement of Sen. McCain) ("Cattlemen in Hawaii who want to bring their cattle to the U.S. mainland market, for example, have actually resorted to flying the cattle on 747 jumbo jets to work around the restrictions of the Jones Act. Their only alternative is to ship the cattle to Canada because all livestock carriers in the world are foreign owned."}
[9] *Novak v. United States*, 2013 U.S. Dist. LEXIS 60231 (D. Haw., Apr. 26, 2013)

to the Jones Act's shipping requirements.[10] Under the Commerce Clause of the United States Constitution[11], plaintiffs claimed that the Jones Act "impaired, hindered, and substantially affected and completely cut off Hawaii from interstate commerce."[12] According to the plaintiffs, the cabotage provisions cut off Hawaii from trading opportunities and have allowed two shipping firms to become a duopoly, which has raised prices.[13] Plaintiffs claimed that the higher shipping costs have also increased the cost of doing business, and have stifled trade between the Hawaii and the rest of the U.S.[14]

The Ninth Circuit began by reviewing the district court's determination of standing.[15] The three elements of standing include: (1) "injury in fact", (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood "that the injury will be redressed by a favorable decision."[16] The court held that the plaintiffs indeed suffered pecuniary injury, but failed to establish causation and redressability.[17]

According to the court an "[a]n injury in fact" is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical.[18] The Ninth Circuit disagreed with the District Court and found that plaintiffs alleged an adequate injury.[19] Plaintiffs alleged in their complaint that they individually suffered a pecuniary injury and damages resulting from the Jones Act, when they purchased domestic cargo shipping services.[20] The lower court "mistakenly focused only on the size of the population allegedly harmed" when they determined that the plaintiffs alleged only a generalized grievance. [21] In contrast, the Ninth Circuit, explained that "[t]he fact that a harm is widely shared does not necessarily render it a generalized grievance" and found a sufficient injury to exist. [22]

Next, the court addressed causation, which is established when "there must be a causal connection between the injury and the conduct complained of."[23] When a plaintiff asserts an injury that stems from government regulation more particular facts must be demonstrated to show standing.[24] Plaintiffs, therefore, must prove that the harmful action of third parties was "at least a substantial factor motivating the third parties actions" [25]

Plaintiffs could not establish a sufficient connection between the cabotage provisions of the Jones Act and their own economic injury. However, plaintiffs' own complaint admitted that the inherent characteristics of the Hawaii shipping market may have allowed for shipping companies to inflate, independent of the Jones Act.[26] These characteristics include: "market concentration, significant barriers to entry, ease of information sharing, lack of viable alternatives to ocean

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[10] *Novak v. United States*, 795 F.3d 1012, 1016 (9th Cir. 2015).
[11] U.S.C. Const. Art. I § 8, cl. 3
[12] *Id.* at 1017.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* 1018-19 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).
[17] *Id.* at 1019.
[18] *Id. at 1018 (quoting Lujan* at 560*).*
[19] *Id.*
[20] *Id.*
[21] *Id. at 1018*.
[22] *Id.* (quoting *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011)).
[23] *Id.* at 1018. *(*quoting *Lujan*, 504 U.S. at 560).
[24] *Id* at 1019 *(*quoting *Lujan*, 504 U.S. at 562).
[25] *Id.* (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)).
[26] *Id.*

shipping, and the commodity nature of ocean shipping services."[27] Therefore the court could not establish causation as the corporations "may well have engaged in their injury-inflicting actions even in the absence" of the Jones Act. [28]

Subsequently the court addressed the third element of Article III standing, redressability, which requires the plaintiffs to demonstrate that a favorable decision by the court would be likely to redress their injury. [29] Moreover, redressability cannot be satisfied if it would depend on choices made by third parties not controlled by the court.[30]

The plaintiffs failed to demonstrate that it would be likely that the shipping companies would lower their prices if the Jones Act protective measures were invalidated.[31] Plaintiffs admitted that collusion between the two companies have kept shipping prices artificially high, and the Jones Act opposes any type of market collusion that creates duopolies.[32] The court concluded that repealing the cabotage provisions would not even affect the collusion, and, therefore, would not redress plaintiffs' purported injury.[33]

Next, the court denied plaintiffs' leave to amend their complaint because amendments would be futile. [34] The Commerce Clause "is in no sense a limitation upon the power of Congress over interstate and foreign commerce." [35] Instead the Commerce Clause allows just the opposite; it gives Congress permission to regulate the channels and instrumentalities of interstate commerce.[36] The clause also grants Congress power to regulate and enact provisions such as the Jones Act.[37]

On appeal, plaintiffs argued that the Jones Act violates protections guaranteed under the Due Process Clause of the Fifth Amendment, which was also dismissed by the court.[38] The Plaintiffs' due process argument was based on the fact that the Jones Act negatively affects Hawaii disproportionately. However, uniformity is not a requirement of the commerce clause.[39] A due process claim that does not involve insidious discrimination must only pass rational basis review, which is that Congress only needs to have a reasonable relation to a legitimate purpose, which the court found to exist.[40]

Accordingly, the Ninth Circuit held that plaintiffs failed to establish standing, and affirmed the dismissal of the District Court without leave to amend their complaint.[41]

Anthony J. Ienna
Class of 2017

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[27] *Id.*
[28] *Id.* at 1019 *(*quoting *Mendia*, 768 F.3d at 1013).
[29] *Id*. at 1020. *(*quoting *Lujan, 504 U.S.* at 561*)*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id*. (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408,423)
[36] *Id. at* 1021 (quoting *United States v. Lopez*, 514 U.S. 549, 558, (1995)).
[37] *Id.* at 1020.
[38] *Id*.
[39] *Id*, (quoting *Currin v. Wallace*, 306 U.S. 1, 14, 59).
[40] *Id*, at 1022. (citing, *Boylan v. United States*, 310 F.2d 493, 498 (9th Cir. 1962)).
[41] *Id*. at 1023.

ORDINARY NEGLIENCE STANDARD OF CARE CAN BE APPLIED UNDER THE JONES ACT REQUIRING THAT BARGE OPERATOR PROVIDE REASONABLY SAFE PLACE TO WORK

Mark Barto v. Shore Construction, LLC; McDermott, Inc.
801 F. 3d 465 (2015)
United States Court of Appeals for the Fifth Circuit
(Decided September 4, 2015)

The Fifth Circuit Court of Appeals held that the ordinary negligence standard of care can be applied to a barge operator for failing to maintain reasonably safe working conditions in accordance with the Jones Act and that the maximum recovery rule did not apply as to the award of future general damages.

Plaintiff-appellee Mark Barto ("Barto") filed suit against McDermott, Inc. ("McDermott") for injuries he sustained when he fell off the derrick barge operated by McDermott.[1] Barto sued McDermott under the Jones Act for future lost wages and pain and suffering from loss of lifestyle.[2] He also sued his employer, Shore Construction L.L.C ("Shore") for cure and payment of surgical medical bills.[3]

Barto was working on Derrick Barge 50 and was part of larger project that involved inspection and maintenance of a cable attached to a crane.[4] However, he had never performed this specified task of tapping the cable lines to ensure they do not overlap.[5] He stood on a wooden plank to complete the assignment with his coworkers looking on.[6] As he was working with the cables, the notched end of the plank broke and he fell sustaining injuries to his left leg, lower back, and neck.[7] Shore did not want to pay for Barto's lumbar surgery although it was recommended by Barto's doctor, Dr. Munshi.[8] Dr. Munshi performed the surgery and afterwards Shore's experts testified it was unnecessary, and challenged that the focus of the surgery was on the wrong side of the pain Barto was experiencing.[9] After surgery, Barto testified that the pain was gone, but he will always be restricted because of the injury.[10]

The district court ruled for Barto and found that McDermott was negligent because of failing to keep a reasonably safe premises, thus in violation of the Jones Act and that Barton was not comparatively negligent.[11] It also found McDermott owed general damages and lost wages to Barto. Shore was found to pay the surgical medical bills.[12] McDermott and Shore appealed.[13]

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[1] *Barto v. Shore Const., L.L.C.*, 801 F.3d 465, 465 (5th Circuit 2015).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

On appeal, the Fifth Circuit affirmed the district court's decision on finding McDermott liable for negligence and violating the Jones Act because the premises were not reasonably safe to work.[14] It also affirmed the decision of not finding Barto comparatively negligent.[15] In the context of damages, the court held McDermott's liability in regards to pain and suffering but reversed on future lost wages.[16] Finally, it affirmed the district court in finding Shore liable for the medical cost of surgery.[17]

The court focused on upholding the ordinary negligence standard used by the district court for review of the incident.[18] It agreed with the reasoning of the district court that found McDermott's failure to provide scaffolding can be considered unreasonable and helped contribute to the unsafe work environment.[19] The court also affirmed the district court's reasoning that Barto's overseers did not effectively do their job in preparing Barto because he had no experience in a dangerous project of this nature.[20]

The court also dealt with the question of whether Barto can be considered comparatively negligent for the injuries he sustained.[21] The court cites *Johnson v. Cenac Towing*[22] as highlighting the standard that the burden is on the employer to prove the comparative negligence. However, the court believed this burden was impossible for McDermott to meet based on the circumstances.[23] Barto was inexperienced and his coworkers failed to offer some form of valid guidance in whether to secure the plank or not.[24]

Finally, the damage allocation was assessed in terms of McDermott and Shore's expected liability. When contemplating the future general damage liability of McDermott for Barto's injuries the court found pain and suffering a central determining factor and cited *Crador v. Dep't of Highways*.[25] Barto admitted that his typical routines and fun hobbies can no longer be continued because of the injuries.[26] This was supported by testimony from Dr. Munshi. The $400,000 award was affirmed.[27] Also, McDermott's challenge to the routine argument offered by Barto was not submitted in the lower court so it cannot be considered here.[28]

The court then analyzed the district court decision on the argument of future lost wages. Future lost wages are calculated by work- life expectancy.[29] The court relied on reasoning from *Madore v. Ingram Tank Ships Inc.* to define the work-life expectancy, "the average number of years that a person of certain age will both live and work."[30] McDermott argued the district court setting the recovery for the wages at $300,000 was well above the average recovery.

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* (quoting *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 302 (5th Cir. 2008)).
[23] *Id.*
[24] *Id.*
[25] *Id.* Future general damages are available, "for pain and suffering and impact on one's normal life routines." (quoting *Crador v. Dep't of Highways,* 625 F.2d 1227, 1230 (5th Cir. 1980).
[26] *Id.*
[27] *Id.*
[28] *Id.* (E.g. *Am. Nat. Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 325 n.3 (5th Cir. 2001)).
[29] *Id. Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984).
[30] *Id.*

Barto's experts provided ages of 55.8 work-life expectancy and 67 full retirement age for the court to consider.[31] The retirement age of 67 was considered a hollow guideline because there was no evidence to support that Barto sought to work to that age.[32] Furthermore, if he worked as an unarmed security guard, the experts found his wages would come out to $209,533 if he retired at 55.8.[33] The court ruled for McDermott.

Finally, the court analyzed the argument offered by Shore about declining to pay the surgical medical bills or "cure."[34] The court affirmed the district court's decision, and Shore was found to have to pay the cost of the surgery. The court relied on *Pelotto v. L & N Towing Co.*, "Cure involved the payment of therapeutic, medical, and hospital expenses not otherwise furnished to seaman . . . until the point of maximum cure."[35] The surgery performed was meant to cure some of the pain and attempt to correct some aspects of the injury. It was curative, therefore Shore must be held liable.

Accordingly, the Fifth Circuit affirmed the district court's decision on the grounds of negligence, general damages, and cure, but reversed on future wages.

Mike DeBenedetto
Class of 2017

[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id. Pelotto v. L & N Towing Co.* 604 F.2d 396, 400 (5th Cir. 1979).

SERVICE AND OPERATING AGREEMENTS GRANTING SOLE RIGHT OF USE TO A PLAINTIFF TO PROPERTY DAMAGED BY AN UNINTENTIONAL MARITIME TORT DOES NOT NECESSARILY CIRCUMVENT *ROBINS DRY DOCK* DOCTRINE

Plains Pipeline, L.P. v. Great Lakes Dredge & Dock Company
46 F.Supp.3d 632
United States District Court for the Eastern District of Louisiana
(Decided August 29, 2014)

The United States District Court for the Eastern District of Louisiana held that having sole use of a property, reimbursing some fixed costs for maintaining the property, and paying some insurance for the property did not grant a non-owner sufficient proprietary interest in the property to overcome the *Robins Dry Dock* bar. Therefore, the party could not recover for purely economic damages resulting from a third party's unintentional maritime tort.

Phillips66 Pipeline, LLC ("Phillips") sought to recover from economic loss suffered as a result of an underwater collision between a dredging barge, Dredge TEXAS, and the BOA pipeline.[1] Great Lakes Dredge & Dock Company and Great Lakes Dredge & Dock, LLC (collectively "Great Lakes") owned the Dredge TEXAS.[2] At the time of the incident, Plains Pipeline L.P. ("Plains") was owner of the pipeline and Phillips was owner of the crude oil being transported in the pipeline.[3] Phillips alleged that the Dredge TEXAS, by lowering its cutter head onto the seafloor, damaged the underwater BOA pipeline that Phillips was using to transport its oil.[4] According to the pipeline meter, this resulted in a loss of 204 barrels of Phillips's crude oil.[5] The pipeline was shut down and Phillips incurred additional business expenses as a result.[6] Phillips claimed damages for its lost product as well as for pure economic loss.[7] With regard to Phillips's damages claim for pure economic loss, Great Lakes moved for summary judgment under the *Robins Dry Dock* doctrine, which bars recovery for pure economic loss in an unintentional maritime tort suit if the plaintiff did not have a proprietary interest in the physically damaged property.[8]

Phillips contended that, though it did not own the pipeline, it had proprietary interest that would overcome the *Robins Dry Dock* bar.[9] Phillips relied on the Service and Operating Agreements between it and Plains to establish its proprietary interest.[10] These agreements gave Phillips a sole right to use the pipeline for a certain term in exchange for monthly rent.[11] In the agreements, Phillips also agreed to reimburse some fixed costs for the maintenance of the

[1] *Plains Pipeline, L.P. v. Great Lakes Dredge & Dock Co.,* 46 F.Supp.3d 632 (2014).
[2] *Id.* at 634.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 634-35. *See Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.Ct. 134 (1927).
[9] *Id.* at 635.
[10] *Id.*
[11] *Id.* at 638.

pipeline and pay "lesser" insurance costs, but any other costs for pipeline operation required Phillips's approval before it agreed to reimbursement.[12]

The *Robins Dry Dock* standard establishes a bright-line rule, which aims to limit the liability of a negligent party in an unintentional maritime tort based on foreseeability.[13] Here, the court noted that the "Fifth Circuit has been 'reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy.'"[14] Under the *Robins Dry Dock* analysis, a party contracted by the owner as a demise-charterer has a proprietary interest in the property if the party has rights to the property where the ship owner retains only a right of reversion.[15] The demise-charterer has "'full responsibility for managing and maintaining the vessel'" and could be liable to the owner if the vessel were damaged.[16] In contrast, a time-charterer does not have these rights.[17] Instead, in a time-charter, "the vessel owner retains possession and control of the vessel, provides necessary crew, fully equips and maintains the vessel performing any needed repairs, and provides insurance on the vessel."[18]

The standard developed by the Fifth Circuit for establishing a proprietary interest is: "(1) actual possession or control; (2) responsibility for repair; and (3) responsibility for maintenance."[19] The court noted that the Fifth Circuit had denied recovery "'where a lessee of a damaged bridge never had possession or control of the property, did not use its employees to maintain the bridge, and had no obligation to repair or contribute to the cost of repairs'" if the bridge were damaged by a third party.[20] The Fifth Circuit also rejected the idea that "'repair of property endows one with a proprietary interest'" by itself.[21] Finally, though a business may rely on facilities like a pipeline, "'such reliance does not rise automatically to the level of a proprietary interest in that transportation medium.'"[22]

Considering *Robins Dry Dock* and Fifth Circuit precedent, the court concluded that Phillips's interest in the BOA pipeline was closer to that of a time-charterer.[23] The court noted that, during the time Phillips had sole contractual right to use the pipeline, Plains maintained a right to sell all assets of the pipeline.[24] In addition, Plains was obligated to operate, maintain, and repair the pipeline with its own employees.[25] Finally, Plains had to obtain insurance for the pipeline.[26] Though Phillips agreed to reimburse "the lesser of the total fixed costs" including maintenance and repair and pay for some insurance, Phillips did not guarantee reimbursement for

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[12] *Id.*
[13] *Id.* at 636.
[14] *Id.*; See *Louisville & N.R. Co. v. M/V Bayou Lacombe,* 597 F.2d 469, 472–73 (5th Cir. 1979) (quoting *Dick Meyers Towing Service, Inc. v. United States,* 577 F.2d 1023, 1025 (5th Cir. 1978)).
[15] *Id.* at 637.
[16] *Id.* (quoting *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe,* 597 F.2d 469, 473–74 (1979)).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* (quoting *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe,* 597 F.2d 469, 473–74 (1979)).
[21] *Id.* (quoting *Texas Eastern Trans. Co. v. McMoRan Offshore Explor.,* 877 F.2d 1214, 1225 (5th Cir. 1989).
[22] *Id.* (quoting *Texas Eastern Trans. Co. v. McMoRan Offshore Explor.,* 877 F.2d 1214, 1225 (5th Cir. 1989).
[23] *Id.* at 637-38. *See Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.Ct. 134 (1927).
[24] *Id.* at 638.
[25] *Id.*
[26] *Id.*

additional services related to the pipeline's operation.[27] Therefore, the court held that Phillips's interest resembled that of a time-charterer.[28]

Phillips strongly relied on the fact it paid for the pipeline's maintenance and repairs to establish proprietary interest.[29] However, the court noted that this inference was incorrect.[30] Unlike the plaintiff in *Texas Eastern,* where the court held the plaintiff was similar to a time-charterer with regard to the plaintiff's interest in a damaged pipeline, Phillips did not even own and maintain parts of its own fixtures on the pipeline.[31] Instead, Phillips paid a certain sum to Plains in exchange for maintenance and repair, and Phillips had not paid for the pipeline's repair costs for the incident at hand.[32] Finally, with regard to the reimbursement language, the court noted that modifying the Service and Operating Agreements to eliminate the reimbursement payments and instead direct those payments towards rent would remove the "reimbursement" language from Phillips's argument, thereby undermining it.[33]

Accordingly, the court granted Great Lakes's motion for summary judgment because no genuine issue of material fact existed regarding the character of Phillips's interest in the pipeline.[34] Phillips had very little proprietary interest in the BOA pipeline, and, therefore, the *Robins Dry Dock* doctrine barred Phillips's claims for economic losses.[35]

Mary Cunningham
Class of 2018

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 639.
[34] *Id.*
[35] *Id.*

SEAMAN INJURED DOING ROUTINE MAINTENANCE CANNOT DEFEAT SUMMARY JUDGMENT AGAINST EMPLOYER WITH CONCLUSORY ALLEGATIONS REGARDING HIS JOB SAFETY

Frank Glaze v. Higman Barge Lines, Incorporated
611 Fed.Appx. 227 United States Court of Appeals for the Fifth Circuit
(Decided August 5, 2015)

The Fifth Circuit Court of Appeals held that Glaze presented no genuine dispute of material fact in his Jones Act, unseaworthiness, and maintenance and cure claims, affirming the district court's grant of summary judgment in favor of Higman Barge Lines, Inc.

Frank Glaze ("Glaze") filed a suit against Higman Barge Lines, Inc. ("Higman") alleging that he was injured on the job while performing maintenance on the M/V SNIPE ("SNIPE") as instructed by Captain Damge ("Damge") on August 27, 2013.[1] Glaze contends that he was instructed to do this work without a job safety analysis, and that unsafe methods of work made the SNIPE an unseaworthy vessel.[2] Glaze appeals the district court's grant of summary judgment in favor of Higman.[3]

The court concludes that Glaze's Jones Act claim fails because Damge's alleged failure to conduct a job safety analysis did not violate the standard of care.[4] Glaze was instructed to grind and strip rust with a needle gun, which he admits is a routine activity.[5] And this court has "persuasively held that the failure to perform job safety analyses on such routine activities is not a breach of duty."[6]

Furthermore, Glaze did not provide any evidence that Damge's failure to institute a policy on the amount of time seamen can use the needle gun, or his failure to instruct on how to use to needle gun, violated ordinary prudence.[7] As a seaman with forty years' experience, Glaze knew how to use a needle gun, and even trained at least one other member of the crew on how to use a needle gun.[8] Therefore, Damge was not negligent in failing to instruct Glaze, a highly experienced seaman, on how best to perform a routine activity.[9]

Glaze's claim that the M/V SNIPE was an unseaworthy vessel also fails.[10] The court defines a vessel as unseaworthy "if 'the owner has failed to provide a vessel, including her equipment and crew, which is reasonably fit and safe for the purposes for which it is to be used.'"[11] He claims that the ship in unseaworthy because (1) Damge did not perform a job safety

[1] *Frank Glaze v. Higman Barge Lines*, Inc., 611 Fed.Appx. 227, 227 (2015).
[2] *Id.* at 227-228.
[3] *Id.* at 227.
[4] *Id.* at 228.
[5] *Id.*
[6] *Id. See Harrison v. Seariver Mar, Inc.,* 61 Fed.Appx. 119 (5th Cir.2003).
[7] *Id.*
[8] *Id*.
[9] *Id.*
[10] *Id.*
[11] *Id.* (quoting *Jackson v. OMI Corp.*, 245 F.3d 525, 527 (5th Circ.2001)).

analysis, (2) the ship did not have safe housekeeping measures, and (3) he was required to chip and grind the rust only one month before the ship's scheduled maintenance.[12]

The lack of a job safety analysis is defeated because isolated personal negligent actions do not fall under an unseaworthiness claim.[13] There is no evidence that the needle gun was not working properly and no evidence that its use on the SNIPE rendered the ship unseaworthy, so the second claim is defeated.[14] Finally, the court determined that the scheduled maintenance is not relevant to the unseaworthiness claim because Glaze did not prove that the ship was unfit for its intended purpose.[15]

Glaze's maintenance and cure claim fails because there is no evidence of his injury until his lawsuit; there are no reports to doctors or in the vessel logs on the date that he said the injury occurred.[16] There are also inconsistent statements concerning what work was done that day. Damge testified that he never told Glaze to perform the work, and another worker testified that he only remembered painting with Glaze.[17]

Therefore, the Fifth Circuit affirmed the district's court's grant of summary judgment because Glaze presented conclusory allegations and unsubstantiated assertions regarding his injury.[18]

Nicholas Marcello
Class of 2018

[12] *Id.*
[13] *Id.* at 229
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

CONSTRUCTION WORKER BUILDING A BOAT RAMP FAILS TO MEET THE 'SITUS' AND 'STATUS' REQUIREMENTS OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

Luis Hernandez v. Louisiana Workers' Compensation Corporation, et al.
Court of Appeals of Louisiana, Third Circuit
166 So.3d 456
(Decided June 3, 2015)

The Third Circuit of the Louisiana Court of Appeals held that: (1) a boat ramp is not a "pier" under the Longshore and Harbor Workers' Compensation Act (LHWCA); and (2) claimant's work in constructing a boat ramp did not constitute "maritime employment."

Plaintiff, Luis Hernandez, suffered an injury while cutting timber to be used in constructing a boat ramp.[1] Plaintiff was an employee of UNO Enterprises, LLC, and was working under the direction and control of M. Matt Durand, LLC, the construction company who had been hired to build the boat ramp.[2]

As a result of his injury, plaintiff filed a claim for compensation with the Office of Workers' Compensation (OWC), listing UNO Enterprises as his employer, and Louisiana Workers' Compensation Corporation (LWCC) as UNO's workers' compensation insurer.[3] LWCC denied plaintiffs claim, asserting that plaintiff was a longshoreman under the Longshoreman and Harbor Workers' Compensation Act (LHWCA), and thus, LWCC did not provide coverage for LHWCA benefits.[4]

In a hearing before the OWC, the Workers' Compensation Judge (WCJ) found that the plaintiff's claims were not governed by the LHWCA, and were compensable under Louisiana's worker compensation laws.[5] The WCJ concluded that the plaintiff "was hired for construction purposes and he was doing construction work…What is clear is that the work this employee was doing was on land."[6]

LWCC appealed, asserting that the WCJ erred in finding that the LHWCA does not apply in this case.[7] The Court of Appeals affirmed the OWC's holding in finding that the plaintiff was not within the confines of the LHWCA at the time of his injury.[8]

For the LHWCA to cover an employee, the employee must meet the "situs" and "status" requirements of the Act.[9] The "situs" requirement involves the location where the employee's work is performed.[10] The "situs" requirement is found in 33 U.S.C. § 903 (a), and provides that:

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[1] *Hernandez v. Louisiana Workers' Comp. Corp*., 2015-118 (La. App. 3 Cir. 6/3/15), 166 So. 3d 456.
[2] *Id* at 458.
[3] *Id.*
[4] *Id.*
[5] *Id*.
[6] *Id.*
[7] *Id*.
[8] *Id*.
[9] *Id.* at 459. See *Julien v. Dynamic Industries, Inc.*, 10–520 (La.App. 3 Cir. 11/3/10), 52 So.3d 174, (citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985)).
[10] *Id*.

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).[11]

The "status" requirements found in 33 U.S.C. §§ 902 (3) and 902 (4) provide in relevant part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker….
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).[12]

LWCC argued that Hernandez met the "situs" requirement because he was essentially building a "pier" in the form of a boat launch.[13] The Court rejected the "pier" argument by following the United States Court of Appeals for the Ninth Circuit's decision in *Hurston v. Director, Office of Workers Compensation Programs,* which held that a pier for purposes of the LHWCA is "a structure built on pilings extending from land to navigable water."[14] There was no evidence to suggest that the boat ramp was "a structure built on pilings extending from land to navigable water."[15] Thus, the boat ramp cannot be considered a "pier" as the LWCC argued.[16]

The LWCC also argued that the plaintiff's injury occurred on an area customarily adjoining navigable waters, which would bestow situs.[17] The court also rejected this argument, holding that to fulfill the LHWCA's situs requirement, an injury must occur on an enumerated situs, or an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."[18] Plaintiff was working in a grassy field that was not an enumerated situs or an area customarily used for "loading, unloading, repairing, dismantling or building a vessel."[19] Therefore, the court cannot bestow situs on the area where the plaintiff was working.[20]

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[11] 33 U.S.C.A. § 902 (West).
[12] *Id.*
[13] *Id.*
[14] *Hernandez,* 166 So. at 460.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 460
[19] *Id.*
[20] *Id.*

In arguing "status," the LWCC argued that "maritime employment" in 33 U.S.C. § 902(3) and 902(4) extends to any employee who is involved in an essential part of any of the activities in the LHWCA: loading, unloading, repairing, building and dismantling a vessel.[21] These factors indicating "status" are distilled from the Supreme Court's decision in *Herb's Welding*, where the Court held that the "maritime employment" requirement was meant to serve as a limit on the expansion of the definition of "navigable waters," not to strictly limit "maritime employment" to the occupations specifically mentioned in the LHWCA.[22] In this case, however, the plaintiff's work stabilizing the earth around a boat launch was not essential to any of the activities in the LHWCA. Thus, the plaintiff does not have the status of a maritime employee.[23]

Because the plaintiff did not meet the "situs" or "status" requirements of a maritime employee, the LHWCA does not apply.

Derek Piersiak
Class of 2018

[21] *Id*. at 461.
[22] *Id*.; *Herb's Welding, Inc.* at 470 U.S. 414.
[23] *Id*.

A MINERAL LESSEE DOES NOT HAVE A DUTY TO POLICE THE WATERS COVERED BY ITS LEASE OR TO TAKE STEPS TO REMOVE OBSTRUCTIONS THAT IT DOES NOT OWN, HAS NOT PLACED THERE, OR DOES NOT MAINTAIN OR CONTROL

Danny Luke v. Hilcorp Energy Company and Roustabouts, Inc.
2015 WL 1810786
United States District Court for the Eastern District of Louisiana
(Decided April 20, 2015)

The United States District Court, Eastern District of Louisiana, affirmed a motion for summary judgment on the grounds that the plaintiff has not shown any genuine issue of material fact regarding defendants' ownership or control of the obstruction that caused plaintiff's injuries.

Danny Luke ("Plaintiff") sued Hilcorp Energy Company and Roustabouts, Inc. ("Defendants") for personal injuries he sustained when his skiff struck a submerged piling.[1] Plaintiff was inspecting crab cages near Four Island Dome when his skiff struck a submerged piling, causing him to sustain injuries to his head, neck, and back.[2] His skiff was also damaged.[3] Hilcorp Energy is in the business of engaging Roustabouts to provide oilfield construction services in connection with the company's oil and gas operations.[4] Since July 2010, Hilcorp Energy has held mineral leases in Four Island Dome Field.[5] Plaintiff alleges that his accident was caused by the negligence of the defendants.[6] Defendants' move for summary judgment on the grounds that they did not own, control, maintain, place, or have any connection to the piling that struck plaintiff's skiff.[7]

In order for Defendants' motion for summary judgment to be granted, Federal Rule of Civil Procedure 56 specifies that summary judgment is proper when no genuine issue of material fact exists.[8] A genuine issue of material fact does not exist when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party."[9]

In addition, the court indicates that the "mere argued existence of a factual dispute does not defeat an otherwise properly supported motion."[10] The court also notes that summary judgment is appropriate when "the party opposing the motion fails to establish an essential element of the case."[11] Furthermore, the non-moving party must provide competent evidence to support any allegations the non-moving party denies.[12] Finally, "the court must read the facts in the light most favorable to the non-moving party."[13]

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[1] *Danny Luke v. Hilcorp Energy Corporation and Roustabouts, Inc.* 2015 WL 1810786 1 (E.D. La.2015).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*. (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, (1986)).
[10] *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[11] *Id*.; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323. (1986).
[12] *Id*.
[13] *Id*. (citing *Anderson*, 477 U.S. at 255).

The court states "A private party assumes liability for damages resulting from collision of a boat with an obstruction of navigable waters when it has ownership, custody, or is responsible for the placement of the obstruction in navigable waters."[14] The plaintiff has given no evidence, which would support his argument that the defendants owned or were responsible for the piling.[15] The plaintiff attempts to support his argument by raising the issue of duty of landowners.[16] The court rejects this argument on the grounds that evidence that the defendants worked in the general area is insufficient to establish ownership or control.[17] Moreover, the plaintiff contends that the roustabouts removed the piling after the accident.[18] The court found this evidence to be insufficient to establish ownership or control.[19]

Finally, plaintiff relied on *Punch v. Chevron USA, Inc.*, to prove that there was a genuine issue of material fact.[20] In *Punch*, the court denied summary judgment on the grounds that there was a genuine issue of material fact regarding whether the defendants owned, controlled or place the piling at issue.[21] The court in *Punch* found that the piling was previously owned by a Texaco facility, which the defendants later obtained.[22] In this case, the court found the facts in *Punch* distinguishable from this case because the evidence only proved that Hilcorp Energy leased the waterway, and worked in the same vicinity.[23]

Accordingly, the defendants' motion for summary judgment was granted because plaintiff did not present any evidence of defendants' ownership or control over the area of the accident.[24]

Rebecca Schwartz
Class of 2017

[14] *Id.* (*See Creppel v. Shell Oil Co.*, 738 F.2d 699, 701 (5th Cir. 1984); *Savoie v. Chevron Texaco*, No. 04—1302, 2006 WL 2795460, at 2 (E.D.La. Sept.27, 2006)).
[15] *Id.*at 2.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* (citing *Punch v. Chevron USA, Inc.*, No. 12-388, 2012 WL 5289379 (E.D.La.Oct.24, 2012)).
[21] *Id.* (citing *Punch*, 2012 WL 5289379)
[22] *Id.* (citing *Punch*, 2012 WL 5289379)
[23] *Id.*
[24] *Id.*

UNDER THE LONGSHORE ACT, AN EMPLOYEE INJURED BY A BORROWED EMPLOYEE, WORKING IN THE SAME EMPLOY, CANNOT SUE FOR NEGLIGENCE

Charles Crawford v. BP Corporation North America Inc., et. al.
2015 WL 1190123
United States District Court for the Eastern District of Louisiana
(Decided March 16, 2015)

The United States District Court for the Eastern District of Louisiana granted a motion for summary judgment for defendant because defendant's employee, whose negligence caused plaintiff's injuries, was determined to be a borrowed employee under the Longshore Act. Therefore, the claims of intervenor BP America were dismissed because they were premised on the viability of plaintiff's claims against defendant.

Charles Crawford ("Crawford") was employed by BP America Production Company ("BP America") on a tension leg platform (the "Marlin") located on the Outer Continental Shelf ("OCS").[1] On March 9, 2012, Crawford suffered a personal injury when another BP employee, Blain Matthew ("Matthew"), dropped a vacuum pump on his back.[2] Matthew was employed by Danos and Curole Marine Contractors, L.L.C. ("Danos"), but performed his work on the platform owned and operated by BP America.[3] Crawford filed suit against Danos, who responded with a motion for summary judgment.[4] BP America intervened, seeking subrogation for payments made to Crawford under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act").[5]

The issue in this negligence suit is whether Matthew is a borrowed employee of BP America, barring Crawford's recovery because it violates the Longshore Act.[6] This act prohibits an injured employee from suing "persons in the same employ" for negligence.[7] This extends to borrowed employees.[8] If Matthew is found to be a borrowed employee, Crawford has no cause of action, rendering Danos not liable for the tort.[9]

The court focused on nine factors to determine employment status: (1) Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation? (2) Whose work was being performed? (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who had the right to discharge the

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[1] *Crawford v. BP North America, Inc.*, Slip Copy, 2015 AMC 1119, 1120.
[2] *Id.* at 1119.
[3] *Id*.
[4] *Id.* at 1119-1120.
[5] *Id*. at 1120.
[6] *Id*. 3 U.S.C. s 1333(b); *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S., 132 S.Ct. 680, 687, 2012 AMC 1, 7 (2012). The parties do not dispute that the Longshore Act applies in this case.
[7] *Id.* at 1119.
[8] *Id*. *Perron v. Bell Maint. & Fabricators, Inc.*, 970 F.2d 1409, 1412, 1994 AMC 602 [DRO] (5 Cir. 1992).
[9] *Id.* at 1120.

employee? (9) Who had the obligation to pay the employee?[10]

Every factor but one (the sixth, which is neutral) weighs in favor of borrowed employee status.[11]

The first factor requires the borrowed employee to take direction and control from his employer, instead of mere suggestion as to details.[12] The court found that BP America prepared and assigned Matthew daily tasks via a company computer site and through daily meetings.[13] BP America also signed his work permits, which were required each day of work.[14] Danos did not supervise his work on the *Marlin*; Matthew's supervisor at Danos worked from an onshore office.[15] BP America exercised authoritative control over Matthew. The first factor weighs in favor of borrowed employee status.[16]

The second factor weighs in favor of borrowed employee status because Matthew was working to further BP America's interest, not Danos'.[17] The third factor asks whether there was an agreement between Danos and BP America.[18] Matthew worked aboard the platform pursuant to a Master Service Contract ("MSA").[19] While the MSA precludes Matthew's borrowed employee status, the practice of the parties suggests otherwise.[20] The reality on the platform is that BP America controlled Matthew's work in all material aspects, modifying the MSA's provision regarding Danos' control and subsequently Matthew's employment status.[21] Therefore, the third factor weighs in favor of borrowed employee status.[22]

The fourth factor is clear because Matthew continued to work within current conditions and never objected to them.[23] BP America had the power to terminate employment, directing the fifth towards Matthew's status as a borrowed employee.[24]

The sixth factor determines the party that supplied the tools.[25] Again, the MSA requires Danos to provide all tools for Matthew; however, the reality on the platform differs.[26] While BP America provided all tools to aid Matthew in his work, it is unclear who paid for these tools. Thus, the court finds this factor neutral.[27]

Matthew worked on the platform for two years; this is a considerable amount of time and establishes the seventh factor.[28] The eighth factor is also easily established because BP America

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[10] *Brown v. Union Oil Co. of Cal.*, 984 F.2d 674, 677, 1995 AMC 606 [DRO] (5 Cir. 1993 *per curiam*) (collecting cases). *But see Gaudet v. Exxon*, 1978 AMC 591, 597, 562 F.2d 351, 357 (5 Cir. 1977) (emphasizing fourth, fifth, sixth, and seventh factors).

[11] *Id.* at 1122.

[12] *Id.* at 1126.

[13] *Id.* at 1122-1123.

[14] *Id.* at 1123.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1124.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 1124-1125.

[24] *Id.* at 1125.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1126.

[28] *Id.*

had the power to terminate employees.[29]

The ninth factor begs the question of payment to the employee. While Danos technically paid Matthews, BP America signed off on Matthew's time sheets; this is an arrangement that supports borrowed employee status.[30]

All factors, except for the sixth, weigh towards the status of borrowed employee.[31] The Eastern District of Louisiana granted Danos' motion for summary judgment because there was no genuine dispute that Matthew was a BP America's borrowed employee.[32] Because plaintiff's claims were dismissed, BP America's intervening claims for subrogation were dismissed as well.[33]

Brian Auricchio
Class of 2018

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

BECAUSE OF UNCERTAINTY IN THE FIFTH CIRCUIT REGARDING WHETHER GENERAL MARITIME CLAIMS ARE REMOVABLE TO FEDERAL COURTS, DISTRICT COURTS DID NOT ABUSE THEIR DISCRETION IN CONCLUDING A PARTY HAS AN OBJECTIVELY REASONABLE BASIS FOR REMOVAL

Riverside Construction Co. v. Entergy Mississippi Inc.
2015 WL 5451433
United States Court of Appeals for the Fifth Circuit
(September 17, 2015)

The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in concluding that Entergy had an objectively reasonable basis for attempting to remove this case to federal court, and, therefore, denied Riverside's motion for attorneys' fees and expenses under 28 U.S.C. § 1447(c).

Riverside Construction Company ("Riverside") brought this action for breach of contract, *quantum meruit*, and unjust enrichment against Entergy Mississippi ("Entergy") due to a price discrepancy over repairs completed by Riverside on Entergy's Fender System ("the Dolphin System.")[1] The Dolphin System is a fuel and unloading system fixed to Entergy's fuel dock in the Mississippi River.[2] In 2008, the Dolphin System was damaged when a barge collided with the dock.[3] Entergy subsequently contracted Riverside to repair the system at a price not exceeding $176,585.62.[4] The repair costs for the system exceeded $1 million, which Entergy declined to pay.[5]

Riverside filed suit in state court, but Entergy removed the case to federal district court, invoking the court's maritime jurisdiction on the basis that the parties operated under a maritime contract.[6] The district court remanded the suit to state court because it held that the contract was not in fact a federal maritime contract.[7] The district court also held that, even if it were a federal maritime contract, that the "saving to suitors" clause of 28 U.S.C. § 1333(1) precluded the suit from being removed. [8] Subsequently, Riverside filed a motion for attorney's fees and expenses under 28 U.S.C. § 1447(c), which allows a plaintiff to recover when a defendant improperly removes a case to federal court where there is no jurisdiction.[9] The district court denied this motion because it held that Entergy had an objectively reasonable belief that removal was proper.[10]

Entergy argued that their contract with Riverside was a federal maritime contract because the contract was for work that was to be done from a floating barge, which the Fifth Circuit considers a maritime vessel.[11] Vessels were also used to transport Riverside's workers to

[1] *Riverside Const. Co. v. Entergy Mississippi Inc.*, 2015 WL 5451433, 1 (5th Cir. 2015).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*; *See* 28 U.S.C. § 1333
[7] *Id*.
[8] *Id*; *See* 28 U.S.C. § 1333(1)
[9] *Id*; *See* 28 U.S.C. § 1447(c)
[10] *Id*.
[11] *Id*. at 2

the repair site.[12] The court held that, regardless of whether a barge is typically a vessel, a moored platform used primarily as a work platform is not classified as a vessel.[13] The sole act of transporting workers by vessel could not make the contract a maritime one because the transportation of workers was auxiliary to the primary purpose of the agreement.[14] Although the court concluded that removal was improper due to their agreement not being a maritime contract, it held that Entergy did have an objectively reasonable basis for removal based on their "colorable arguments supported by facts and authority."[15]

Riverside argued that, regardless of whether their contract was maritime in nature, removal to federal court was prohibited under the "saving to suitors" clause in 28 U.S.C. §1333(1).[16] Therefore, there would still be no objectively reasonable basis for removal.[17] Although the Fifth Circuit has previously held that state court claims brought under the "saving to suitors" clause are not removable, it recognizes that Congress' 2011 amendment to 28 U.S.C. § 1441(b) created a disagreement among the district courts regarding whether maritime claims were removable absent an independent basis for federal jurisdiction. [18] The only direction that the Fifth Circuit has provided is that admiralty jurisdiction cases under 28 U.S.C. § 1331 "may" need complete diversity for removal.[19] Because of this uncertainty, Entergy has an objectively reasonable basis for removal.[20]

Accordingly, the district court did not abuse its discretion in concluding that Entergy had an objectively reasonable basis for attempting to remove this case to federal court, and, therefore, denied Riverside's motion for attorneys' fees and expenses under 28 U.S.C. § 1447(c).[21]

James W. Clarke
Class of 2018

[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 3
[16] *Id*; *See* 28 U.S.C. §1333(1).
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*. at 3-4

MARITIME SUBSTANTIVE LAW DOES NOT APPLY WHEN INJURED PLAINTIFF FAILS TO SATISFY THE LOCALITY TEST PREREQUISITE TO A MARITIME TORT

Adamson v. Port of Bellingham
2015 WL 4716421
United States District Court for the Western District of Washington
(Decided August 6, 2015)

United States District Court held that Adamson's claims were not covered by Maritime Law because they failed to meet the "locality test" and because Adamson brought her claims to Federal Court using diversity jurisdiction and not Admiralty Law.

Shannon Adamson ("Adamson") was employed as an officer aboard the car ferry M/V Columbia ("the Columbia").[1] Adamson was tasked with adjusting the passenger gangway leading from the port to the ship while the Columbia was docked at the Port of Bellingham. The Port of Bellingham ("Bellingham") owns this gangway, which is part of a steel structure permanently affixed to a pier extending from land over the water.[2] When a ferry arrives at the port, the gangway is lowered onto the boat, allowing passengers to board and disembark from arriving boats.[3] While she was on the gangway, it fell and Adamson was injured.[4]

Adamson filed a complaint for personal injury and for loss of consortium, citing diversity jurisdiction under 28 U.S.C. 1333(a)(1).[5] Adamson argued that the gangway should be considered part of the ship, while it is being used "in preparation for a passenger-loading operation."[6] Therefore, the tort is maritime in nature, or at least there is a genuine dispute of material fact as to whether the gangway is part of the ship or part of the land.[7] Bellingham contends that the gangway on which the injury occurred is permanently attached to a pier, and should be considered an "extension of land."[8] Therefore, Adamson's injury is not a maritime tort.[9]

The main question that the court needed to decide was whether Adamson's personal injury claim qualifies as a maritime tort or a general tort.[10] The Ninth Circuit has identified a test for maritime torts outside or prior to application of the Admiralty Extension Act ("AEA").[11] First, the "locality test" determines whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water.[12] Second, "the relationship test" indicates whether the tort claim bears a significant relationship to traditional maritime activity.[13]

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[1] *Adamson v Port of Bellingham*, 2015 WL 4716421, 1 (2006).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*; 28 U.S.C. 1333(a)(1).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* (citing AEA, 46 U.S.C. 30101).
[13] *Id.* at 3.

Bellingham did not dispute "the relationship test", so the court only considered "the locality test."[14] Adamson argued that, because her injuries occurred on a gangway, "the locality test" was satisfied.[15] The court disagreed, finding that the gangway was "permanently affixed" to the pier, which is "an extension of the land." Therefore, "the locality test" was not satisfied, and Adamson's claim did not qualify as a maritime tort.[16] Furthermore, the court noted that, because Adamson did not bring a claim against the vessel, which might owe a duty of care to employees, a claim against the port was not sufficient for a maritime tort.[17]

Adamson further argued that the locality test was satisfied because the gangway fell onto the Columbia when she was injured.[18] Adamson contended that she was injured in the commission of a maritime tort against the Columbia.[19] However, the court held that, because Alaska is not bringing claims in this action, Adamson's argument is purely hypothetical and fails to establish her claim as a maritime tort.[20]

Adamson further argued that, even if the gangway is considered part of the land, the case still satisfies the locality test under the Admiralty Extension Act ("AEA").[21] The AEA extends maritime jurisdiction to include "injury or damage […] caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."[22] Here, Adamson failed to explain how the AEA could affect the maritime nature of her claims under diversity jurisdiction, and, therefore, the court refused to apply the AEA to her negligence claim.[23]

Maxwell Weiss
Class of 2018

[14] *Id.*
[15] *Id.* at 4.
[16] *Id.* (citing *The Admiral Peoples*, 295 U.S. 649, 651 (1935)).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

A THIRD PARTY CAN RECOVER FOR ECONOMIC DAMAGES SUFFERED AS A RESULT OF PHYSICAL DAMAGE TO THE PROPERTY OF ANOTHER UNDER EQUITABLE SUBROGATION

In re Marquette Transportation Gulf-Inland, LLC, as Owner Pro Hac Vice of the M/V St. Thomas
United States District Court for the Eastern District of Louisiana
(2015) WL 2341653
(Decided: May 14, 2015)

The District Court of the Eastern District of Louisiana held that Parish could recover its economic losses incurred as a result of the physical damage to State's property caused by Marquette if Parish could prove the damages would be recoverable by State and the right to recover was contractually shifted from State to Parish.

Marquette Transportation Gulf-Inland, LLC ("Marquette") filed an instant limitation action under the Limitation of Liability Act[1] as a result of an allision between the M/V ST. THOMAS, chartered by Marquette, and the Gross Tete Bridge (the "Bridge"), owned by the State of Louisiana ("State").[2] As a result of this action, Parish filed an opposition and Marquette moved for summary judgment regarding Parish's opposition.[3]

On February 28, 2014 the M/V ST. THOMAS, chartered by Marquette, was travelling up the Intracoastal Waterway when it struck the Bridge causing extensive damage.[4] The Bridge had to be closed for approximately eighty days at which time Parish entered into an agreement, brokered by State's Department of Transportation and Development ("DOTD"), with State's Department of Wildlife and Fisheries ("DWLF") to provide for ferry transportation for the residents of Parish and State.[5] The ferry was owned by the state and operated by DWLF while Parish was responsible for the creating and operating the ferry landing sites on either side of the Intracoastal Waterway.[6]

The district court denied Marquette's motion for summary judgment, holding that the doctrine established in *Robins Dry Dock* was not applicable to this case as "the loss sought to be recovered is a loss properly recoverable by the real party in interest, the right to recovery having merely been shifted to a third party."[7] The court did not find in favor of Parish's claim or award Parish any damages as the facts at trial could show that State, the real party in interest, would not have been able to recover or the interest was not properly transferred from State to Parish.[8]

The *Robins Dry Dock* doctrine does not allow for recovery of economic damages in the absence of physical damage to property in which the party seeking to recover held a proprietary interest.[9] In *Robins Dry Dock & Repair Co. v. Flint*, the Supreme Court held that lost expected

[1] *In re Marquette Transportation Gulf-Inland, LLC, as Owner Pro Hac Vice of the M/V St. Thomas*, 2015 WL 2341653, 1 (2015); See 46 U.S.C. § 30501, *et seq.*
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 6
[8] *Id.*
[9] *Id.* at 3

profits as a result of negligent damage to the ship while in dry dock were not recoverable.[10] As a result, in *State of La. ex rel. Guste v. M/V TESTBANK*, the Fifth Circuit established that "claims for economic loss unaccompanied by physical damage to a proprietary interest [are] not recoverable in maritime tort."[11] The principal concern behind the formation of this doctrine was the limitation of liability and recovery in maritime torts for pragmatic reasons.[12]

There are two paths available for recovery in light of the *Robins Dry Dock* doctrine, the "*Amoco* exception" and the "*Amoco* exclusion" which stem from *Amoco Transp. Co. v. S/S Mason Lykes*.[13] The Fifth Circuit in *Amoco* found there was nothing in that doctrine that prevented recovery of losses in the event interest in the damaged property had been "contractually shifted."[14] Under the exception, in cases in which the *Robins Dry* Dock doctrine would normally apply, a cargo owner can recover damages in the event of a collision between two vessels and the cargo owner and damaged vessel are considered to be part of a common venture.[15] Under the exclusion, a third party can recover economic damages if the real party in interest would be able to recover for the physical damage to property that caused the economic damages and the real party in interest had transferred that interest to the third party, a concept known as equitable subrogation.[16]

Marquette asserted Parish's claim should be dismissed "[b]ecause the Fifth Circuit has squarely endorsed the *Robins Dry Dock* doctrine. . ." which would prevent recovery in the absence of physical damage to property in which it had a proprietary interest.[17] Marquette attempted to distinguish the instant matter from Amoco to show the *Amoco* exception did not apply.[18] Marquette's motion for summary judgment was based on the claim that Parish failed to prove equitable subrogation.[19]

Parish asserted that it may recover under the *Amoco* exclusion as its economic damages were the result of physical damage to the property of State and that State contractually transferred a portion of that interest to Parish.[20] In addition to asserting equitable subrogation, Parish claimed the concern behind the formation of the *Robins Dry Dock* doctrine, excessive liability, is not an issue in this case.[21]

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id. Amoco Transp. Co. v. S/S Mason Lykes* involved a collision between two vessels, one of which was loaded with cargo. The cargo was not damaged as a result of the collision, but the vessel carrying that cargo was unable to continue its voyage. The owner of the damaged vessel put the cargo on another vessel to continue on to its destination. The owner of the cargo and the owner of the vessel had a "freight earned clause" in their contract which meant Amoco was liable for the full freight on the aborted voyage as well as the second full freight charge for the rest of the trip. Since the economic loss did not stem from any property damage, the district court applied the *Robins Dry Dock* doctrine barring Amoco from recovering any damages.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 1
[18] *Id.* Marquette relied on the Fifth Circuit's holding in *Norwegian Bulk Transport A/S v. Int'l Marine Terminals P'ship* which limited the *Amoco* exception to cases involving collisions.
[19] *Id.* at 1
[20] *Id.* at 2
[21] *Id.*

The court found the Fifth Circuit had limited the *Amoco* exception to collision cases so it was not applicable to the instant matter.[22] The court further reasoned the *Amoco* exclusion is not incompatible the *Robins Dry Dock* doctrine because of the requirement that the interest be transferred from the primary party in interest to the third party.[23] A trier of fact could reasonably find that in entering into a cooperative agreement in operation of the ferry the State shifted the economic loss incurred as a result of the physical damage to the Bridge to Parish.[24]

Accordingly, the court dismissed Marquette's motion for summary judgment as it failed to show it was entitled to judgment as a matter of law. The matter of whether there was equitable subrogation in this case is to be decided at trial.

William Accordino
Class of 2018

[22] *Id.* at 5
[23] *Id.*
[24] *Id.* at 4

NON-SEAMEN ARE NOT ENTITLED TO JONES ACT RELIEF UNLESS THEY MEET ALL PRONGS OF THE CHANDRIS TEST

Alexander v. Express Energy Services Operating, L.P
784 F.3rd 1032
United States Court of Appeals Fifth Circuit
(Decided May 7, 2015)

United States Court of Appeals, Fifth Circuit, held that a non-seaman is not entitled to relief under a Jones Act claim for failure to meet all prongs of the Chandris Test.

Michael Alexander (Appellant) appealed a decision from the United States District Court for the Eastern District of Louisiana granting Express Energy Services Operating L.P.'s (Appellee) motion for summary judgment on seaman status.[1]Appellant was employed as a lead hand/operator in Express's plug and abandonment (P & A) department.[2] Appellant specialized in plugging decommissioned oil wells on various platforms.[3] On August 11, 2011 Appellant was injured while working on the P & A project on a platform owned by Appellee.[4] A crane owned and operated by Aries Marine Corporation, for the benefit of the P & A crew, was set up above the platform.[5] Additionally, wireline equipment was located on the platform where Appellant was working.[6] Appellant testified that the P & A crew set up the equipment on the platform where he began working.[7] Appellant was injured when a wireline from the crane snapped causing a bridge plug/tool to fall from the above deck and rolled onto the Appellant's foot. Appellant filed an action under the Jones Act against Appellee.[8] Appellee filed a motion for summary judgment on seaman status.[9] Appellee argued that Appellant was a platform-based worker who failed to satisfy either prong of the *Chandris* seaman status test.[10] The district court granted Appellee's motion for summary judgment. Appellant appealed the motion.[11]

Federal Rule of Civil Procedure 56(a) provides that summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact.[12] The court consider the "evidence in the record in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party."[13]

A party asserting that a fact is genuinely disputed must do so by either: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers or other materials; or (B) showing that the materials cited do not establish the absence or presence of a

[1] *Alexander v. Express Energy Services Operating*, L.P., 748 F.3d 1032, 1033 (5th Cir. 2015).
[2] *Id*. at 1035.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id* at 1035-1036.
[8] *Id* at 1036.
[9] *Id.*
[10] *Id.*
[11] *Id*. at 1032.
[12] *Id*. at 1033.
[13] *Id*. (quoting *Bluebonnet Hotel Ventures, L.L.C v. Wells Fargo Bank, N.A*., 754 F.3d 272,275 (5th Cir. 2014)).

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.[14]

In order to maintain an action under the Jones Act the plaintiff must be a seaman.[15] "Land-based workers are not seaman."[16] The Court based their determination on the two prong test set out by the Supreme Court in *Chandris, Inc. v. Latsis* in order to determine seaman status.[17] In order to be a seaman, one must satisfy the first prong of the test by showing that his duties "contribute to the function of the vessel or to the accomplishment of its mission" but does not necessarily require "aid in the navigation or contribution to the transportation of the vessel" but requires "doing the ship's work."[18] The second prong a seaman must satisfy is they must have a connection to the vessel in navigation that is substantial in terms of both its duration and its nature.[19] In other words there must be a substantial connection.[20] "A maritime worker who spends only a small fraction of time working on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what their duties are."[21] The court also found that, "a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[22]

Appellee argued that Appellant was a platform-based worker who failed to satisfy either prong of the *Chandris* seaman status test.[23] Appellee argued that because Appellant worked on the wells he did not contribute to the function of the vessel or the accomplishment of its missions.[24] Appellee states that Appellant failed to show that he spent at least 30% of his time on the vessel. Appellant argues that he did contribute to the function of the Aries lifeboat and that if Roberts was applied he would meet the second prong.[25]

The district court granted Appellee's motion for summary judgment.[26] The Court of Appeals concluded that Appellant failed to carry his burden of showing that he is a seaman and affirmed the district court's order granting the motion for summary judgment.[27]

Brian G. White
Class of 2016

[14] *Id.* (quoting *Bluebonnet Hotel Ventures, L.L.C v.,* 754 F.3d 272,275 (5th Cir. 2014)).
[15] *Id.*
[16] *Id. (*quoting *Hufagel v. Omega Serv. Indus., Inc*., 182 F. 3d 340,346 (5th Cir. 1999) (citing *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed.2d 800(1997)).
[17] *Id*. at 1033.
[18] *Id*. at 1033-1034 (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S.Ct. 2172, 132 L.ED.2d 314 (1995)).
[19] *Id*.
[20] *Id*.
[21] *Id*. (quoting *Chandris, Inc.*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.ED.2d 314 (1995)).
[22] *Id*. (quoting *Chandris, Inc.*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.ED.2d 314 (1995)).
[23] *Id*. at 1036.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*. at 1037.

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