Procrastinators’ Programs℠

Maritime Law Update 2012

Grady S. Hurley

*Jones, Walker, Waechter, Poitevent, Carrère & Denège L.L.P.*

Course Number: 0200121227

1 Hour of CLE

December 27 2012

11:20 a.m. – 12:20 p.m.
Grady Hurley has practiced primarily in the areas of maritime, oilfield, and energy litigation since 1979. His varied experience has included cargo, collision, allision, product liability, toxic tort, insurance, indemnity, death, personal injury, property damage, lease cancellation, right-of-way disputes, explosions, and multi-party complex and commercial litigation in state and federal courts. In his maritime practice, Mr. Hurley has engaged in both brown water, offshore, and blue water litigation, including briefs to the U.S. Supreme Court on Suits in Admiralty Act cases, indemnity, and amicus briefs to the Louisiana Supreme Court.

Mr. Hurley's oilfield practice has included the representation of pipeline companies, offshore platform operators, crewboats, drilling companies, exploration and production companies, seismic operators, catering companies, and other oilfield service concerns. In an advisory capacity, he has drafted Master Service Agreements and insurance provisions, and was actively involved in the initial litigation defining the Louisiana Oilfield Indemnity Act. Mr. Hurley has represented oil companies in fishery laws and lobbying, including oyster restoration cases, wherein amicus briefs were provided to the Louisiana Supreme Court, which changed the law on remedies available to oyster fishermen.

Mr. Hurley has lectured extensively on risk management, discovery, ethics, and admiralty law, while remaining active in local and national bar associations. He has been recognized in various national and local publications.

Mr. Hurley is Past President of the New Orleans Bar Association and Inn of Court. He has served as a district representative for the Louisiana State Bar Association and was a member of the House of Delegates for the American Bar Association. He previously served as the chairman of the Maritime Law...

Practice Areas
Admiralty & Maritime
Business & Commercial Litigation
Energy
Energy: Distinguishing Our Attorneys
Environmental & Toxic Torts
Products Liability

Bar Admissions
Louisiana, 1979

Education
Tulane University Law School, LL.M., 1981
Tulane University Law School, J.D., 1979;
Representative, University Senate; Vice Justice, Phi Alpha Delta
Tulane University, B.A., 1976; President, Associated Student Body; Omicron Delta Kappa; Kappa Delta Phi; Phi Alpha Theta
Association (MLA) Offshore Industries Committee and as a board member of the MLA. Additionally, he participates in various civic organizations and is a past president of the Tulane Alumni Association; he currently serves on the advisory council of Tulane's Admiralty Law Institute as well as on the East Jefferson General Hospital Board of Directors.

**Noteworthy**

- Listed in the 2012 edition of *Louisiana Super Lawyers* in the area of Transportation/Maritime (listed annually since 2007)
- Recognized as a Top Lawyer by *Litigation 2007 and 2012– A Supplement to The American Lawyer and Corporate Counsel* (Energy, Environmental and Natural Resources Law)
- AV® Peer Review Rating in Martindale-Hubbell

**Presentations**

- “Offshore Maritime, Jurisdictional, and Construction Law Issues”
  Fluor LawCon Conference, New Orleans, Louisiana, November 9, 2011
- "Maritime Death Actions: Time for a Change?"
- "Current Maritime Release Issues: The Effects of AmClyde and Medicare Secondary Payer Act"
  Tulane Admiralty Law Institute, New Orleans, Louisiana, March 23, 2011
- "Procrastinators' Programs"
  New Orleans Bar Association CLE Program, New Orleans, LA, December 21, 2010
- "Medicare, Medicaid, and SCHIP Extension: What Every Lawyer Must Know and Do"
  New Orleans Bar Association, April 17, 2010
"Big Easy Bootcamp: Basic Training for Lawyering in New Orleans"
New Orleans Bar Association, November 2009

"The Nuts and Bolts of Law Practice Management"
New Orleans Bar Association, October 16, 2009

"Principles of Maritime Torts"
Lorman Education Services, May 14, 2009

"Troubled Waters—Admiralty Law: Insurance, Pollution, and Finance Issues"
Tulane Admiralty Law Institute, New Orleans, Louisiana, March 2009

"Right Client, Right Terms, Right Time"
New Orleans Bar Association, Procrastinator's Program, December 2008

Tulane University Law School Annual Professionalism Orientation 2008–2010

"Bridging the Generation Gap"
LLTA, 2007

"Shipbuilding and Repair Disputes"
OMSA Seminar, 2007

"Ethics and Professionalism"
New Orleans Bar Association, Procrastinator's Program, December 2006

"E-Discovery and Spoilation"
El Paso Pipeline Conference, Birmingham, Alabama, October 2006

"Attorney Advertising"
New Orleans Bar Association, March 2006

"Delivering Bad News to Clients"
New Orleans Bar Association, 2006

"Ethical Consideration in Business Litigation"
Lorman Educational Seminar – Business Torts in Louisiana, April 22, 2005

"Ethics Considerations in E-Discovery and Spoilation"
Lorman Commercial Litigation, January 1, 2005

Jones Walker Hurricane Katrina Seminar 2005

"Jones Act Sexual Harassment"
Jones Walker Seafood Seminar, April 2004

"Oilfield Master Service Agreement"
New Orleans Bar Association, 2004
"Shakespeare and the Law of Detrimental Reliance"
Bench/Bar Conference, 2004

"Law Day"
Civil District Court

Publications

- "LexisNexis Expert Commentaries"

Memberships

- American Bar Association (Vice-Chair, Tort Trial and Insurance Practice Section, Maritime Law Committee; House Delegate, 2004–2006; Former Chairman, Subcommittee on Wrongful Death and Workman's Compensation, 1990–1992; Member, TIPS, Maritime Law Committee, Subcommittee on Collision Law; 2006 Mid-Year Planning Committee)
- Associated Catholic Charities
- Bar Association of the Fifth Federal Circuit (Member, Delegate to Fifth Circuit Judicial Conference, 2002 and 2005)
- Camp Challenge/Volunteer
- East Jefferson General Hospital Board of Directors (2011 to date)
- East Jefferson General Hospital Foundation (Board of Directors, 2006 to date; Executive & Finance Committee, 2009 to date)
- Energy Bar Association
- Federal Bar Association
- Institute for Energy Law (Advisory Council)
- Louisiana Bar Foundation (Fellow, 2001 to present; Member Gala Committee 2008; YLS Representative to the Board; Member, Judicial Liaison Committee, 2005–2006; Fellows Gala Committee, 2008)
- Louisiana State Bar Association (First Board District; Representative, Young Lawyers Section, 1986–1987; Member, Executive Committee, National Mock Trial Championship, 1991; Assistant Tort Examiner, Committee on Bar Admissions, 1986 to date)
- Mariners' Club of New Orleans
- Maritime Law Association (Member, Board of Directors, 2005–2009; Proctor, Chairman of Offshore Industries Committee, 2004–2008; Member, Committee on Maritime Personnel, 1989 to date; Member, Young Lawyers Committee, 1989–1995; Proctor Member, 2001)
- New Orleans Bar Association (President, 2002; Vice President, 2000; Treasurer, 1998; Secretary, 1997; Member, Executive Board of Directors, 1994–1999; Chairman, Maritime Law Committee, 1990–1992; Editor, Briefly Speaking, 1993; Member, It's The Law Committee, 1994–2001; Chairman, Bench/Bar Conference, 2005)
- The New Orleans Bar Association American Inn of Court (President, 2003–2005)
- New Orleans Bar Foundation (President, 2007–2009; Board of Directors, 2001 to present; Vice President, 2006)
- The New Orleans Claims Association
- Offshore Marine Services Association
- The Pro Bono Project (Member, Board of Directors, 2001–2002; Volunteer, 2006 to date)
- Rocky Mountain Mineral Law Institute
- Southeast Admiralty Law Institute (Member, Board of Directors/Port Captain, 2003–2006)
- St. Thomas More Society
- Tulane Admiralty Law Institute (National Advisory Board and Planning Committee, 2004 to date)
- Tulane University, Alumni Association (President, 1996), Associated Student Body President (1975)
- World Trade Center, Plimsol Club

**Court Admissions**
- U.S. Supreme Court, 1986
- 5th Cir., 1980
- 11th Cir., 1980
- E.D. La., 1979
- M.D. La., 1980
- W.D. La., 1980
New Orleans Bar Association’s
Procrastinators’ Programs

Maritime Law Update
Thursday, December 27, 2012

2012 Maritime Law Overview
in the Fifth Circuit

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I. JURISDICTION


Plaintiff spent 98 percent of his time working on fixed offshore platforms, but was killed in a forklift accident at an onshore facility. His widow sought benefits under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”). Relying on the Fifth Circuit’s “situs-of-injury” test, an ALJ dismissed the claim since the accident did not occur on the Outer Continental Shelf (“OCS”). The decision of the ALJ was affirmed by the Benefits Review Board, but was reversed by the Ninth Circuit. The Ninth Circuit rejected tests used by the Third and Fifth Circuits, and concluded that a claimant seeking LHWCA benefits through the Outer Continental Shelf Lands Act (“OCSLA”) must establish a “substantial nexus” between the injury and extractive operations on the shelf in order to recover benefits.

The Supreme Court considered four competing interpretations of 43 U.S.C. §1333(b) which provides LHWCA benefits for the “disability or death of an employee resulting from an injury occurring as the result of operations conducted on the outer Continental Shelf” before ultimately adopting the Ninth Circuit’s “substantial nexus” test.

The Supreme Court rejected the Fifth Circuit’s “situs-of-injury” test which required an injury to occur on the OCS in order for a claimant to recover LHWCA benefits. The Court reasoned that the plain language of the statute does not impose a situs requirement – only a causal requirement. The Solicitor General proposed a different two-pronged situs based test for determining LHWCA coverage. The proposed test would provide coverage to any claimant injured on the OCS, but would only provide coverage to claimants injured off of the OCS whose duties contribute to operations on the OCS and whose work on the OC itself was substantial in both duration and nature. The Court rejected this test on the same grounds as it rejected the Fifth Circuit’s “situs-of-injury” test. The Court also rejected the Third Circuit’s “but-for” causation test on the grounds that it was too expansive and could potentially cover injuries that did not directly result from operations on the OCS.

In adopting the Ninth Circuit’s “substantial nexus” test, the Court noted that although the test may not be the easiest to administer, it was the most faithful to the text of 43 U.S.C. 133(b). This test requires that the claimant establish a significant causal link between the injury that he suffered and his employer’s on-OCS operations conducted for the purpose of extracting natural
resources from the OCS. The Court further recognized that this determination will depend on the individual circumstances of each case.


An intoxicated watercraft operator struck a barge and tug in Louisiana navigable waters resulting in the death of the watercraft operator. The parties stipulated that general maritime law was applicable to this matter. However, the owner of the barge and tug moved for summary judgment seeking a declaration that the estate of the watercraft operator was statutorily barred from recovering damages pursuant to La. R.S. § 9:2798.4 which provides that no one shall be liable for damages as a result of the injury or death of a watercraft operator who (1) was operating a watercraft with a blood alcohol content of 0.8 or greater; (2) is found to be in excess of 25% negligent; and (3) whose negligence was a contributing factor causing the injury or death.

The trial court found that the plaintiff’s estate had a valid claim for wrongful death damages under the general maritime law pursuant to *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). The barge and tug owner argued that Louisiana state law should be applied in this case pursuant to *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). However, the court did not accept this interpretation of *Yamaha* stating:

> While Yamaha would potentially allow for a plaintiff to supplement the remedies available under federal maritime law with state law remedies to allow for additional recovery, it cannot be read to allow a defendant to be immunized from liability, thus denying any and all remedies to the survivors and estate of a deceased non-seaman in an admiralty allision.

Finally, the court found that applying the contributory negligence scheme of La. R.S. § 9:2798.4 would interfere in the uniformity of maritime law in its settled comparative fault allocation scheme in wrongful death cases.

*Evans v. TIN, Inc.*, 2012 WL 1499225 (E.D. La. Apr. 27, 2012) - Admiralty Tort Jurisdiction for Land-Based Discharges

Proposed class of plaintiffs filed suit against a Paper Mill after the alleged discharge of contaminants into Pearl River, seeking, inter alia, punitive damages under the General Maritime Law and/or state law.

The Paper Mill moved to dismiss the claims for punitive damages under the General Maritime Law, arguing that admiralty jurisdiction did not exist over the alleged torts in question.

Under the situs and nexus requirements set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995), the Court first held that the discharge of contaminants into Pearl River satisfied the location test, holding that “[a]lthough the discharge may have originated from a land-based facility, the proposed class of property owners, commercial and recreational fishermen, as well as others who use the Pearl
River for business or recreational purposes, claim to have sustained their injuries on navigable water as a result of the environmental damage caused by the discharge.”

Under the nexus test, the Court held that the first requirement was easily satisfied in that the discharge had the obvious potential to impact or disrupt maritime commerce.

Regarding the second prong of the nexus requirement, the Court held:

“Despite the potential impact on maritime commerce, the general character of the activity giving rise to the incident in this case was neither maritime in nature nor substantially related to any traditional maritime activities. Plaintiffs have not alleged that [the Paper Mill’s] land-based industrial activities involved navigation, seamen, safety aboard vessels, or other more traditional maritime activities.”

Accordingly, the Court held that admiralty jurisdiction did not exist, and dismissed the claims for punitive damages under the General Maritime Law.


The Court denied a Motion to Dismiss for lack of subject matter jurisdiction, finding that admiralty jurisdiction exists over claims of trespass.


A vessel was built at the Defendant’s shipyard for the U.S. Navy. In December 2008, the vessel underwent an unsuccessful sea trial when the propulsion system failed resulting in a fire in the aft engine room. Plaintiff was injured in January 2009 when he fell through an open hatchway. The vessel completed a successful sea trial in February 2009. Plaintiff filed a Complaint on the basis of maritime jurisdiction and general maritime law. Defendant filed a motion to dismiss for lack of subject matter jurisdiction.

In order to have maritime subject matter jurisdiction, the court considers the location of the tort, the situs factor, and the pertinent activity, the nexus factor. To satisfy the nexus factor, the wrong must bear a significant relationship to traditional maritime activity. It is well-established that ship construction is not a maritime activity. Plaintiff argued that there is maritime jurisdiction since he was hired to repair the vessel – an activity that constitutes maritime activity. The court refused to adopt Plaintiff’s argument as a ship undergoing sea trials is not a vessel in navigation and dismissed Plaintiff’s lawsuit.
II. PERSONAL INJURY

*Manderson v. Chet Morrison Contractors, Inc.*, 2012 U.S. App. LEXIS 18 (5th Cir. 2012) - Work Illness and Medical Expenses

Plaintiff is a licensed engineer who experienced symptoms of ulcerative colitis, diabetes, and liver disease while in the service of a vessel. He asserted Jones Act, unseaworthiness, and maintenance and cure claims against his employer. Plaintiff set forth allegations of negligence *per se* and unseaworthiness against his employer for violations of mandatory rest period, manning, and watch procedure requirements. The Fifth Circuit upheld the trial court’s denial of plaintiff’s Jones Act and unseaworthiness claims finding that plaintiff did not produce sufficient evidence that he was not provided 10 hours of rest per 24 hour period and that defendant did not violate the USCG manning and watch procedure requirements.

With regard to plaintiff’s maintenance and cure claims, the trial court found that defendant acted in an arbitrary and capricious manner in failing to pay maintenance and cure and awarded attorneys’ fees to plaintiff. The Fifth Circuit reversed the trial court’s award of attorneys’ fees finding that defendant was not arbitrary and capricious as plaintiff had prior health issues, claimed that his condition was not work related on disability forms, failed to disclose to defendants a prior history of Hepatitis C and diabetes, and failed to file an injury report with defendants. The Court also reduced plaintiff’s cure award from $169,691.06 – the amount charged by plaintiff’s health care providers – to $71,085.79 – the amount actually paid by plaintiff’s insurer. The Fifth Circuit relied on the well-established principle that a seaman is only entitled to recover maintenance and cure for those expenses that he actually incurred in doing so.

*Ledet v. Smith Marine Towing Corp.*, 2011 U.S. App. LEXIS 25506 (5th Cir. 2011) - Comparative Fault

Plaintiff suffered a compression fracture to his L1 and T12 vertebrae when he was struck by a pendant wire during a tow transfer. The injury required a three level fusion, but did not resolve the plaintiff’s pain. The plaintiff admitted to knowing that he was in a “danger zone” at the time of the injury. However, the Court found that the plaintiff could not be contributorily negligent even if he knew of the possible dangers of entering the area as he was following the captain’s orders at the time. In doing so, the Fifth Circuit also upheld a $1.3 million pain and suffering award.

*Callahan v. Gulf Logistics, LLC*, 2011 U.S. App. LEXIS 26012 (5th Cir. 2011) - Personnel Transfer

Plaintiff is an employee of an offshore service provider who was injured while preparing for a personnel basket transfer from a crew boat to a mobile drilling unit. Plaintiff asserted numerous negligence claims against the owner and operator of the MODU and the owner and time charterer of the crew boat.
The Fifth Circuit upheld the trial court’s dismissal of plaintiff’s claims against the owner and operator of the MODU and the time charterer of the crew boat finding that these parties had no operational control over the personnel transfer and, thus, owed no duty to plaintiff.

The Fifth Circuit reversed the trial court’s dismissal of the owner and operator of the crew boat. No agent of the crew boat owner instructed plaintiff to leave the cabin of the vessel. Plaintiff independently arrived at the conclusion that the crew of the crew boat was ready for the personnel transfer and left the cabin on his own. However, the Fifth Circuit concluded that there existed a genuine issue of fact as to whether plaintiff was following custom and experience when he exited the cabin to prepare for transfer or was implicitly directed by the crew of the crew boat to prepare for transfer.

*Mercer v. Chem Carriers, LLC, 790 F.Supp.2d 478 (E.D. La. 20011).*

Plaintiff was injured while securing a barge to defendant’s tug resulting in the amputation of his left foot. Plaintiff filed a Jones Act claim against his employer alleging that defendant was negligent in requiring the captain of the vessel to work more than 12 hours in a 24 hour period in violation of 46 U.S.C. §8104(h). The issue was whether the 24 hour period referenced in 46 U.S.C. § 8104(h) is a calendar day starting at 12:01 a.m. or whether it was the 24 hours immediately preceding the accident. Although there is no Fifth Circuit case law regarding this issue, the court relied on the plain language of the provision in determining that the relevant 24 hour period is the 24 hours immediately preceding the accident.

*Alario v. Offshore Service Vessels, LLC, 2012 U.S. App. LEXIS 9715 (5th Cir. 2012) - Palliative Case*

Plaintiff injured her neck in a fall aboard a vessel. She filed suit against her employer asserting claims of negligence and maintenance and cure and against the vessel asserting a claim for unseaworthiness. The trial court dismissed Plaintiff’s negligence and unseaworthiness claims on summary judgment, but initially maintained Plaintiff’s maintenance and cure claim as it was possible that she had not reached MMI.

In his deposition, Plaintiff’s treating orthopedist testified that she had reached MMI. Plaintiff’s treating neurologist also testified that she could not provide any further treatment, but that a steroid injection administered by another doctor could perhaps improve Plaintiff’s overall function. Following a second motion for summary judgment on Plaintiff’s maintenance and cure claims, the district court granted Defendant’s motion and dismissed Plaintiff’s claim for maintenance and cure as it found that Plaintiff had reached MMI.

Plaintiff appealed the maintenance and cure decision arguing that because the steroid injection could improve Plaintiff’s overall function, there was a genuine issue of fact as to whether Plaintiff had reached MMI. The Fifth Circuit upheld the trial court’s decision holding that the steroid injections were palliative in nature as they would not cure the underlying condition, but merely would alleviate pain.

A seaman injured his neck while swinging a sledgehammer in a cramped space which required the seaman to swing the sledgehammer while bent over. Judge Fallon issued a judgment finding employer 80% at fault and seaman 20% at fault in causing the injury. Judge Fallon’s decision was affirmed by the Fifth Circuit.

In order to prevail in a claim for negligence, the plaintiff must present some evidence from which the fact finder can infer that an unsafe condition existed and that the vessel owner either knew, or in the exercise of due care should have known, of the condition. The court found the employer negligent on two grounds. First, there was a reasonable alternative tool, a hydraulic jack, that could have been and, in fact, was used to complete the task. Second, the knowledge of employer’s supervisor that the workspace was cramped resulting in an unsafe condition was imputed to the employer. The court also noted that the employer failed to complete a JSA which increased the risk that an employee would be injured. With regard to the seaman’s negligence, the court found that the Plaintiff was an experienced seaman who should have known that the cramped conditions could increase the chance of injury and who could have stopped work pursuant to the employer’s work-stop program. The court applied the “feather-light” standard of causation to both the employer and the seaman’s negligence holding both parties liable for any negligence that played any part, even the slightest, in causing the injury.

The court, in calculating damages for lost future earnings, based the calculation only upon the seaman’s last full year of employment, even though the seaman earned much less in the years immediately preceding his last full year of earnings. In so holding, the court found that the calculation of lost income begins with the earnings of the injured party at the time of the injury.


Plaintiff allegedly injured his knee in 2010 while employed as a Jones Act seaman and filed suit asserting Jones Act, unseaworthiness, and maintenance and cure claims. Defendant filed a Motion for Partial Summary Judgment asserting a McCorpen defense to Plaintiff’s maintenance and cure claim. Plaintiff previously injured his knee in 2001 requiring surgery. Plaintiff was hired on June 9, 2008. A “pre-employment medical questionnaire” was completed on June 11, 2008 in connection with a medical examination that was conducted on the same date. Plaintiff argued that because the medical examination was conducted after he was hired, he could not have concealed his medical history in order to obtain employment and the his medical history was immaterial to Defendant. Defendant argued that the June 11, 2008 medical examination was a pre-employment exam and that Plaintiff would have been required to complete a functional capacity evaluation had he disclosed his prior injury.

The Court denied Defendant’s Motion for Partial Summary Judgment as it found that the fact that Plaintiff was hired before the medical examination was completed created a genuine issue of material fact as to whether Plaintiff’s employment was conditioned upon successful completion of this medical examination. The Court noted that if Defendant proves at trial that
Plaintiff’s employment was conditioned upon a successful medical exam, the fact finder must consider the exam as part of the pre-employment process.


- Maintenance & Cure - _McCorpen_

Plaintiff injured his foot when he struck a milk crate when exiting a bunk. Plaintiff had diabetes which resulted in a need to amputate his right leg below the knee. Plaintiff failed to disclose his history of diabetes and high blood pressure in a pre-employment medical questionnaire. Defendant moved to dismiss Plaintiff’s maintenance and cure claims pursuant to a _McCorpen_ defense. The court granted Defendant’s motion dismissing Plaintiff’s maintenance and cure claims.

Plaintiff, who was diagnosed with diabetes and prescribed injectionable insulin eight years prior to his employment with Defendant, intentionally concealed his condition. This intentional concealment was material to Defendant’s employment decision as Defendant would have inquired further into Plaintiff’s employability had it known of the condition since the position of deckhand requires significant physical labor. However, the court denied Defendant’s claim for reimbursement of amounts previously paid to Plaintiff finding that there was a lack of precedent justifying such an award.


Seaman plaintiff alleged personal injury resulting from his handling of benzene-containing chemicals and solvents. As a result, plaintiff sued his employer alleging claims based on Jones Act negligence and general maritime law unseaworthiness. In addition to maintenance and cure, plaintiff sought damages under the Jones Act and GML, including punitive damages.

Before the District Court for the Eastern District of Louisiana was a motion for partial summary judgment. In granting the motion, the court explained that the recent Supreme Court decision in _Atlantic Sounding Co. v. Townsend_ merely addressed the narrow question of whether the general maritime claim of willful failure to pay maintenance and cure, which arises from common law, was limited to the remedies available under the Jones Act. The Court noted that a claim for maintenance and cure was a separate cause of action from Jones Act claims and, therefore, the Jones Act limitations did not apply. As a result, the Supreme Court held that punitive damages are recoverable for the general maritime law claim of maintenance and cure.

However, the Supreme Court’s ruling in _Townsend_ did not affect the previously established rule concerning limitation of damages under the Jones Act. Specifically, the court states that “_Townsend_ does not hold that punitive damages are recoverable under the Jones Act.” Accordingly, the defendant’s motion for partial summary judgment as to the plaintiff’s claim for punitive damages under the Jones Act was granted.


**Chapman v. ENSCO Offshore Co., 2012 U.S. App. LEXIS 4009 (5th Cir. 2012)** - Comparative Fault, Sole Fault

Plaintiff suffered chemical burns to his hands while removing gauges on an HVAC unit and filed a Jones Act claim against his employer. A jury rendered a verdict against plaintiff finding that his employer was not negligent in causing his injuries.

On appeal, the Fifth Circuit affirmed, stating that the evidence clearly supported a finding that any negligence causing plaintiff’s injuries was solely on the part of plaintiff. Plaintiff was not instructed by his employer to remove the gauges, was supposed to be performing another task at the time of the accident, and failed to use a proper tool to remove the gauges as well as insulated gloves that were available on board the vessel.


Plaintiff, a welder employed by a subcontractor aboard an offshore platform, tripped on coiled hoses while attempting to access his worksite. His normal route to his worksite was blocked by the operations of Nabors, another subcontractor performing services aboard the platform for Chevron. While attempting to use another route that required him to cross coiled hoses which he knew required care to navigate, he tripped on a hose fracturing his ankle. Plaintiff sued Chevron and Nabors in state court asserting negligence claims. Nabors removed the case to the Southern District of Texas asserting jurisdiction under the LHWCA based on OCSLA. Chevron and Nabors filed motions for summary judgment which were granted by the trial court which ruled that the coiled hoses were an open and obvious condition and, as such, did not constitute an unreasonably dangerous condition under Louisiana law.

The Fifth Circuit affirmed holding that under Louisiana law landowners have no duty where the potentially harmful condition should have been observed by the individual in the exercise of reasonable care, or was as obvious to a visitor as it was to the landowner. The fact that there was not an alternative route providing access to plaintiff’s worksite has no effect on the analysis of whether the condition was unreasonably dangerous.

**P&O Ports, Texas, Inc. v. OWCP, 446 Fed. Appx. 724 (5th Cir. 2011).** - Medical Causation and LHWCA

Worker was injured when he was struck in the knee by a wrench. An MRI taken shortly thereafter showed degenerative changes to the medial meniscus, but no meniscal tear. A subsequent MRI taken six months after the initial MRI revealed a medial meniscal tear which was not caused by the initial injury. Claimant had two knee surgeries to repair the meniscal tear, joint effusion and neuroma. Two of Claimant’s physicians testified that the initial injury could have aggravated pre-existing degenerative conditions and could have made the meniscal tear more symptomatic. An ALJ rendered a decision in favor of Claimant under the “aggravation rule” which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the
employment injury alone, the entire resulting disability is compensable. This decision was affirmed by the Benefits Review Board.

On appeal, the Fifth Circuit affirmed the decision of the Benefits Review Board finding that the causation requirement of the aggravation rule is satisfied as long as there is substantial evidence that claimant’s injury worsened his condition, even if he cannot conclusively demonstrate that the injury was the direct or sole cause of his meniscus tear. The ALJ’s attachment of greater weight to the testimony of certain treating physicians who testified that the initial accident exacerbated unrelated injuries was sufficient to meet this standard.

Huffman v. Union Pacific Railroad, 2012 U.S. App. LEXIS 5271 (5th Cir. 2012) - FELA

Causation for Repetitive Tasks

Plaintiff, a trainman with Union Pacific Railroad, was diagnosed with osteoarthritis in his knee following his retirement. Plaintiff filed suit under FELA alleging that the repetitive physical demands of his work resulted in the cumulative trauma injury of knee osteoarthritis. Evidence was introduced at trial supporting the position that activities such as those typically performed by a trainman could lead to musculoskeletal disorders. A jury returned a verdict in favor of plaintiff finding that employer’s negligence was a cause of plaintiff’s osteoarthritis. Employer moved for a judgment as a matter of law, arguing that there was insufficient evidence of causation. Plaintiff argued that he was not required to present medical or expert testimony specifically stating that there is a direct causal link between the defendant’s actions and the plaintiff’s injuries. The district court denied employer’s motion.

On appeal, the Fifth Circuit reversed holding that the evidence was insufficient to establish causation. Under FELA, a "defendant railroad 'caused or contributed to' a railroad worker's injury if [the railroad's] negligence played a part -- no matter how small -- in bringing about the injury.” The burden of establishing causation is on the employee. In discussing the standard for causation under FELA, the court stated:

there must be evidence to support that work the claimant performed led to the specific condition the claimant suffered -- not a lot of evidence, not necessarily expert evidence, but something probative that supplies jurors with everything they need to which inferences can then be applied. It was necessary, then, for probative evidence to be introduced that work such as Huffman performed would play at least a small part in bringing about Huffman's osteoarthritis.

However, the evidence introduced did not establish even this minimal connection. Although experts testified at trial that the types of activities that plaintiff engaged in as a trainman could lead to musculoskeletal problems, no one testified that these musculoskeletal problems included osteoarthritis.
Finding No Negligence or Unseaworthiness - Causation

The Court found that the plaintiff seaman failed to carry his burden of proof on negligence and unseaworthiness claims after he fell from a bunk ladder on defendant’s vessel. The plaintiff failed to present evidence that the vessel owner knew or had reason to know that the ladder in question was not reasonably fit for its intended use. Further, the plaintiff acknowledged that he had used the ladder over a 100 times without incident and that he did not check to see if it was properly affixed before using it.

Ceres Gulf, Inc. v. Director, OWCP, 683 F.3d 225 (5th Cir. 2012) - Hearing Loss - Presumptions

Claimant sought benefits under the LHWCA for hearing loss allegedly sustained as a result of noise exposure while working as a longshoreman. Employer provided the ALJ with expert testimony that noise surveys conducted at the facilities indicated that the noise levels were not sufficient to cause hearing loss and that Claimant’s hearing was better than average for someone his age. The ALJ found in favor of employer holding that employer rebutted the presumption that Claimant’s claim fell within the LHWCA by substantial evidence and that the employer’s workplace was not the cause of Claimant’s injuries.

The BRB vacated and remanded the decision of the ALJ and excluded employer’s expert’s testimony. The BRB excluded this evidence on the basis that the hearing capacity of the average person was unrelated to whether Claimant’s hearing loss was actually caused by noise exposure at the facility. Additionally, the BRB found that the noise studies did not “demonstrate that exposure to injurious stimuli did not cause the employee’s occupational disease.” On remand and without benefit of the expert testimony, the ALJ found that the evidence failed to rebut the presumption of compensability.

On appeal, the Fifth Circuit reversed holding that the BRB exceeded its authority in excluding the testimony of employer’s expert as the ALJ, as fact finder, and not the BRB is entitled to assess the relevance and credibility of testimony and of conflicting evidence. Additionally, the Fifth Circuit held that the BRB imposed an improper burden of rebutting the presumption on the employer by requiring it to demonstrate the absence of causation. The substantial evidence standard is less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence. The BRB may not adopt standards requiring employer’s rebuttal evidence to “rule out,” “unequivocally state,” or “affirmatively state” their positions to the exclusion of the claimant’s case. Once an employer produces substantial evidence, the presumption is overcome and the ALJ must weigh all the record in evidence.


Plaintiff seaman filed Jones Act, unseaworthiness, and maintenance and cure claims alleging that he injured his neck and back when he was forced to operate a vibrating, air-powered needle gun while on his hands and knees. The trial court granted employer’s motion for
summary judgment dismissing all of Plaintiff’s claims. Plaintiff appealed and the Fifth Circuit affirmed the judgment of the trial court.

The court found that employer was not negligent in failing to complete a JSA regarding use of the tool because Plaintiff did not rebut employer’s evidence that the use of a needle gun is a routine, safe, and straightforward task. The court also refused to accept plaintiff’s argument that employer was negligent in failing to provide an alternative tool that could be used while standing since plaintiff failed to show that the needle gun used by the employer was unsafe in the first place. The court also found that the vessel was seaworthy as plaintiff admitted that the needle gun was working properly when he used it.


Plaintiff was a service technician hired to replace gears aboard a vessel owned by Blessey Marine and housed in a drydock in Bollinger’s shipyard. Plaintiff was injured when an unsecured I-beam used as a lifting point fell and struck him in the lower back. The I-beam was placed there by Plaintiff and his crew. Plaintiff filed suit asserting negligence claims under 905(b) of the LHWCA and under the general maritime law. The trial court found in favor of the defendant on the issue of liability.

Defendant did not violate the “turnover duty” under 905(b) as any danger posed by the use of the I-beam is one which a reasonably competent worker such as Plaintiff should anticipate encountering. The Defendant did not violate the “active control duty” as Defendant did not actively participate in or maintain any control over Plaintiff’s work. Plaintiff made the determination as to how to use the unwelded I-beam as a lifting point without any input from Defendant. The Defendant also did not breach its “duty to intervene” as it had no knowledge that the I-bean posed any hazardous condition since Defendant offered the use of a welder to weld the I-beam in place, the I-beam could have been secured without welding, and the I-beam was successfully used for more than 20 lifts prior to the accident. Once the stevedore begins its operations, the shipowner has no general duty to supervise work or to inspect the area assigned to the stevedore.

_Manderson v. Chet Morrison Contractors, Inc., 666 F.3d 373 (2012) - Collateral Source in Maintenance & Cure Case_

The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor. A majority of state courts addressing the issue have held that the rule prohibits in tort actions a reduction of compensatory damages by the difference between the amount billed for medical services and the amount actually paid. However, because maintenance and cure is not based on an employer’s negligence, it is unrelated to any duty of care under tort law. Accordingly, because of the unique nature of maintenance and cure, normal rules of damages, such as the collateral source rule in tort, are not strictly applied.
The Fifth Circuit has identified an exception to this general prohibition of the collateral source rule in maintenance and cure lawsuits: where a seaman has alone purchased medical insurance, the shipowner is not entitled to deduct from its maintenance and cure obligation moneys the seaman receives from his insurer. However, an injured seaman is still only permitted to recover maintenance and cure for those expenses actually incurred.

In *Manderson v. Chet Morrison Contractors, Inc.*, the injured seaman paid his own insurance premiums. The district court, having found Manderson purchased his own medical insurance, made no deduction from the cure award for payments by Manderson’s insurer. In doing so, however, the district court determined that the amount of cure owed was actually the greater amount *originally charged* by Manderson’s health-care providers. On appeal, Manderson’s employer contended that the appropriate amount for cure was the lesser amount the medical providers *actually accepted* as full payment from Manderson’s insurer. The Fifth Circuit agreed.

Specifically, the Court held that the amount needed to satisfy an employer’s cure obligation is the amount needed to satisfy a seaman’s medical charges. Thus, for Manderson, regardless of what his medical providers charged, those charges were satisfied by the much lower amount *actually paid by his insurers* (i.e. the amount actually incurred). Consequently, the district court exceeded the scope of cure by awarding the higher charged amount.


In *Beech v. Hercules Drilling Co., L.L.C.*, the Fifth Circuit defined the meaning of the phrase “in the course of employment” when analyzed in the context of a Jones Act lawsuit.

The court was tasked with deciding whether or not an employee on an oil rig was acting in the course of employment when he accidentally discharged a firearm resulting in the death of a coworker. On December 13, 2009, Michael Cosenza was assigned to work a night shift aboard a jack-up drilling rig and was the only crew member on duty. His duties that night were to monitor the rig’s generator, to check certain equipment, and to report any suspicious activity or problems, which were performed at the direction of his employer while watching television and commiserating with fellow employees in the break room. Keith Beech, who was not on duty that night, but was subject to the call of duty, was also in the break room. During the two men’s conversation, Cosenza retrieved his firearm which he had accidentally brought onboard in order to display to Beech. As Cosenza sat back down, his arm accidentally bumped a part of the couch and the firearm discharged, mortally wounding Beech.

The district court concluded that Cosenza was acting within the course of employment because at the time of discharge, he had “abandoned his purpose of showing off the gun and was in the process of sitting down on the couch to watch television.” Because Hercules encouraged its night watchmen to watch television, doing so was within the scope of employment. After so ruling, the district court awarded Beech’s survivors a total of $1,194,329.
On appeal, Hercules alleged, and the Fifth Circuit agreed, that the district court had erred in finding Cosenza’s conduct to be within the scope of his employment. The court quoted a prior holding in which it held that “an employer is only liable for the wrongful acts committed by its employee when the employee’s tortious conduct is in furtherance of the employer’s business.” Stoot v. D&D Catering Serv. Inc. 807 F.2d 1197, 1199 (5th Cir. 1987). The Court of Appeals rejected Beech’s argument that Stoot only applied to intentional torts. In so ruling, the Fifth Circuit took advantage of an opportunity to explicitly state its rule for vicarious liability under the Jones Act. Specifically, the court stated that “whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer’s business interests.” Showing off one’s handgun clearly falls outside this scope.
III. STATUS


 Plaintiff was hired by defendant as a crane operator/installer and was tasked with disassembling a crane on an offshore platform. Plaintiff boarded a supply vessel on June 21, 2009 – his first day on the job – and was transported to the platform. Plaintiff slept and ate aboard the supply vessel and inspected and unloaded tools while on the vessel. On June 22, 2009, plaintiff fell from a gang box on the offshore platform and was paralyzed only thirty minutes into the project. Plaintiff filed suit asserting negligence claims under the Jones Act and Louisiana law. Defendant removed the claim to federal court arguing that the Jones Act claim was fraudulently pled.

The Fifth Circuit upheld the removal finding that plaintiff could not establish that he was a seaman as he did not contribute to the function of the supply vessel and did not have a connection to the vessel that was substantial in nature and duration. The work that plaintiff was hired to undertake was to be performed entirely on the platform and the fact that he ate and slept aboard the supply vessel did not establish that he performed work on the supply vessel. The Court further found that Teaver did not have seaman status solely because he spent 20 of his first 24 hours aboard the supply vessel. The Court examined the entire scope of his job assignment, which was to disassemble a crane on an offshore platform, when determining seaman status.


 Plaintiff is a repair supervisor employed by defendant at its liftboat and crane inspection and repair facility in Houma, Louisiana. He was injured when a pedestal on a land-based crane that he was operating snapped causing the crane to tip over resulting in injuries to his calf and heel that required surgery. Plaintiff filed suit asserting claims under the Jones Act and, alternatively, reserving his claims under the LHWCA. Defendant moved for summary judgment on plaintiff’s seaman status arguing that plaintiff is a longshoreman whose work bears only an indirect relationship to the vessels’ missions.

As a repair supervisor, plaintiff oversaw the repairs to defendants liftboats and spent much of his time onboard these vessels. Approximately half of the vessels that plaintiff worked on were moored in navigable waters, while the other half were jacked up. Plaintiff worked on engines, hulls and cranes and also performed routine maintenance to the vessels that is traditionally done by deckhands. He also was onboard these vessels as they were rearranged in the yard 2-3 times per week and handled lines and tied off vessels in these circumstances. He also occasionally operated cranes aboard liftboats in the Gulf of Mexico. In total, plaintiff estimated that he spent approximately 75% of his time working on vessels and 25% working on land.


Decedent was employed as a rigger and was working on a barge under construction in a shipyard owned by defendant when he fell to his death. Decedent’s father and children asserted
numerous claims including, *inter alia*, general maritime negligence claims against the vessel and shipyard owners and a 905(b) claim against the barge under construction. Defendant shipyard owner moved for summary judgment as to the general maritime negligence claims asserted against it on the grounds that plaintiffs could not establish jurisdiction under admiralty or general maritime law because the barge on which decedent was working was not a vessel for purposes of admiralty jurisdiction.

The court granted defendants motion for summary judgment finding that the barge under construction was not a vessel for purposes of admiralty jurisdiction. The barge, whose intended purpose was to transport liquid cargo, was not complete at the time of the accident as its piping, valve, hydraulic, and cargo wash systems had not been completed and/or tested at this time. The court relied on a long line of cases holding that vessels under construction, even if they are moored in navigable waters, do not give rise to claims in admiralty as they do not bear a significant relationship to traditional maritime activity.


Plaintiff, a barge washer, was injured when he fell through an open hatch of a barge. Plaintiff filed a Jones Act claim against the defendant-employer, Diamond L, and a negligence claim against defendant-barge owner, AEP. AEP removed the matter to federal court on the grounds that 1) plaintiff fraudulently joined Diamond L in an attempt to avoid diversity jurisdiction and 2) plaintiff was not a Jones Act seaman, but instead was a longshoreman pursuant to the LHWCA. Plaintiff filed a motion to remand which was heard by the district court.

The district court, utilizing the *Chandris* test for the determination of seaman status, held that plaintiff did not have a substantial connection to a vessel and, therefore, could not meet the second prong of the *Chandris* test. The court rejected plaintiff’s argument that he had a substantial connection to a vessel or fleet of vessels because all of his work was performed on AEP barges that were not permanently moored and were afloat on the river. In denying plaintiff’s motion for remand, the court found that plaintiff’s activities as a barge washer did not expose him to “perils of the sea” as he was "not a member of the crew of any vessel, would never sail with the barge once his washing duties were completed, and did not sleep or take his meals upon any barge, as members of a vessel's crew typically would.” Rather, the dangers he faced in the course of his job were more similar to "those faced by longshoremen who load and unload barges at docks everyday, not special maritime hazards or disadvantages that seamen face."

*Mason v. Fugro Chance, Inc.*, 11-1893 (W.D. La. 3/27/12) [Magistrate Hill]

Plaintiff, an offshore survey tech, was injured while pulling on a cable and assigned to a jack-up drilling vessel. Plaintiff filed a Jones Act claim in Louisiana state court which was removed by Fugro to the Middle District of Louisiana on the grounds that this claim was removable under OCSLA. Plaintiff filed a motion to remand on the grounds that removal was barred by the Jones Act.
The court denied the motion to remand finding that plaintiff could not meet the second prong of Chandris as he did not have the requisite “connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and nature. The court applied the 30% rule as set forth in Becker v. Tidewater, 335 F.3d 376 (5th Cir. 2003) in reaching its conclusion. Although plaintiff spent 96% of his time with Fugro aboard vessels, he only spent 5% of his time aboard the vessel on which he was injured. Thus, he did not meet the 30% rule as to the vessel at issue.

The court further found that plaintiff also could not satisfy the 30% rule with regard to his connection to a fleet of vessels. During the course of his time at Fugro, plaintiff worked for 29 different customers aboard 39 different vessels. None of the vessels on which he worked were owned, operated, chartered or controlled by his employer, Fugro. “An employee who works virtually entirely on vessels, contributing to the mission of the vessel, is not a seaman for the purposes of the Jones Act unless at least 30 percent of his time is spent working on a vessel, or group of vessels, owned by his employer.

The court also rejected plaintiff’s argument that he was entitled to Jones Act protection because he spends the majority of his time working at sea. The court noted that the Fifth Circuit has carved out an exception to the “fleet rule” for two types of employees – anchor handlers and divers. However, the court refused to expand this exception to offshore survey technicians, even ones who work almost entirely on vessels at sea. Any further exceptions to the fleet rule can only be created by the Fifth Circuit.


Fifth Circuit affirmed district court’s dismissal of Jones Act claims on basis that the spar upon which plaintiff was working at the time he was injured was not a vessel for Jones Act purposes.

The spar in question was a floating gas-production platform moored in ocean water 5,000 feet deep more than 200 miles from the coast of Texas. While the spar floated on the ocean’s surface, the spar was moored to six large anchors in the seabed below. Because of the moorings, the spar cannot move laterally. In addition to the mooring lines, an underwater infrastructure of flow lines and export pipeline systems, as well as umbilicals extending from the spar to the subsea wellheads, used to transport oil and gas to shore-based facilities attach the spar to the ocean floor.

The owner of the spar intended for the spar to remain in place for the productive life of the field in question. The owner conducted a study to see what it would cost to move the spar to another field, but had no plans to do so. Some of the spar’s features could support the movement from one offshore location to another, but the work to unmoor and transport it make it difficult and expensive.
The Fifth Circuit noted that it held that a spar almost identical to the one in question was not a vessel in *Fields v. Poole Offshore*, 182 F.3d 353 (5th Cir. 1999). Citing *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), the Fifth Circuit stated that a vessel is “any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.”

The Fifth Circuit held that the spar in question was not a vessel because it was permanently affixed to the sea floor and would cost millions to unmoor and move; while the spar was theoretically capable of transportation, it was not practically capable.

Finally, the Fifth Circuit also pointed to the Supreme Court’s approval of *Pavone v. Miss. Riverboat Amusement Corp.*, 975 F.3d 560, 570 (5th Cir. 1995) in *Dutra*. As noted by the Supreme Court, the *Pavone* Court held that a “floating casino was no longer a vessel where it ‘was moored to the shore in a semi-permanent or indefinite manner’ as an example of the “sensible” rule that “ships ... do not remain vessels merely because of the remote possibility that they may one day sail again.”

The Fifth Circuit in *Mendez* held that the spar made an even stronger case for non-vessel status, stating that “[d]isconnecting the [spar] from the sea floor would make disconnecting a casino boat from the shore look as easy as unplugging a toaster. The [spar], therefore, embodies the distinction between theoretical capability, which it has, and practical capability, which it does not.”


Plaintiff was severely burned and suffered back injuries when a wellhead, which he was advised was “dead,” exploded while plaintiff was cutting bolts with an acetylene torch. Plaintiff filed suit asserting a Jones Act claim against his employer and negligence claims against various third parties. All parties moved for summary judgment on the issue of Plaintiff’s status as a Jones Act seaman.

Plaintiff was a floor hand assigned to a truck-mounted workover rig which was secured to a barge with hydraulic stabilizers, chains, binders, and cables. The rig had only been secured to the barge for two days and the plaintiff had only been assigned to the rig/barge combo for two days at the time of the accident. The rig/barge combo had no steering mechanisms, navigational devices, crew quarters, or motor power and could only be transported by tugboat from location to location.

In determining Plaintiff’s seaman status, the Court first considered whether the rig/barge arrangement was a vessel. In relying upon *Manuel v. P.A.W. Drilling & Well Services, Inc.*, 135 F.3d 344 (5th Cir. 1998), the Court found that the rig/barge combination constituted a “special purpose craft” qualifying as a vessel for Jones Act purposes as transporting necessary equipment across navigable waters was essential to the rig’s work. The Court did not find the method or duration of attachment pertinent for purposes of its determination of vessel status.
The Court also found that Plaintiff had a substantial connection to the vessel as he was permanently assigned to the vessel. Defendant argued that Plaintiff did not have a substantial connection to the vessel as he could not show that he performed a substantial part of his work (30%) aboard the vessel because he has only worked on the vessel for two days. Plaintiff argued that he need only show permanent assignment to or that he performed a substantial portion of his work on the vessel, not both. The Court agreed with Plaintiff and found that Plaintiff was permanently assigned to the vessel as he worked exclusively aboard the vessel once his assignment began. His prior assignments to land based sites were not considered as the Court was required to focus solely on his new assignment when evaluating the employees duties. Accordingly, the Court granted Plaintiff’s Motion for Summary Judgment on seaman status.

New Orleans Depot Services, Inc. v. Director, OWCP, 2012 U.S. App. LEXIS 15336 (5th Cir. 2012)

Claimant, a retired former container repair mechanic, sought permanent partial disability benefits under the LHWCA as a result of hearing loss. The yards in which Claimant worked were 300 yards or less form the Industrial Canal, but did not have docks, piers, or wharfs. Claimant was a member of the International Longshoremen’s Association. Claimant repaired both marine and land based containers. Considering the above facts, the ALJ held that Claimant was covered under the LHWCA as he satisfied both the maritime situs and status requirements. The BRB then affirmed.

On appeal, the Fifth Circuit affirmed the BRB’s decision finding that Claimant met both the situs and status requirements. In the Fifth Circuit, when deciding whether a location satisfies the situs component of LHWCA coverage, courts consider both the geographic proximity to the water's edge and the functional relationship of the location to maritime activity. The parties stipulated that the facility met the geographic proximity requirement. The Court further found that the facility met the functional relationship requirement as it was used to store and repair containers which were used in or had previously been used in marine transportation. If a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading. The Court also found that Claimant’s work on maritime containers met the status requirement as the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of maritime employment.

Judge Clement wrote a scathing dissent stating that the panel’s decision was contrary to law and common sense. Judge Clement’s principal argument was that the facility did not have the functional nexus to maritime activity necessary to establish that it was a maritime situs as the facility was never used to load or unload vessels or to support the loading or unloading of vessels.


In this Jones Act case, plaintiff seaman sought recovery for his employer’s negligence. After the Deepwater Horizon oil spill, defendant was hired to work as a technician to install oil-
removal equipment on barges and to maintain the equipment and ensure that it was operating properly while it was in use on the barges.

Significantly, defendant’s employer had leased twelve to fourteen barges from a co-defendant. It was on these leased barges that defendant worked, slept, and ate. During his employment, defendant worked on several of these leased barges. After several months of employment, defendant fell and fractured his ankle. It was this injury that formed the basis of his Jones Act suit.

At issue in the case was the plaintiff’s status as a Jones Act “seaman.” Specifically, defendant argued that plaintiff was not a “seaman” because he lacked a substantial connection to a vessel or identifiable group of vessels. Plaintiff contended that he was “assigned to an identifiable fleet of vessels controlled by [his employer’s co-defendant] that were used for the sole purpose of cleaning up the Louisiana Gulf Coast waterways.” However, plaintiff’s employer argued that there is an additional requirement in the Fifth Circuit that the vessel’s in question be owned by the plaintiff’s employer. In support of this argument, defendant quoted Roberts v. Cardinal Servs. which stated that “when a group of vessels is at issue, a worker who aspires to seaman status must show that 30 percent of his time was spent on vessels, every one of which was under his defendant-employer’s common ownership or control.” (emphasis added).

The court rejected this argument noting that the holding in Roberts was only applicable to fact patterns similar to the facts in Roberts. The court stated that “Roberts did not overrule [the longstanding rule] that the plaintiff’s employer need not be the owner or operator of the identifiable fleet of vessels.” Accordingly, because plaintiff’s employer assigned him to perform all of his work in relation to twelve to fourteen barges which were all under the control of a co-defendant and all used in furtherance of the cleanup efforts, the court held that plaintiff was capable of showing the existence of an identifiable group of vessels within the meaning of the Jones Act.
IV. **POLLUTION**

*Buffalo Marine Services, Inc. v. United States, 663 F.3d 750 (5th Cir. 2011).* - OPA

A barge and tug collided with a tanker while attempting a fuel delivery resulting in a spill of 27,000 gallons of heavy fuel oil with a clean-up cost of $10.1 million. The Oil Pollution Act (“OPA”) provides that each responsible party for a vessel from which oil is discharged is liable for the clean-up cost. Since the oil was discharged from the tanker, the USCG found the tanker to be the responsible party. 33 U.S.C. §2703(a)(3) provides a responsible party a defense to liability if the spill was caused solely by a third party, other than a third party with “any contractual relationship” with the responsible party.

In the instant case, the barge did not have a direct contractual relationship with the tanker. Instead, the fuel was provided through a chain of intermediaries. The parties entered into a stipulation that the barge and tug were solely at fault in causing the spill and requested that the barge owner be listed as the responsible party. This was done in an attempt to limit the clean-up cost for which the parties would be responsible to the value of the barge ($2 million) – as opposed to the value of the tanker ($36 million) – thus requiring the Oil Spill Liability Trust Fund to fund the remaining $8.1 million of the clean-up costs. The Fifth Circuit held that the tanker owner could not avail itself of the 33 U.S.C. §2703(a)(3) defense as the provision does not require direct privity of contract.

*In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., 2012 U.S. Dist. LEXIS 141546 (E.D. La. Oct. 1, 2012)* - OPA

Before the court was the defendant’s motion for partial summary judgment to dismiss the “Pure Stigma Claims” and “Recreation Claims” from the suit. The court defined “Pure Stigma Claims” as “claims by or on behalf of owners, lessors, and lessees of real property that they have suffered damages resulting from the taint of their property by the oil spill, though no oil or other contaminant physically touched the property.” The plaintiffs argued that Robins Dry Dock rule did not apply to prohibit their recovery of purely economic losses because the alleged torts were intentional. However, the court rejected this argument stating that “intentional torts generally require that the actor intend the consequences of the act and not simply the act itself.” Because B.P. did not intend to either spill oil into the Gulf nor did it intend to diminish the property value of the plaintiff’s property, the court held that Robins Dry Dock prohibited the recovery of Pure Stigma Claims asserted under General Maritime Law.

Plaintiffs next argued that the Pure Stigma Claims could be recovered under the Oil Pollution Act. Again, the court rejected this argument. Because the relevant sections of OPA require either “loss of profits,” “impairment to earning capacity,” or “damages … resulting from the destruction of real or personal property,” the court held that OPA did not permit recovery of Pure Stigma Claims because the plaintiffs’ property was never damaged and the plaintiffs had not realized any economic loss because they still owned the property in question.

Plaintiffs then attempted to recover “recreation claims.” The court defined such claims as “claims by or on behalf of recreational fisherman, recreational divers, beachgoers, recreational..."
boaters, etc., that they have suffered damages that include loss of enjoyment of life from the inability to use portions of the Gulf of Mexico for recreation and amusement purposes.” The court rejected these claims as well noting that the same analysis used to dismiss the Pure Stigma Claims under the OPA applied equally to the recreation claims.
V. MISCELLANEOUS

*Frule v. Amerisure Mutual Insurance Co.*, 663 F.3d 743 (5th Cir. 2011) - Insurance Indemnity

Amerisure Mutual Insurance Co. (“Amerisure”) and Chubb Custom Insurance Co. (“Chubb”) each issued CGL and umbrella policies of insurance to subsidiaries of Rockbit Holding. Chubb issued its policies to Ulterra MWD (“MWD”). Amerisure issued its policies to Ulterra Drilling Technologies. Amerisure’s policies also named MWD as an additional insured.

In August 2006, a drill sensor installed by MWD exploded and injured plaintiff who sued both Ulterra entities for negligence. Plaintiff later released Ulterra Drilling Technologies. In September 2007, Amerisure issued two policy change forms deleting MWD as an additional insured and terminated its defense of MWD claiming its addition of MWD was a clerical error. Chubb filed a cross-claim seeking a declaration that Amerisure was required to defend MWD and a declaration ranking the policies. The trial court determined, *inter alia*, that Louisiana law prohibited reformation of the contract after an injury had occurred and prohibited consideration of extrinsic evidence of mutual mistake in an unambiguous contract.

The Fifth Circuit reversed the trial court finding that while Louisiana law does not allow annulment of an insurance policy after an injury has occurred, it clearly allows reformation of an insurance policy when, because of mutual error or mistake, the policy fails to reflect the intent of the parties. The Court further found that parole evidence is admissible to show mutual error even though the terms of the contract are unambiguous and instructed the trial court to consider affidavits by MWD and Amerisure declaring that the addition of MWD as an additional insured was a mutual mistake.


The Court denied a Motion for Summary Judgment filed by an insurer which sought to dismiss indemnity and insurance claims on the grounds that the contract giving rise to said claims was not a maritime contract and instead was governed by Louisiana law such that the Louisiana Oilfield Indemnity Act voided the obligations.

The contract in question was a master service contract for coiled tubing operations, and the specific work which gave rise to the indemnity and insurance claims involved backplugging and/or fishing conducted from a vessel.

In analyzing whether the contract was maritime in nature, the court focused on the issue of whether the work in question could be performed without the use of a vessel. Finding that a vessel was required to complete the work, the court held that the contract work to be performed was “inextricably intertwined” with the maritime activities of the vessel.
This litigation arose from damages suffered by Chevron as a result of defective bolts used in a riser system. Chevron contracted Aker to provide design and engineering services for construction of the riser system. After noticing issues with the bolts, Aker ordered replacement bolts from Lone Star. These bolts were manufactured by Oriental fastenings and improperly installed by Oceaneering. The trial court found Aker to be 35% at fault, Lone Star 35% at fault, Oriental fastenings 35% at fault, and Oceaneering 5% at fault. The trial court then found Oceaneering liable for the indemnity of Aker. Oceaneering appealed the indemnity determination.

The Fifth Circuit affirmed the trial court’s finding that Oceaneering was liable for the indemnity of Aker. A Master Service Agreement between Chevron and Oceaneering required Oceaneering to indemnify all “indemnitees” for damage to the property of Chevron arising out of Oceaneering’s performance of the contract. “Indemnitees” include all agents of Chevron. When construing indemnification contracts, the court will not ignore broad, straightforward language that unequivocally states an agreement to indemnify. The Master Service Agreement unambiguously indemnifies agents of Chevron, using extremely broad language and going so far as to indemnify them regardless of their own negligence. Independent contractors, on the other hand, are not listed in this "indemnitees" definition. Thus, the crucial determination was whether Aker was an agent or an independent contractor.

The contract between Chevron and Aker defined Aker as an independent contractor, but provided an exception stating that Aker is an agent of Chevron when procuring equipment, material, or services for Chevron. The court found that the agency began with Aker’s initial ordering of the bolts and continued until Oceaneering obtained possession thereof. Aker’s procurement of the bolts was in the capacity of Chevron’s agent and Oceaneering’s assembly of the riser using these bolts was part of Oceaneering’s performance under the Master service Agreement. The court noted that this indemnity is quite broad, making Oceaneering’s relatively minor and brief performance of work under its Master Agreement with Chevron the source of a duty to indemnify Aker who was much more at fault than Oceaneering. However, such inequities, often unpredictable when contracts are written, do not then become a basis to prevent the contracts from being enforced.

Plaintiff provided fuel services to the defendant vessel. The vessel owner remitted payment in full for these fuel services which was verified by email from plaintiff. However, the fuel services contract contained a provision that allowed plaintiff to payments received to older outstanding invoices. Based upon this provision, plaintiff filed a complaint in rem for the arrest of the vessel as a result of its failure to timely pay for the fuel services. Defendant filed a motion to dismiss the arrest of the vessel and seeking damages for wrongful arrest. The district court found that while delivery of fuel constituted a “necessary” such that a maritime lien on the vessel
was established, the specific debt for the provision of fuel was extinguished at the time of the arrest. It further denied defendant’s motion for damages as a result of wrongful arrest.

The Fifth Circuit affirmed the decision of the trial court on two grounds. First, although plaintiff had the contractual right to allocate payments when they were made, its verification that the debt paid was for fuel services provided to the vessel specified the invoice to which the payment applied. Plaintiff cannot later reallocate these payments in a different manner. Second, the court found that a maritime lien is premised on the concept that a vessel is a distinct entity. As such it is only liable for its own debts and is not liable for other outstanding debts of the vessel owner.


Judge Berrigan found both vessels at fault after an allision between a tugboat and its tow and a stationary dredge. The Court found that the owner of the moving vessel was liable because of various violations of the Inland Navigation Rules, including Rules 2, 7 and 8. The Court found that the owner of the stationary dredge was liable for violating Rule 9 of the Inland Navigation Rules for failing to move to a safer location and instead anchoring in a narrow channel. The Court also found the dredge owner liable for its breach of a contract with the Army Corps, which required the dredge owner to have a picket boat on hand to assist passing traffic.


The Court held that master service agreement was a non-maritime contract where it called for the use of company men to implement certain workover/recompletion operations taking place on a platform. The Court noted that there was a lack of Fifth Circuit precedent as to whether contracts involving workover/recompletion or coiled tubing work were maritime contracts. The Court held that while the operations under the contract sometimes involved a vessel, the contract did not reference maritime services. Additionally, the work performed was done on the platform itself, and any vessel activity was merely incidental to the work being done under the contract.


Trial Court Opinion finding terminal operator liable for damage to a Boiler unit. The court rejected the application of COGSA’s package limitation and the Terminal Tariff.


Plaintiff and the owners of the M/V MARY ANN VIZIER entered into a properly recorded preferred ship mortgage on May 8, 2008. On April 4, 2010, Plaintiff placed the vessel owner in default and subsequently filed an in rem action seeking the balance due on the note,
interest, and attorneys’ fees. Kevin Gros Offshore, LLC ("Gros") filed a Complaint in Intervention asserting a maritime lien against the vessel for breach of a Bareboat Charter and Vessel Management Agreement ("Agreement") executed on February 16, 2007 and contending that its lien was a preferred maritime lien that outranked Plaintiff’s preferred maritime mortgage. Plaintiff moved for summary judgment on the grounds that Gros did not hold a maritime lien as the Agreement was not a charter party but rather a vessel management agreement and, alternatively, that Gros’ status as a joint venturer precluded lien status.

"Under the Ship Mortgage Act, a ship mortgage takes priority over all other claims against a vessel except for preferred maritime liens. Breach of a charter party gives rise to a maritime lien and that lien will be a preferred maritime lien if it attaches before a ship mortgage is filed. . . Breach of a non-charter party, maritime contract does not give rise to a maritime lien." (citations omitted). Accordingly, the principal question to be resolved by the Court was whether the Agreement was a charter party, thus granting preferred maritime lien status, or an ordinary maritime vessel management agreement, which does not give rise to a lien.

In considering the Agreement as a whole, the Court found that the Agreement was both a bareboat charter and a vessel management agreement. However, the Agreement was “first and foremost” a vessel management agreement as the primary purpose of the Agreement was for Gros to broker charter hires for the vessel so that both Gros and the vessel owners could earn a profit from the chartering of the vessels. The bareboat charter portion of the Agreement was only entered into as a means for easily carrying out the vessel management agreement.

The Court further found that just because a bareboat charter existed, it did not follow that Gros was entitled to a preferred maritime lien for all damages flowing from the agreement. If any lien existed for a breach of the bareboat charter, this lien did not extend to damages arising solely from the vessel management aspect of the Agreement.

Gros additionally argued that it has a maritime lien for the provision of necessities to the vessel. The Court found that Gros was not acting as a vendor in providing necessities to the vessel as Gros was, in fact, the owner pro hac vice of the vessel. The Court granted Plaintiff’s Motion for Summary Judgment finding that Gros as owner pro hac vice did not supply necessities to the ship and did not suffer any damages as a result of any alleged breach of the charter parties, thus it had no valid maritime lien.


- Release

A seaman injured his shoulder in July 2009 while working aboard a MODU. He reached MMI and returned to work in September 2009. Immediately after being pronounced at MMI, Plaintiff met with a claims administrator and executed a release in exchange for $4,800. The Plaintiff was not represented by counsel at this time. He returned to work on October 4, 2009 and reinjured his shoulder a week later. The trial court granted Defendant’s motion for summary judgment in part concluding that the release precluded claims arising from Plaintiff’s July 2009 accident, but not those arising from the October 2009 injury. The parties entered into a consent
judgment regarding the October 2009 accident, but Plaintiff appealed the district court’s ruling that his release was valid.

The Fifth Circuit affirmed the district court’s judgment. The burden of proof in establishing the validity of a seaman's release is on the shipowner. The shipowner must show that the seaman's release 'was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. Factors to be considered when evaluating the validity of a seaman's release include "the nature of the legal advice available to the seaman at the time of signing the release, the adequacy of the consideration, whether the parties negotiated at arm's length and in good faith, and whether there was the appearance of fraud or coercion. The ultimate concern in these cases, however, is not whether the seaman has received what the court believes to be adequate consideration, but rather whether the seaman relinquished his rights with an informed understanding of his rights and a full appreciation of the consequences when he executed a release.

The court found the release to be valid as Plaintiff received and signed the release with full knowledge of his rights and a full appreciation of its consequences, the entire agreement was read to Plaintiff, Plaintiff was not pressured to sign the release agreement, Plaintiff entered into the agreement freely and voluntarily, and Plaintiff understood the agreement would settle all claims arising out of his July 3, 2009 injury.

This case is interesting in that it seems to relax somewhat the requirements for the execution of a valid unrepresented seaman’s release as the opinion makes no mention that Plaintiff’s medical situation was explained to him or that his rights were explained to him. The court seems to suggest that a seaman’s understanding that all rights are being released, even though those rights have not been explained to him in detail, is sufficient for a valid release.


In this case regarding a claim under the LHWCA, the district court addressed a procedural matter of first impression. Here, defendant attempted to strike testimony that was provided to the court after a deposition via an errata sheet. The defendant argued that such testimony was an alteration of the original testimony given under oath and should thus be stricken from the record.

Before ruling, the court noted a circuit split on the issue. Courts in favor of the “broad view” of Rule 30(e)\(^1\) of the FRCP support their position by noting that “allowing changes to a

\(^1\) Rule 30(e) of the FRCP states in relevant part:

If requested by the deponent ... before completion of the deposition, the deponent shall have 30 days after being notified by the [court reporter] that the transcript ... is available in which to review the transcript ... and, if there are changes in form or
deposition prior to trial … eliminates the likelihood of deviation from the original deposition in his testimony at trial; reducing surprises at the trial through the use of Rule 30(e) is an efficient procedure.” This broad view has been characterized as the “traditional or majority view” and is justified as a being consistent with the plain language of the rule. Conversely, proponents of a “narrow view” argue that only clerical and typographical errors should be corrected with errata sheets.

Concluding that the arguments for a broad interpretation of Rule 30(e) were more persuasive, the court held that the rule “expressly contemplates changes in substance and form” and thus permitted significant changes to the sworn deposition testimony to be heard at trial.

substance, to sign a statement reciting such changes and the reasons given by the deponent for making them.
VI. DAMAGES


Plaintiff entered into a contract with defendant to repair and overhaul a vessel that was operated by plaintiff. During the course of the repair work, the vessel caught fire. Plaintiff filed an action for breach of contract and fraud alleging that defendant misrepresented the quality of materials used, billed for days when no work was performed, and used unqualified personnel to perform the repairs. Plaintiff further sought punitive damages alleging that defendant committed these acts “with a degree of culpable mental state including malice.” Defendant moved for summary judgment on the issue of punitive damages.

Relying on Atlantic Sounding Co., Inc. v. Townsend, 129 S.Ct. 2561 (2009), the court found that the common law tradition of punitive damages extends to maritime claims. However, the court recognized that punitive damages are generally unavailable for breach of contract claims under the common law. Punitive or exemplary damages are recoverable only if the conduct which constitutes the breach is also a tort for which punitive damages are recoverable. Defendants motion for summary judgment was granted since the conduct constituting a breach in this case did not constitute a tort for which punitive damages are available.

Chandris v. Latsis, 515 U.S. 347 (1995) sets forth a two prong test for seaman status requiring the seaman to show (1) that his duties contributed to the function of the vessel or the accomplishment of its mission; and (2) that there is a connection to a vessel in navigation that is substantial in both duration and nature. The court found that plaintiff introduced evidence sufficient to withstand summary judgment on the first prong of this test as plaintiff actually went to sea on a number of occasions and performed duties typical of deckhands such as tying off vessels, painting, fixing leaks, fixing cracks in the hull and cleaning the vessels.

The court further found that there was a genuine issue of fact as to whether plaintiff had a connection to a vessel or fleet of vessels that was substantial in both duration and nature. Applying the Fifth Circuit’s 30% rule, the court found that it is possible that the plaintiff’s connection to defendants fleet of vessels was substantial in duration. Although very little of plaintiff’s work was actually performed “at sea,” a vessel is generally considered to still be in navigation even when it is temporarily moored and undergoing repairs, such as when plaintiff worked on defendant’s vessels while moored in the repair yard.

With regard to whether plaintiff’s work was substantial in nature, the court held that it was possible that this requirement was met as many of plaintiff’s task, including movement of the vessels around the yard, handling the vessel’s lines, painting, and engine maintenance, were identical to those tasks traditionally performed by a deckhand. The totality of plaintiff’s duties were sufficient to raise a genuine issue of material fact. As such, defendants motion for summary judgment was denied.

Plaintiff, an engineer aboard a vessel operating off the coast of Alaska, was injured while lifting a piece of steel. After reporting the injury, he was sent ashore for treatment and then sent home to Louisiana. Defendant’s adjuster reported that plaintiff’s injuries were likely career ending and recommended settlement. Defendant later filed suit in federal court seeking to terminate plaintiff’s maintenance and cure alleging that he impeded the investigation of the claim. Discovery later revealed that defendant had conducted an extensive investigation into the status of plaintiff’s condition. Plaintiff then filed suit in Washington Superior Court seeking damages for defendant’s Jones Act negligence, unseaworthiness, and wrongful withholding of maintenance and cure. A jury found in favor of plaintiff and awarded $453,100 as a result of defendant’s negligence, $37,420 in compensatory maintenance and cure damages, and $1.3 million in punitive damages for defendant’s willful misconduct. Pursuant to a post-trial motion, the trial court awarded $387,558 in attorneys’ fees.

Defendant appealed the amount of the award for punitive damages and the calculation of attorneys’ fees. On appeal, the Washington Supreme Court affirmed the trial court’s award of damages. The court distinguished the U.S. Supreme Court case of Exxon v. Baker, 554 U.S. 471 (2008) wherein the USSC appeared to limit the amount of punitive damages recoverable in a maritime cause of action to a 1:1 ratio to compensatory damages. It found that the USSC did not establish a general rule limiting the jury’s role in determining punitive damages, but that the holding in Exxon was limited to the specific facts before the USSC. The court further found that the 1:1 ratio only applied to those cases where the act committed was worse than negligence but less than malicious. Quite incredibly, the court found that the 3:1 ratio discussed in dicta in Exxon, as it related to those cases involving malicious behavior and dangerous activity carried on for the financial gain of the tortfeasor, supports its finding that the USSC “embraced a variable limit approach based on culpability.” The court found that in this case, the actions of the defendant were egregious and, as such, the 1:1 ratio did not apply as a variable rate was necessary to deter this type of behavior.

The court further found that an award of attorneys’ fees as a result of a defendant’s willful failure to pay maintenance and cure is compensatory in nature and not punitive. As such, the $387,558 award of attorneys’ fees was included in the total amount of compensatory damages for purposes of the calculation of punitive damages. When combining the compensatory maintenance and cure damages and the award of attorneys’ fees, the $1.3 million punitive damage award was just over the 3:1 ratio to compensatory damages discussed by the court.
VII. **LIMITATION OF LIABILITY**

*In re Eckstein Marine Services, L.L.C, 2012 U.S. App. LEXIS 3480 (5th Cir. 2012).*

In this limitation action, claimant seriously injured his leg when he became entangled in a line and was pulled into a mooring bit. Claimant filed suit in a Texas state court on April 28, 2009. In December 2009, claimant made a settlement demand for $3 million. Plaintiff-in-limitation filed its limitation action in federal court on January 18, 2010 seeking to cap its liability at $750,000. Claimant then filed a motion to dismiss the limitation action for failure to bring the action within six months of receiving notice which was granted by the trial court. Claimant then won a judgment in state court in excess of $750,000.

Plaintiff-in-limitation appealed the trial courts grant of claimants’ motion to dismiss its limitation action on the grounds that the six month limitation period for bringing a limitation action did not begin to run until it received notice that claimant’s claim could exceed $750,000 by way of claimant’s December 2009 demand letter. The Fifth Circuit affirmed the trial court’s grant of claimant’s motion to dismiss finding that claimant’s allegations in its petition that he sustained permanent, catastrophic and disabling injuries was sufficient to establish a “reasonable possibility” that the damages sought could exceed the value of the vessel. It is not necessary that claimant’s petition allege a specific dollar amount sought.

*In re Environmental Safety & Health Consulting Services, Inc., 2012 U.S. App. LEXIS 4546 (5th Cir. 2012).*

In another limitation action, claimant filed a petition in a Louisiana state court alleging that he was injured in a “small, unnamed boat” while assisting in the cleanup of an oil spill. Claimant did not name the owner of the vessel in his petition, but did allege that he was working at the direction and under the supervision of plaintiff-in-limitation and that plaintiff-in-limitation was the party responsible for causing him to work from the unnamed vessel. More than seven months after claimant filed its state law claim, plaintiff-in-limitation filed its limitation action. Claimant then filed a motion to dismiss the limitation action for failure to bring the action within six months of receiving notice which was granted by the trial court.

Plaintiff-in-limitation appealed the trial courts grant of claimants’ motion to dismiss its limitation action on the grounds that the petition did not name it as owner of the vessel. The Fifth Circuit affirmed the trial court’s grant of claimant’s motion to dismiss finding that claimant’s state-court petition contained enough information to "inform the owner of the vessel both of details of the incident and that the owner appeared to be responsible for the damage in question." There is no requirement that the claimant identify the vessel or the owner of the vessel in the underlying action.


Claimants were injured while riding in rough seas aboard a crew boat owned by plaintiff-in-limitation. Claimants filed a Jones Act claim against their employer in state court in March
2011. Plaintiff-in-limitation was not a party to the state lawsuit. Nevertheless, plaintiff-in-limitation filed a limitation action in the Eastern District of Louisiana on May 6, 2011 after being put on notice of a demand for defense and indemnity by claimants’ employers. The court dismissed the initial limitation action on summary judgment finding that no real controversy existed between plaintiff-in-limitation and claimants’ employer. Plaintiff-in-limitation then filed a second limitation action on December 16, 2011 seeking limitation of liability based on the allegations of claimant that it was at fault for the accident resulting in claimants’ injuries. Claimants moved to dismiss this second limitation action on the grounds that it was not brought within six months of plaintiff-in-limitation learning of the accident and/or their third party lawsuit against their employer.

The court denied claimants’ motion to dismiss finding that they did not provide sufficient written notice to plaintiff-in-limitation prior to the filing of their formal claims in the initial limitation action on June 16 and 27, 2011. Claimants’ April 4, 2011 demand letter did not constitute sufficient written notice because it did not provide a "clear expression of intent to pursue a claim for damages against" the vessel owner. The letter was not addressed to plaintiff-in-limitation, but was instead addressed to an affiliated company. Additionally, the letter did not provide details of the incident forming the basis of claimants’ state court claim. The court further found that any actual knowledge of the incident by plaintiff-in-limitation was irrelevant as the law expressly requires notice to be in writing.


Consolidated limitation actions were filed after a collision which resulted in several personal injury claims.

All personal injury claims were settled, but the manufacturer of the one of the vessels in question maintained its claim against the vessel owners for tort indemnity.

The Petitioners moved to dismiss the Limitation Actions as a result of the personal injury settlements, but the manufacturer, which had asserted a claim in the Limitation Actions, opposed the dismissal.

The Court held that the shipowners’ preference for forum was paramount under the Limitation Act, and the manufacturer failed to demonstrate why the shipowners’ request for dismissal of their own actions should be denied.

Accordingly, the Court dismissed the Limitation Actions.