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Admiralty

by Colin A. McRae*
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I. APPELLATE ADMIRALTY JURISDICTION

In Wajnstat v. Oceania Cruises, Inc.,¹ the United States Court of Appeals for the Eleventh Circuit reviewed the decision of the United State District Court for the Southern District of Florida denying the cruise line’s motion for partial summary judgment and granting the injured passenger’s motion for partial summary judgment as to the cruise line’s limitation of liability defense.² Wajnstat was a passenger on board the Oceania cruise ship who became ill and required medical attention during a cruise from Istanbul, Turkey to Athens, Greece. After several surgeries, Wajnstat filed suit claiming that “Oceania negligently hired, retained, and supervised the ship’s doctor.”³ Oceania raised as

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¹ 684 F.3d 1153 (11th Cir. 2012).
² Id. at 1154-55.
³ Id.
an affirmative defense the limitation of liability provisions of the Athens Convention, as referenced in the cruise ticket contract.

Ruling on cross motions for summary judgment as to the reasonableness of the limitation of liability provision, the district court concluded that the limitation of liability provision was unenforceable, and Oceania appealed. The Eleventh Circuit never reached the issue of the Athens Convention and the enforceability of the limitation of liability provision. Although both parties consented to the Eleventh Circuit's appellate jurisdiction, the court disagreed and dismissed the appeal. The general rule is that "final judgments of a district court are appealable to the United States Courts of Appeals, whereas interlocutory orders are not." However, "in admiralty cases . . . we have jurisdiction over interlocutory appeals 'determining the rights and liabilities of the parties'" under 28 U.S.C. § 1292(a)(3). Relying on a prior United States Court of Appeals for the Fifth Circuit opinion, the Eleventh Circuit held the following:

If, as Ford Motor Co. held, a district court does not determine the "rights and liabilities of the parties" when it decides the applicability of a statutory limitation of liability, it also does not determine "the rights and liabilities of the parties" when it determines the applicability of a contractual limitation of liability.

The appeal was dismissed for lack of jurisdiction.

5. Id. at 1154-55.
6. Id. at 1155.
7. Id. at 1155-57.
8. Id. at 1157.
11. Ford Motor Co. v. S.S. Santa Irene, 341 F.2d 564 (5th Cir. 1965).
12. Wajnstat, 684 F.3d at 1155.
13. Id. at 1157. Oceania also argued that the Eleventh Circuit had jurisdiction unrelated to the admiralty jurisdiction provision of 28 U.S.C. § 1292(a)(3). Wajnstat, 684 F.3d at 1156. However, the Eleventh Circuit also denied jurisdiction under the collateral order rule. Id. at 1156-57.
II. SEAFARER ARBITRATION CLAUSES

After a busy slate of arbitration clause-related appeals in 2011, the Eleventh Circuit continues to hear appeals on the enforceability of seafarers' arbitration clauses, even post *Lindo v. NCL (Bahamas), Ltd.*, and *Bautista v. Star Cruises.* In a new case similar to *Lindo* and the many before it, the Eleventh Circuit affirmed the United States District Court for the Southern District of Florida's order compelling arbitration of a Carnival employee's complaint for failure to provide medical care. Kenneth Fernandes sued his employer, Carnival Corp., in Florida state court. Carnival removed the case to federal court and moved to compel arbitration pursuant to the Seafarer's Agreement signed by Fernandes upon his employment. Fernandes then appealed the district court's order compelling arbitration.

The crew member plaintiff, relying on the Eleventh Circuit's *Thomas v. Carnival Corp.* opinion from 2009, argued that the arbitration provision was invalid as against public policy. However, the Eleventh Circuit has held that the only defenses available to enforcement of an arbitration provision are, "fraud, mistake, duress, and waiver." Further, the Eleventh Circuit "also rejected Plaintiff's argument about *Thomas*: 'to the extent *Thomas* allowed the plaintiff seaman to prevail on a new public policy defense under [the Convention], *Thomas* violates *Bautista* and our prior panel precedent rule.' The Eleventh Circuit further ruled that the plaintiff's Jones Act and maintenance and cure claims were subject to arbitration as those claims arose as a result of his employment.

Prior to *Fernandes*, the Eleventh Circuit addressed another arbitration provision in *Arauz v. Carnival Corp.* *Arauz* is worth discussing in this Survey, but its substantive principles do not require extensive review due to the procedural posture and timing of the appeal. The

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14. 652 F.3d 1257 (11th Cir. 2011).
15. 396 F.3d 1289 (11th Cir. 2005).
17. *Id.*
18. 573 F.3d 1113 (11th Cir. 2009).
20. *Id.* (quoting *Lindo*, 652 F.3d at 1273).
23. *Id.* at 363.
24. 466 F. App'x 815 (11th Cir. 2012).
Eleventh Circuit decided *Lindo* while the *Arauz* appeal was pending.\(^\text{25}\) In addressing the appeal, *Arauz* essentially acknowledged that *Lindo* foreclosed his public policy argument.\(^\text{26}\) Further, *Arauz* acknowledged that the Eleventh Circuit panel could not overrule *Lindo*.\(^\text{27}\) As such, the Eleventh Circuit held "*Lindo* requires us to affirm the order compelling arbitration."\(^\text{28}\)

### III. CRUISE SHIP’S DUTY TO WARN

In *Chaparro v. Carnival Corp.*,\(^\text{29}\) the Eleventh Circuit reversed the Southern District of Florida's dismissal of the plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (F.R.C.P.).\(^\text{30}\) The district court had dismissed the plaintiffs' complaint despite a very unfortunate fact pattern. While the Carnival cruise ship M/V VICTORY was in port at St. Thomas, Virgin Islands, a Carnival employee recommended the Chaparro family visit a local beach. After visiting the local beach, the family was caught in a gang-related shooting during which one member of the family was struck by a bullet and killed. The family sued Carnival under a failure to warn theory, but the district court granted Carnival's motion to dismiss pursuant to F.R.C.P. 12(b)(6).\(^\text{31}\)

In order to analyze whether the appellants had satisfied the pleading standard, the Eleventh Circuit first had to determine whether Carnival actually "has a duty to warn passengers of known dangers at ports of call."\(^\text{32}\) The court began by acknowledging that a maritime negligence case relies on the general principles of negligence law.\(^\text{33}\) In order to sufficiently plead negligence, both maritime and non-maritime plaintiffs must "allege that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm."\(^\text{34}\) The Eleventh Circuit went on to define the duty in a maritime context as, "*reasonable care under the circumstances*, a standard which requires, as a prerequisite to imposing

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25. *Id.* at 817.
26. *Id.*
27. *Id.*
28. *Id.*
29. 693 F.3d 1333 (11th Cir. 2012).
30. *Id.* at 1333; FED. R. CIV. P. 12.
31. *Chaparro*, 693 F.3d at 1335.
32. *Id.*
33. *Id.* at 1336.
34. *Id.*
liability, that the carrier have had actual or constructive notice of the risk-creating condition, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure."\footnote{35} The Eleventh Circuit also cited a non-binding Florida immediate appellate court decision where the state court held "a cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit."\footnote{36} Based upon the defined duty, the Eleventh Circuit concluded that the appellants' allegations in the complaint—"that Carnival was aware of gang-related violence and crime, including public shootings, in St. Thomas generally and near Coki Beach specifically"—were sufficiently pled.\footnote{37}

\section*{IV. Forum Selection Clauses in Cruise Ship Tickets}

In \textit{Estate of Myhra v. Royal Caribbean Cruises, Ltd.},\footnote{38} the Eleventh Circuit reviewed the dismissal of a personal injury matter based on a forum selection clause contained in a cruise ticket.\footnote{39} The complaint was filed by the estate of Royal Caribbean passenger Tore Myhra, a resident of England, who fell ill and died while onboard a Royal Caribbean vessel. After Myhra passed away, his estate filed suit against Royal Caribbean in the Southern District of Florida. Royal Caribbean moved to dismiss the complaint based upon improper venue under F.R.C.P. 12(b)(3). Royal Caribbean's basis for its motion to dismiss was the forum selection clause included in the ticket contract, which required that all personal injury claims be litigated in the courts of England and Wales, and be governed by English law.\footnote{40} The district court dismissed the complaint and the passenger's estate appealed arguing that the forum selection clause should be invalidated for two reasons: (1) it is against the statutorily expressed policy of the United States; and (2) its terms were not reasonably communicated to the Myhras.\footnote{41}

The deceased passenger's wife booked the cruise through an English travel agency. The terms and conditions of the contract were provided to the passengers both in an invoice from the travel agency and in the

\begin{footnotesize}
\begin{enumerate}
\item Id. (quoting Keefe v. Bahamas Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989)).
\item Id. (citing Carlisle v. Ulysses Line, Ltd., 475 So. 2d 248, 251 (Fla. Dist. Ct. App. 1985)).
\item Id.
\item 695 F.3d 1233 (11th Cir. 2012).
\item Id. at 1236.
\item Id. at 1235-37.
\end{enumerate}
\end{footnotesize}
travel documents provided by Royal Caribbean. The terms and conditions limited Royal Caribbean's liability pursuant to the Athens Convention. The travel documents expressly provided, "We both agree that any dispute, claim or other matter arising out of or in connection with your contract or your holiday with us will only be dealt with by the Courts of England and Wales." On appeal, the Myhra estate pointed to 46 U.S.C. § 30509(a), and argued that the forum selection clause should not be enforced by federal courts as it is against the public policy of the United States. The Eleventh Circuit pointed to the express language of the statute, which expressly prohibits limitations on liability in certain situations but does not prohibit the use of a forum selection clause. The passenger's estate argued that the ticket contract essentially limits the liability of any injured parties by including a forum selection clause. After in-depth analysis, the Eleventh Circuit returned to the plain language of the statute, and "think[es] the appropriate course is to interpret the statute to its plain language unless Congress, by appropriate amendment, makes policy choices on the contours of choice-of-forum clauses that involve the Country's international commercial relationships." The court of appeals ruled that 46 U.S.C. § 30509(a) did not prohibit the forum-selection clause at issue.

The Myhra estate next argued that the forum selection clause should be invalidated because it was "achieved by overreaching." The Eleventh Circuit addressed fraud and overreaching in the non-negotiated

42. Id. at 1237.
43. Id.
44. Id.
45. 46 U.S.C. § 30509(a) (2006). The statute reads in full as follows:
(a) PROHIBITION.—
(1) IN GENERAL.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—
(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
(B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
(2) VOIDNESS.—A provision described in paragraph (1) is void.
46. Estate of Myhra, 695 F.3d at 1241.
47. Id. at 1242.
48. Id.
49. Id. at 1244.
50. Id.; see also 46 U.S.C. § 30509.
51. Estate of Myhra, 695 F.3d at 1244.
forum selection clause context by applying the "useful two-part test of 'reasonable communicativeness' [which] takes into account the clause's physical characteristics and whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms."  

First, the Eleventh Circuit addressed the clause's physical characteristics. The court analyzed the travel documents provided to the passengers and determined that the type-face was legible and that the pertinent sections were under "clear, plain-English headings." Further, the Eleventh Circuit considered the five separate invoices forwarded to the passengers, each of which contained a notice directing passengers to the terms and conditions available at a specific web address. The Eleventh Circuit concluded that "the physical characteristics of the warning in this case were sufficient to reasonably communicate the forum-selection clause to the [appellants]."  

Next, the Eleventh Circuit addressed whether the passengers "had the ability to become meaningfully informed of the clause and to reject its terms." The Eleventh Circuit noted the five separate invoices, the extensive travel documents, and the clear unambiguous reference to the courts of England and Wales as evidence that the appellants had the ability to become meaningfully informed. As such, the Eleventh Circuit upheld the district court's dismissal of the complaint under F.R.C.P. 12(b)(3).  

V. CONTRACTUAL STATUTE OF LIMITATION IN CRUISE SHIP TICKETS  
In an unpublished opinion, Farris v. Celebrity Cruises, Inc., the Eleventh Circuit affirmed summary judgment in favor of a cruise line based upon its contractual limitations period. Passenger Deanna Farris was injured in May 2009 while on board a Celebrity cruise vessel. Farris brought suit in the United States District Court for the Southern District of Florida in April 2011, seeking damages for injuries sustained  

52. Id. (quoting Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009)).  
53. Id. at 1244-45.  
54. Id. at 1245.  
55. Id.  
56. Id. at 1246.  
57. Id. (quoting Krenkel, 579 F.3d at 1281).  
58. Id.  
59. Id. at 1247.  
60. 487 F. App'x 542 (11th Cir. 2012).  
61. Id. at 544.
during her 2009 cruise. The cruise line moved for summary judgment, relying on the language of its cruise ticket contract.62

A paragraph in the ticket contract entitled, “NOTICE OF CLAIMS AND COMMENCEMENT OF SUIT OR ARBITRATION, SECURITY,” contained a provision limiting the time period to file suit to one year.53 The ticket also provided that the cruise line was entitled to the protections available under the Athens Convention.64

Farris argued that 46 U.S.C. § 30508(b)(2)65 forbids parties from contractually shortening a limitations period from the three-year statute for maritime torts prescribed in 46 U.S.C. § 30106.66 The Eleventh Circuit was not persuaded because Farris entirely misread the statute upon which she relied.67 The Eleventh Circuit discussed the statute:

Congress has precluded the owner of a “vessel transporting passengers . . . between ports in the United States, or between a port in the United States and a port in a foreign country” from contracting for a limitations period for maritime personal injury claims that is “less than one year after the date of the injury.”68

The Eleventh Circuit held that the plain language of the statute allowed the cruise line to do just as it had done in shortening the limitations period to one year.69 Likewise, the Eleventh Circuit summarily held that pursuant to the plain language of the ticket contract, the limitations period under the Athens Convention only benefitted the cruise line.70

VI. MARITIME PERSONAL INJURY

A 2012 Eleventh Circuit decision worth noting is *Rosenfeld v. Oceania Cruises, Inc.*71 This reported opinion is particularly interesting in that the opinion itself consists of a one-paragraph Order Denying Rehearing En Banc, which is followed by a twenty-one page dissenting opinion by Judge Gerald Tjoflat.72 The underlying case involved a personal injury suffered by a passenger onboard a cruise line. At trial, the plaintiff

62. *Id.* at 543.
63. *Id.* (emphasis in original).
64. *Id.* at 543 & n.1.
67. *Farris*, 487 F. App’x at 544.
68. *Id.; see also* 46 U.S.C. § 30508(b)(2).
69. *Farris*, 487 F. App’x at 544.
70. *Id.*
71. 682 F.3d 1320 (11th Cir. 2012).
72. *Id.* at 1321 (Tjoflat, J., dissenting).
proffered expert testimony regarding the floor on which she slipped and fell. As Judge Tjoflat bemoaned, "presumably" the district court sustained Oceania's objection to introduction of that testimony, as no trial transcript was included as part of the record on appeal. Judge Tjoflat devoted many paragraphs to the importance of pretrial rulings versus trial rulings. Judge Tjoflat's conclusion shows the importance he placed on this dissent:

Writing this dissenting opinion has been a very distasteful undertaking. I have written it because I am concerned about the integrity of the court as an institution. Rule 35 of the Rules of Appellate Procedure declares that an "en banc . . . rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." A routine "slip and fall" case ordinarily does not present a question of exceptional importance. But en banc consideration of this "slip and fall" case became necessary when the panel refused to grant rehearing. Surely, maintaining the integrity of the court's decision making process is a matter of exceptional importance.

VII. MARITIME ATTACHMENT

In an unpublished opinion, Adams Offshore, Ltd. v. Blake Marine Group, the Eleventh Circuit affirmed the decision of the United States District Court for the Southern District of Alabama allocating attachment costs amongst several parties. Plaintiff Adams Offshore, Ltd. (Adams) filed an action in the district court seeking attachment of a diving system owned by one of its debtors. Adams claimed damages of $7 million, while Blake Marine Group (Blake Marine) intervened claiming damages of $60,647,834, and Cashman Equipment Corporation (Cashman) intervened claiming damages of $1.7 million. The district court vacated its attachment order after Adams had incurred attachment costs of $235,957.96. The district court apportioned the costs amongst Adams, Blake Marine, and Cashman based upon the relative value of each party's claim for damages. Adams was ordered to absorb 10% of the costs, Blake Marine was ordered to reimburse Adams for 87.5% of

73. Id.
74. Id.
75. Id. at 1341 (citations omitted); see also FED. R. APP. P. 35(a)(1)-(2). While the dissenting opinion of Judge Tjojfat is not binding on the district courts of the Eleventh Circuit, its reasoning is worth review by the practitioners in the circuit.
76. 478 F. App'x 558 (11th Cir. 2012).
77. Id. at 560.
the costs, and Cashman was ordered to reimburse Adams for 2.5% of the
costs.\textsuperscript{78} 

Blake Marine appealed, arguing that the costs should not have been
allocated amongst the parties at all, and in the alternative, that the
allocation should not have been based upon the relative value of the
claims. Blake Marine's position was that only reasonable costs should
be allocated, and that the costs allocated by the district court were not
reasonable.\textsuperscript{79} The Eleventh Circuit noted that it "review[s] only for
clear error factfindings made by the district court sitting in admiralty
jurisdiction without a jury."\textsuperscript{80} As to Blake Marine's second argument
the allocation method was improper, the Eleventh Circuit relied upon
the local rules of the district.\textsuperscript{81} First, the Eleventh Circuit "give[s] a
great deference to a district court's interpretation of its local rules."\textsuperscript{82}
The local rule at issue provides the following: "Intervenors under this
rule shall be liable for costs together with the party originally effecting
seizure on any reasonable basis determined by the court."\textsuperscript{83} Because
the Eleventh Circuit relies upon the district court's interpretation of its
own local rules, the only issue for the Eleventh Circuit to determine is,
"whether the court's method of allocating the attachment costs had a
'reasonable basis.'\textsuperscript{84} The Eleventh Circuit cited to the Fifth Circuit
and the Model Local Admiralty Rules in affirming the district court's
allocation method.\textsuperscript{85} Interestingly enough, it was Blake Marine who
had brought the Model Rules to the district court's attention, including
the provision that provides allocation of attachment costs "in the
proportion that the intervenor's claim bears to the sum of all the
claims."\textsuperscript{86}

VIII. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

In \textit{Boroski v. DynCorp International},\textsuperscript{87} the Eleventh Circuit faced a
case on remand from the United States Supreme Court.\textsuperscript{88} While the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 559.
\item Id. at 559-60.
\item Id. at 559.
\item Id. at 560.
\item Id. (quoting Fils v. City of Aventura, 647 F.3d 1272, 1282 (11th Cir. 2011)).
\item Id.; see also S.D. Ala. Loc. Adm. R. 6(c).
\item Adams Offshore, Ltd., 478 F. App'x at 560; see also S.D. Ala. Loc. Adm. R. 6(c).
\item Adams Offshore, Ltd., 478 F. App'x at 560; see Beauregard, Inc. v. Sword Servs.
LLC, 107 F.3d 351, 353 n.8 (5th Cir. 1997).
\item Adams Offshore, Ltd., 478 F. App'x at 560; see also MODEL LOC. ADM. R. E(11)(b)
(2008).
\item 700 F.3d 446 (11th Cir. 2012).
\item Id. at 447.
\end{enumerate}
\end{footnotesize}
underlying facts of the case are not maritime in nature, the case deals with an interpretation of the Longshore and Harbor Workers' Compensation Act (the Act), as extended by the Defense Base Act. The amount of each payment made under the Act is determined in reference to the national average weekly wage, which is calculated each year, so the amount of a disabled employee's benefit payment depends on which year's national average weekly wage is used to calculate that payment. Section 906(c) of the Act provides that determinations of the national average weekly wage apply to employees or survivors "currently receiving compensation for permanent total disability or death benefits during such period," along with those "newly awarded compensation during such period."

Bernard Boroski (Boroski) applied for workers' compensation benefits under the Act, which applied to him by virtue of the Defense Base Act after exposure to various chemicals left him legally blind in both eyes. He has been permanently disabled since April 20, 2002, when he stopped work. When the case first appeared in the Eleventh Circuit, on appeal from the United States District Court for the Middle District of Florida, Boroski argued that the phrase, "newly awarded compensation" in § 906(c) means the actual entry of a compensation award. The Eleventh Circuit agreed with that interpretation; however, after the Eleventh Circuit handed down its opinion in Boroski I, the Supreme Court held in Roberts v. Sea-Land Services, Inc., that "newly awarded compensation" means newly entitled to compensation, or "statutorily entitled to compensation because of disability. Therefore, the date on which the employee's disability occurs determines the maximum weekly rate of compensation for a permanently and totally disabled employee who is "newly awarded compensation." On remand, the Eleventh Circuit affirmed the district court's determination that the compensation rate applicable to Boroski was determined by reference to the date when his benefits became payable, April 20, 2002.

90. 42 U.S.C. §§ 1651-55 (2006); Boroski, 700 F.3d at 447.
91. Boroski, 700 F.3d at 447.
92. Id.; see also 33 U.S.C. § 906(c).
94. Boroski, 700 F.3d at 448.
95. 132 S. Ct. 1350 (2012).
96. Boroski, 700 F.3d at 448 (quoting Roberts, 132 S. Ct. at 1357).
97. Id. at 452-53.
98. Id. at 453.
The Eleventh Circuit then considered Boroski's second argument, an issue which the Supreme Court did not address in Roberts.99 This argument deals with the “currently receiving compensation” language of § 906(c).100 Boroski argued that “currently receiving” compensation means actually physically receiving the payments, and does not mean that the employee is currently entitled to the payments.101 He argued that under the Act there is not a problem in interpreting the two clauses differently because the Act sets up two compensation schemes. According to Boroski, the “currently receiving” clause is expressly limited to those who are permanently and totally disabled, and the “newly awarded” clause is not so limited. Boroski's argument, then, would allow those who are not totally and permanently disabled to have their benefits determined according to the year they become entitled to them, and allow those who are totally and permanently disabled to have their benefits determined according to the time they actually receive them.102

The Eleventh Circuit disagreed, and held that “currently receiving compensation” means “currently entitled to compensation.”103 The court found the “newly awarded” clause does not exclude “totally and permanently disabled” employees from its reach: every person entitled to benefits under the Act is “newly awarded” benefits at some point.104 Boroski's interpretation of § 906(c) would lead to a conflict between the two clauses.105 Instead, by interpreting “currently receiving” to mean “currently entitled to,” the two clauses result in only one benefit payment amount for a claimant's first year of disability.106 The court also found that Boroski's interpretation of the “currently receiving” clause was inconsistent with § 910(f) of the Act, which provides for annual increases in benefit payments to persons who are totally and permanently disabled.107 Boroski's interpretation would also lead to disparate treatment of similarly situated claimants.108 Two people permanently disabled on the same day could receive different amounts,
Therefore, the Eleventh Circuit held that “currently receiving compensation” in 33 U.S.C. § 906(c) means “currently entitled to compensation.”

IX. SEAMAN STATUS UNDER THE JONES ACT

The Eleventh Circuit Court of Appeals took the opportunity in Clark v. American Marine & Salvage, LLC to clarify the parameters for a plaintiff to qualify as a “seaman” under the Jones Act. William Clark was an employee of American Marine & Salvage, LLC, a Mobile-based vessel repair contractor. His duties with the company included responding to business calls, preparing invoices and operating the office, as well as diving, welding and repair work. A diary Clark kept between January 1 and May 15, 2010, recorded 159 hours of vessel repair work out of his 768.5 total hours of work for American Marine. That diary also recorded three separate injuries sustained during repair work, including an elbow injury and two back injuries. He filed suit against American Marine for unseaworthiness and maintenance and cure under the general maritime law, and negligence under the Jones Act. American Marine successfully argued that Clark did not qualify as a seaman under the Jones Act because he had not worked a substantial amount of time in the service of a vessel in navigation, and the district court granted summary judgment.

The court of appeals applied the criteria from the landmark United States Supreme Court case of Chandris, Inc. v. Latsis in affirming the district court’s grant of summary judgment. The court began by setting forth the two-part test from Chandris for determining whether a marine employee qualifies as a seaman under the Jones Act, which requires that the employee’s duties “contribute to the function of the vessel,” and that the individual employee “ha[s] a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature.” The court went on to cite the “general rule” from Chandris that “an employee who spends less than about 30 percent of his time in

109. Id.
110. Id.
111. 494 F. App’x 32 (11th Cir. 2012).
113. Clark, 494 F. App’x at 32-33.
114. Id. at 33-34.
116. Clark, 494 F. App’x at 34-35.
117. Id. at 34 (quoting Chandris, 515 U.S. at 368).
the service of a vessel in navigation should not qualify as a sea-
man."

In applying these criteria to Clark's situation, the court of appeals
agreed with the district court's conclusion that Clark had failed to
introduce sufficient evidence that his work was substantially connected
to a vessel in navigation. Significant amongst the factors considered
in reaching this conclusion were that Clark's repair hours never took
him to sea, nor exposed him to the perils of the sea; he never performed
repair work while a vessel was in navigation; his repairs from the
American Marine repair barge were mostly performed while the barge's
bottom was resting on land; and even while cutting and welding, his
leads and torch were at all times tethered to welding machinery located
in his landside utility trailer. Furthermore, 159 hours of dockside
repair work (out of 768.5 total hours) did not reach the threshold 30% figure set forth in Chandris. The grant of summary judgment was
therefore affirmed.

X. MARITIME JURISDICTION

The case of United States v. Pena presented the Eleventh Circuit,
as an issue of first impression in any federal circuit court of appeals, the
question of whether federal courts have jurisdiction to prosecute offenses
under the International Convention for the Prevention of Pollution from Ships (commonly named MARPOL) committed by United States-
based MARPOL surveyors during their inspection of foreign-flagged
vessels in the United States. Hugo Pena was a Fort Lauderdale-
based surveyor nominated by the vessel's classification society to
classification society is an organization that inspects vessels and issues
certificates on behalf of a vessel’s flag state. Id. at 1142-43.

118. Id. (quoting Chandris, 515 U.S. at 371).
119. Id. at 33.
120. Id. at 34-35.
121. Id.
122. Id. at 35.
123. 684 F.3d 1137 (11th Cir. 2012).
124. International Convention for the Prevention of Pollution from Ships (MARPOL),
125. Pena, 684 F.3d at 1141.
126. A vessel's "classification society" is an organization that inspects vessels and issues
certificates on behalf of a vessel's flag state. Id. at 1142-43.
127. Id. at 1143.
confirming that the vessel's structure, equipment, systems, and other components complied with MARPOL.\footnote{128}

The United States Coast Guard (USCG) conducted an unannounced port state control inspection of the ISLAND EXPRESS I at a port near Fort Lauderdale on May 4, 2010, and found the vessel to be significantly out of compliance with MARPOL. In particular, the vessel's oil pollution prevention equipment was found to be inoperable and there was no bilge tank space for storing dirty bilge water pending disposal ashore. In its place, the USCG discovered a makeshift system of pumps and rubber tubes connecting the ship's bilge directly to the main deck of the vessel, where the bilge water could be discharged directly over the side of the ship without being filtered or run through oily water separator equipment, as required by MARPOL of all vessels four hundred gross tons or greater.\footnote{129}

When the USCG officers reviewed the vessel's IOPP paperwork to see if these deficiencies had been noted, they found a clean and unqualified certificate issued by Pena a mere nineteen days before. Specifically, Pena's April 15, 2010 IOPP certificate stated that he had surveyed the vessel in accordance with MARPOL, and that he found the vessel's equipment, including the oil filtering (15 ppm) equipment, to be satisfactory and compliant with MARPOL. No mention was made in the IOPP certificate of either the inoperable oily water separator, or the presence of the makeshift system of pumps and tubes allowing discharge of oily bilge water directly into the ocean.\footnote{130} When questioned by USCG authorities, Pena admitted that he had not actually tested the oily water separator and that he had knowledge of the portable pumps and tubes, but that he had authorized their use "only in an emergency."\footnote{131} Pena was charged under the United States' Act to Prevent Pollution from Ships (APPS)\footnote{132} with an offense against the law of the United States by conducting a survey that violated MARPOL protocol,

\footnote{128} Id. at 1143-44. The certificate issued by Pena is commonly referred to as an International Oil Pollution Prevention (IOPP) Certificate, and is required to be maintained by the Master onboard a vessel in order to enter or set sail from the ports of MARPOL signatory countries. \textit{Id.} at 1142-43.
\footnote{129} Id. at 1142-44 (citing Reg. 15.2, Resolution MEPC.117(52), Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Oct. 15, 2004 (entered into force Jan. 1, 2007) (also known as MARPOL Annex I)).
\footnote{130} Id. at 1143-44.
\footnote{131} Id. at 1144.
and was found guilty in a jury trial conducted in the United States District Court for the Southern District of Florida.\footnote{Pena, 684 F.3d at 1144.}

On appeal, Pena argued that since MARPOL requires a vessel's flag state to conduct surveys on vessels that fly its flag, only the flag state (as opposed to the port state) enjoys jurisdiction to prosecute a surveyor for failing to conduct a proper MARPOL survey.\footnote{Id. at 1144-45.} The Eleventh Circuit examined the APPS to determine whether there was such a limit on exercise of subject matter jurisdiction.\footnote{Id. at 1145.} The court first noted that the APPS and its implementing regulations apply to MARPOL violations occurring on foreign-flagged vessels only "while [the ships are] in the navigable waters of the United States."\footnote{Id. at 1145 (alteration in original); see also 33 U.S.C. § 1902(a)(2).} Since it was undisputed that the violation at issue occurred while the vessel was in a Florida port, this first limitation did not divest the district court of jurisdiction.\footnote{Pena, 684 F.3d at 1145.}

The second limitation on jurisdiction under the APPS states that "[a]ny action taken under [the APPS] shall be taken in accordance with international law."\footnote{Id. (alterations in original); see also 33 U.S.C. § 1912.} The court of appeals pointed out that Article 4 of the MARPOL Convention clearly states that for violations occurring within the jurisdiction of a port state, both the port state and the flag state have concurrent jurisdiction to enforce MARPOL protocols.\footnote{Pena, 684 F.3d at 1146.} By signing on to the MARPOL treaty, the United States consented to a surrender of exclusive jurisdiction over violations within its ports, but it maintained concurrent jurisdiction to sanction violations of MARPOL by foreign-flagged vessels within United States waters.\footnote{Id.; see also 18 U.S.C. § 3231 (2006); 33 U.S.C. §§ 1907-1908.} The court of appeals confirmed the district court had subject matter jurisdiction and upheld the conviction.\footnote{Pena, 684 F.3d at 1147, 1153.}

XI. SALVAGE

A. Evidence of "Marine Peril"

Two cases involving the salvage of foundering vessels provided the court of appeals with the occasion to clarify the standard in the Eleventh Circuit for a "successful" salvage operation, and the requirements for an
award of attorney fees to successful salvage litigants. The first case of Reliable Salvage & Towing, Inc. v. Bivona involved the rescue of a thirty-five foot Sea Ray vessel owned by the defendant Michael Bivona after it ran up onto a shoal near Boca Grande, Florida. The salvor Reliable Salvage and Towing, Inc. (Reliable) found the vessel listing thirty degrees in ten inches of water with a storm approaching and no hope of tide action freeing the vessel for several days. Reliable successfully towed the vessel to deeper water, for which Reliable billed Bivona $7,523.10. After a dispute between Bivona and his insurer left the invoice unpaid, Reliable filed suit in the United States District Court for the Middle District of Florida asserting an in personam claim against Bivona (under a contract salvage theory) and an in rem claim against the vessel (under a pure salvage theory).

The district court conducted a bench trial and awarded Reliable $14,000 under a pure salvage theory for the services rendered in the rescue of the Sea Ray vessel. The district court first determined that the "contract" signed by Bivona was not enforceable as it was missing essential terms, including the actual fee for the salvage. The district court went on to hold that Reliable had successfully established at trial the three elements of pure salvage—to wit, (1) the existence of a "marine peril," (2) service voluntarily rendered by the salvor and not required as an existing duty, and (3) success, in whole or in part, in saving the vessel from the marine peril. In addition to awarding Reliable the principal amount of the pure salvage claim, the district court found that the defense proffered by Bivona to the salvage claim at trial was frivolous and in bad faith, awarded Reliable its attorney fees and costs totaling $46,583.83.

Bivona appealed the district court award arguing that he had successfully defended against the contract salvage theory, and that requiring Reliable to prove at trial the unliquidated amount of the "pure salvage" it was seeking should not amount to bad faith or inequitable conduct. The court of appeals conducted a thorough review of the record from the bench trial and determined that the defense put forth by

142. See Esoteric, LLC v. M/V Star One, 478 F. App'x 639 (11th Cir. 2012); Reliable Salvage & Towing, Inc. v. Bivona, 476 F. App'x 852 (11th Cir. 2012).
143. 476 F. App'x 852 (11th Cir. 2012).
144. Id. at 853.
145. Id.
146. Id. (quoting Flagship Marine Servs., Inc. v. Belcher Towing, 966 F.2d 602, 605 (11th Cir. 1992)).
147. Id.
148. Id. at 853-54.
Bivona was not well-founded in fact. His opening statement and closing argument both asserted that the Sea Ray vessel had not been in peril, despite the clear evidence of the approaching weather conditions the vessel would have faced were it not for Reliable's assistance. The court of appeals made further note of Bivona's testimony on the stand conceding that Reliable had performed a service and "should be entitled to payment," and that he had an obligation to make such payment, all of which directly contradicts the earlier assertion that the vessel had not been in peril. Lastly, the court of appeals pointed out that Bivona never argued that the amount billed by Reliable was unreasonable. The award of attorney fees and costs to Reliable was therefore affirmed.

B. Element of "Successful Salvage"

The case of Esoteric, LLC v. M/V STAR ONE was the second salvage case to come before the Eleventh Circuit Court of Appeals and involved issues very similar to the Reliable Salvage appeal, albeit with a very different result. The salvage situation in this case arose after the yacht M/V STAR ONE capsized near the Bahamas and was discovered by the crew of another nearby yacht, the M/V ESOTERIC. The captain of the ESOTERIC determined that the submerged STAR ONE constituted a navigational hazard due to its location in a busy sea lane, and further noted that it could sustain additional damage if it were to drift into nearby coral reefs. The ESOTERIC therefore put a line on the STAR ONE and towed it to Bahamian waters, where local law enforcement ordered the crew of the ESOTERIC to anchor the foundering vessel just outside the entrance to the harbor. A professional salvage company took over at that point, and proceeded to right the vessel, pump her dry, and tow her back to Miami. A second salvor then towed the STAR ONE to a boatyard up the Miami River. The owners and underwriters of the STAR ONE paid the two professional salvage companies for their services in returning the vessel to Miami, but did not compensate the ESOTERIC for its initial salvage efforts, so the owners

149. Id. at 854.
150. Id.
151. Id. at 855.
152. Id.
153. Id.
154. 478 F. App'x 639 (11th Cir. 2012).
155. See id.
of the ESOTERIC filed suit in the United States District Court for the Southern District of Florida.\textsuperscript{156}

The primary issue litigated at the trial court level was whether ESOTERIC had established the third element\textsuperscript{157} of a pure salvage claim—"success" in saving, or in helping to save at least part of the property at risk.\textsuperscript{158} The record from the bench trial below showed that the STAR ONE had capsized and was at risk of sinking in 6,000 feet of water when the ESOTERIC came upon the scene. The efforts of the ESOTERIC ensured the safety of the STAR ONE by removing it from the dangerous sea lane and depositing it anchored in waters thirty-five feet deep, where it could be easily located for additional salvage efforts to be undertaken. The trial court determined these efforts amounted to a "successful" salvage, and awarded ESOTERIC a principal amount of $67,800 for its voluntary salvage services.\textsuperscript{159} Like the district court in Reliable Salvage, the trial court in this matter went on to conclude that the owners of the STAR ONE had "no basis for disputing [Esoteric's] salvage claim" because it had offered no evidence and had "no cognizable defense at law" to counter the notion that the salvage efforts of the ESOTERIC were successful, and thus awarded attorney fees in the amount of $72,755.\textsuperscript{160}

The primary dispute on appeal was not whether the salvage services rendered by the ESOTERIC were in fact successful, but whether the district court had erred in ruling that the owners of the STAR ONE had failed to offer "any evidence" that the salvage efforts of the ESOTERIC were unsuccessful.\textsuperscript{161} The court of appeals began its analysis on this issue by citing the general rule in admiralty cases that attorney fees are not recoverable absent a showing that the losing party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."\textsuperscript{162} The STAR ONE's owner had presented evidence in support of the defense that other than being anchored, the condition of the STAR ONE remained unchanged despite the purported salvage efforts by the ESOTERIC—namely, the vessel remained capsized, submerged, and at the same

\begin{itemize}
  \item \textsuperscript{156} Id. at 640-41.
  \item \textsuperscript{157} The three elements of a pure salvage claim include (1) the existence of a "marine peril," (2) service voluntarily rendered by the salvor and not required as an existing duty, and (3) success, in whole or in part, in saving the vessel from the marine peril. Flagship Marine Servs., Inc., 966 F.2d at 605.
  \item \textsuperscript{158} Esoteric, 478 F. App'x at 641.
  \item \textsuperscript{159} Id. at 641-42.
  \item \textsuperscript{160} Id. at 643 (alteration in original).
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Id. (quoting Chambers v. NASCO, 501 U.S. 32, 45-46 (1991)).
\end{itemize}
level of risk of sinking as it had been before being towed by the ESOTERIC.\textsuperscript{163}

While this argument was not sufficient to reverse the district court's ruling that the salvage efforts were a "success," the court of appeals could not say such argument was "uncognizable" or constituted "an abuse of the legal system."\textsuperscript{164} In reversing the grant of attorney fees, the opinion closed with an admonition to district courts to "resist the understandable temptation to engage in post hoc reasoning in concluding that, because a [party] did not ultimately prevail, his action must have been unreasonable or without foundation."\textsuperscript{165}