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Admiralty

by Robert S. Glenn, Jr.*
Colin A. McRae**
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I. INTRODUCTION

The Eleventh Circuit Court of Appeals handed down ten opinions distinctly concerning admiralty issues during the 2003 calendar year. The topics covered in these cases varied from the traditional maritime issues of allision, cargo, contribution, and admiralty jurisdiction, to the less common maritime fields of criminal law and state sovereign immunity. With ten admiralty opinions in 2003, the Eleventh Circuit has maintained its status as one of the busiest admiralty circuits.

II. ALLISION

In *Sunderland Marine Mutual Insurance Co. v. Weeks Marine Construction Co.*,[1] the Eleventh Circuit was asked to determine when a stationary vessel involved in an allision is considered a "moored" vessel and when it is an "anchored" vessel in order to identify the applicable set of safety regulations.[2] *Sunderland Marine* addressed the allision

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1. 338 F.3d 1276 (11th Cir. 2003).
2. *Id.* at 1277.

of two vessels during a heavy fog in the Florida Keys. A shrimp boat was headed out to sea for a fishing trip when it set an incorrect course that took it outside the Edmont Key Channel. Unfortunately, the appellant, Weeks Marine Construction Company ("Weeks Marine"), had tied one of its barges to a mooring buoy in the same area where Weeks Marine was performing dredging work. The shrimp boat allided with Weeks Marine's unlit barge, causing the shrimp boat to sink. The District Court for the Middle District of Florida found both parties negligent and apportioned the damages accordingly. Weeks Marine appealed the district court's finding that its stationary barge was partially at fault in the allision.[3]

The central issue on appeal was whether the unlit barge was moored or anchored for the purpose of determining which navigational rules applied at the time of the allision.[4] The court of appeals went to great lengths to determine the proper characterization of the barge at the time of the allision because "[t]he safety requirements for an anchored vessel . . . are generally higher, for its presence is in unexpected places."[5] The court initially resorted to the use of dictionary definitions by noting that "[t]he traditional distinguishing factor of a moored vessel versus an anchored vessel has been that the former is moored to a permanent object such as a dock or a pier while the anchored vessel is anchored in open water."[6] The difficulty in determining whether the vessel was moored or anchored in this case lay in the fact that the vessel had been made fast to a *mooring* buoy using its *mooring* lines, while the mooring buoy was *anchored* to the ocean bottom.[7] Appellant argued that its barge should be considered a moored vessel because it had been secured to a mooring buoy via mooring lines.[8] The court responded by stating that the barge "was not connected to a permanent location, such as a dock or a pier, but was located in open water, similar to a traditionally anchored vessel."[9] The court ultimately relied on a United States Coast Guard clarification of this debatable question: "'The interpretive rules are added to insure that the term vessels at anchor in Rule 30 of the COLREGS and the Inland Rules includes vessels moored to a mooring buoy.'"[10]

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3. *Id.*
4. *Id.*
5. *Id.* at 1278 (citing Self Towing, Inc. v. Brown Marine Serv., Inc., 837 F.2d 1501, 1505 (11th Cir. 1988)).
6. *Id.* at 1277 (citing THE OXFORD COMPANION TO SHIPS AND THE SEA 559 (1988)).
7. *Id.* at 1277-78.
8. *Id.* at 1276.
9. *Id.* at 1278.
10. *Id.* (quoting 63 F.R. 5728, 5729).

After determining that the Weeks Marine barge had been a "vessel at anchor" at the time of the allision, the Eleventh Circuit examined the safety regulations that apply to such a vessel.[11] The court noted that the Weeks Marine barge was violating elevated lighting, sound, and navigational obstruction rules at the time of the allision.[12] The opinion states the general rule that the presumption of fault for an allision lies with the moving vessel, which in this case was the shrimp boat.[13] However, the burden of proof shifts to the stationary vessel when the stationary vessel is in violation of a statutory rule intended to prevent accidents.[14] Weeks Marine failed to meet its burden under the Pennsylvania rule requiring proof that the navigation rule violations by the barge did not contribute in any way to the allision, and thus, the court ruled that the district court was correct in finding Weeks Marine partially at fault for the allision.[15] As a final note, the court of appeals awarded pre-judgment interest and made the pronouncement that "[t]he rate of pre-judgment interest that should be awarded is the prime rate during the relevant period."[16]

III. STATE SOVEREIGN IMMUNITY

The central issue in *Vierling v. Celebrity Cruises, Inc.*[17] was the right of a state port authority to assert Eleventh Amendment immunity.[18] Plaintiff John Vierling was a would-be passenger on the M/V CENTURY, a cruise ship owned by Celebrity Cruises, Inc. ("Celebrity"). The M/V CENTURY was secured to a Port Everglades, Florida pier that was owned and operated by the Port Everglades Port Authority (the "Port Authority"), a department of Broward County, Florida. The Port Authority had an arrangement with Celebrity to provide passenger

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11. *Id.*

12. *Id.*

13. *Id.* at 1279 (citing Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790, 795 (5th Cir. 1977)).

14. *Id.* The opinion further states that under the longstanding Pennsylvania rule, the stationary vessel then bears the burden of showing that its statutory violation could not have been a contributory cause of the allision. *Id.* (citing The Pennsylvania, 86 U.S. 125, 136 (1873)).

15. *Id.* at 1279-80. The apportionment of damages between the parties resulted from the district court's finding that the captain of appellees' shrimp boat, who had a trace of cocaine in his system, had negligently set the boat's course in the fog using an incorrect marker, which contributed to the allision. *Id.* at 1277.

16. *Id.* at 1280 (citing First Nat'l Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 480 (7th Cir. 1999); The Ohio River Co. v. Peavey Co., 731 F.2d 547, 549 (8th Cir. 1984)).

17. 339 F.3d 1309 (11th Cir. 2003).

18. *Id.* at 1313.

loading services to Celebrity's cruise ships on a per-passenger fee basis. Pursuant to this agreement, a Port Authority employee would position a bridge from the pier in such a way that a gangway would be extended onto the ship to allow for the embarkation of Celebrity passengers. On the morning of September 21, 1996, the M/V CENTURY experienced inclement weather during the passenger loading process, with wind gusts up to fifteen to twenty knots. As plaintiff traversed the bridge and gangway, a sudden gust of wind pushed the ship away from the dock, causing the gangway to pull away from the ship. Plaintiff fell from the gangway, slammed into the side of the ship, and fell approximately forty-five feet into the water below.[19]

Plaintiff Vierling filed suit against both Celebrity and the Port Authority to recover damages for the injuries he sustained in the fall. Celebrity then cross-claimed against the Port Authority, seeking indemnification for damages if Celebrity had to pay Vierling. Celebrity's indemnity action sounded in both negligence, for failure to exercise due care during loading, and in contract, for breach of the Port Authority's implied warranty of workmanlike performance. The Port Authority responded with a motion to dismiss both the complaint and the cross-claim on the basis of Eleventh Amendment sovereign immunity. The district court denied the Port Authority's motions to dismiss on sovereign immunity grounds, and the Port Authority appealed.[20]

The court of appeals was required to determine whether the Port Everglades Port Authority was a state agency or instrumentality which could invoke sovereign immunity.[21] The court focused on three factors in deciding the question: "(1) how state law defines the entity; (2) what degree of control the state maintains over the entity; and (3) from where the entity derives its funds and who is responsible for satisfying the judgments against the entity."[22] First, the court noted that Florida law treats the Port Everglades Port Authority as an entity of the county and not of the state.[23] Second, the court determined that the State of Florida had no control over the operation of the Port Everglades facilities because Florida statutory law provides that the county, as the owner of the Port Authority facility, has the authority to operate and manage the

19. *Id.* at 1310-11.

20. *Id.* at 1311-12.

21. *Id.* at 1313.

22. *Id.* at 1314 (citing Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp., 208 F.3d 1308, 1311 (11th Cir. 2000)).

23. *Id.* at 1314-15 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (holding that Eleventh Amendment immunity does not extend to counties)).

facility and to charge fees for its use.[24] Third, the court stated that the Port Authority is a self-sufficient enterprise that runs its operations on the revenues it generates with no financial support from the state.[25] Based on these three findings, the Eleventh Circuit affirmed the district court's ruling that the Port Everglades Port Authority is not an arm of the state and therefore was not entitled to sovereign immunity.[26] After that determination, the court ruled that Celebrity was entitled to proceed with its claim for indemnification from the Port Authority.[27]

IV. CARGO

In *A.I.G. Uruguay Compania de Seguros, S.A. v. AAA Cooper Transportation*,[28] the Eleventh Circuit examined the "sealed container doctrine" and the shifting burden of proof in cases involving this defense.[29] Plaintiff shipped three shrink-wrapped pallets of cellular phones from Illinois with an intended destination of Uruguay. While en route from Illinois to Miami, Florida, where the pallets were to be loaded onto an ocean-going vessel, defendant, common carrier AAA Cooper Transportation ("Cooper"), unloaded the shipment from its truck and loaded it into a storage trailer for the weekend. When Cooper's driver returned to pick up the shipment, he discovered that the cellular phones had disappeared from the shipment.[30]

The United States District Court for the Southern District of Florida conducted a bench trial and determined that plaintiff had made out a prima facie case against Cooper.[31] The court awarded plaintiff a total of $126,000 for the lost cargo. On appeal, Cooper argued that the district court improperly allowed plaintiff to establish its prima facie case by using circumstantial evidence rather than direct evidence, as is

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24. *Id.* at 1315 (citing FLA. STAT. ch. 125.012 (2000)).
25. *Id.*
26. *Id.*
27. *Id.* at 1320.
28. 334 F.3d 997 (11th Cir. 2003).
29. *Id.* at 1002. *AIG Uruguay* arose in the context of an overland shipment of cargo, to which the Carmack Amendment of the Interstate Commerce Act applies. 49 U.S.C. § 14706 (2000). However, the court of appeals stated that courts should apply the same analysis to all sealed containers, whether shipped by land or by sea. *AIG Uruguay*, 334 F.3d at 1006. The analysis undertaken by the court in *AIG Uruguay* is therefore applicable with equal force to cases involving ocean-going transportation of containerized cargo, and thus bears significance for admiralty practitioners in this circuit.
30. 334 F.3d at 1002-03.
31. *Id.* at 1003. AIG Uruguay Compania de Seguros was the cargo insurer for the lost phones and sued Cooper as subrogee after paying the shipper's claim for loss of the phones. *Id.*

required under the sealed container doctrine.[32] Under the sealed container doctrine, when the cargo at issue is shipped in a sealed container, "the carrier has no . . . ability to ascertain the contents of the shipment, and [thus,] the shipper is held to a higher standard of proof" in establishing its prima facie case.[33] The appellate court concluded that under this higher standard of proof, plaintiff shipper cannot rely on the bill of lading alone to prove the condition of the cargo at the time of delivery to the carrier, but instead must supplement this documentary evidence with some form of direct evidence as to the contents of the sealed container.[34]

V. MARITIME CRIMINAL LAW

The Eleventh Circuit decided two cases in 2003 concerning the Maritime Drug Law Enforcement Act ("MDLEA").[35] In the first case, *United States v. Rendon*,[36] the court dealt with the issue of enhanced sentencing imposed under the United States Sentencing Guidelines upon a defendant who acts as a "captain" of a vessel used to transport illegal drugs into the United States.[37] In the second case, *United States v. McPhee*,[38] the Eleventh Circuit was called upon to decide when, under the Act, a vessel is subject to the jurisdiction of the United States courts.[39]

A. *United States v. Rendon*

Defendant, Geovanni Rendon, was detained by United States Coast Guard personnel after a high-speed chase in the eastern Pacific Ocean on May 11, 2001. A Navy surveillance plane spotted defendant's "go-fast" vessel and relayed this information to both a Coast Guard helicopter and a rigged hull inflatable boat launched from a Coast Guard vessel.[40] When the Coast Guard personnel intercepted and boarded the go-fast boat, defendant identified himself as the captain and stated that

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32. *Id.*

33. *Id.* at 1004.

34. *Id.* (citing Highlands Ins. Co. v. Strachan Shipping Co., 772 F.2d 1520, 1521 (11th Cir. 1985)).

35. 46 U.S.C. app. §§ 1901-04 (2004).

36. 354 F.3d 1320 (11th Cir. 2003).

37. *Id.* at 1329-31.

38. 336 F.3d 1269 (11th Cir. 2003).

39. *Id.* at 1272-78.

40. 354 F.3d at 1322-24. Such vessels are "'refer[red] to as "go-fast" boats because they can travel at high rates of speed, which makes them a favored vehicle for drug and alien smuggling operations.'" *Id.* at 1322 n.1 (quoting United States v. Tinoco, 304 F.3d 1088, 1092 (11th Cir. 2002)).

the boat was registered in Colombia. After consulting with Colombian officials who were unable to confirm the claim of registry, the Coast Guard searched the vessel and found traces of cocaine in the forward compartment of the boat. Soon thereafter, the Coast Guard agents returned to the area where they had observed the crew of the go-fast boat dumping bales overboard during the high-speed pursuit. The agents recovered forty-eight bales of cocaine with a net weight of 1,171 kilograms.[41] Defendant was charged with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of §§ 1903(a),(g), and (j) of the MDLEA.[42] Defendant pleaded guilty, without a plea agreement, and was sentenced. Defendant was subject to a mandatory minimum imprisonment term of ten years on each count of the indictment. He was given upward adjustments under the Sentencing Guidelines for being both the captain of the boat and the organizer or leader of the conspiracy; therefore, he was sentenced to concurrent terms of 360 months.[43]

On appeal, Rendon argued that the district court erred by giving him upward adjustments for being both the captain of the boat, and the organizer and leader of the conspiracy.[44] Rendon was given a two-level increase for being the captain of the boat[45] and a four-level increase for serving as the organizer or leader of the drug smuggling operation.[46] Defendant argued that these two separate enhancements were based on the same conduct and therefore constituted impermissible "double counting."[47] The court of appeals determined that Rendon was the captain because he identified himself as such when Coast Guard

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41. *Id.* at 1322-23.

42. 46 U.S.C. app. § 1903 (2000).

43. 354 F.3d at 1323-24.

44. *Id.* at 1324. Defendant also raised the issue of the court's jurisdiction in the case, but the court noted that these same jurisdictional and constitutional challenges to the MDLEA had been raised and dealt with by the court in *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002). *Id.* at 1324-28. The Eleventh Circuit also rejected Rendon's argument that his sentence was improper in light of the Supreme Court case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* at 1328. Because Rendon's sentence was the mandatory minimum and not above the statutory maximum, his Apprendi argument was "unavailing." *Id.*

45. *Id.* at 1328 (citing UNITED STATES SENTENCING GUIDELINES MANUAL § 2D1.1(b)-(2)(B) (2001)).

46. *Id.* (citing UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2001)).

47. *Id.* "'Impermissible double counting occurs . . . when one part of the [Sentencing] Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.'" *Id.* at 1333 (quoting United States v. Rodriguez-Matos, 188 F.3d 1300, 1309 (11th Cir. 1999)).

personnel boarded the vessel.[48] Rendon's co-defendants further testified that they considered him to be the captain, that he was the only crew member who knew the course to be taken, and that he hired the crew and directed their operations while on board.[49] The court stated that enhancement of Rendon's sentence for serving as the organizer or leader was based on separate and independent evidence that Rendon had instructed at least eight people involved in the conspiracy, which is well more than the "five or more participants" required under § 3B1.1(a) of the Sentencing Guidelines to trigger this enchancement.[50] The court reasoned that the factors used in these two sentence enhancements were not subsets of each other, and thus, Rendon was not sentenced using impermissible double counting.[51] Therefore, the court of appeals affirmed Rendon's conviction and sentence.[52]

B. United States v. McPhee

Defendant in *United States v. McPhee*[53] raised a novel challenge to the "territorial waters" prong of the court's elements of jurisdiction under the MDLEA, but his conviction was ultimately upheld by the Eleventh Circuit.[54] Defendant was convicted of conspiracy to possess with intent to distribute one hundred kilograms or more of marijuana and was given a fifty-seven month sentence. Although he entered a conditional plea of guilty, defendant expressly reserved the right to appeal the denial of his motion to dismiss the indictment under Federal Rule of Criminal Procedure 11(a)(2) based on subject matter jurisdiction.[55] Defendant's pretrial motion to dismiss the indictment centered around the argument that the vessel he was in at the time of his arrest, the NOTTY, was located within the territorial waters of a foreign nation, the Bahamas, which does not consent to enforcement of the MDLEA by the United States.[56]

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48. *Id.* at 1329.
49. *Id.*
50. *Id.* at 1334.
51. *Id.*
52. *Id.*
53. 336 F.3d 1269 (11th Cir. 2003).
54. *Id.* at 1278.
55. *Id.* at 1271. Under Federal Rule of Criminal Procedure Rule 11(a)(2), a defendant may, with the consent of the court and the government, enter a conditional plea of guilty and reserve in writing the right to have an appellate court review an adverse determination of a pre-trial motion. FED. R. CRIM. P. 11(a)(2).
56. 336 F.3d at 1273. In *McPhee* the court ultimately determined that it was not necessary to decide the question of whether the Bahamas had consented to enforcement of the MDLEA because United States courts would have jurisdiction over the vessel as a "vessel without nationality" under § 1903(c)(1)(A) and as a "vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation

In *McPhee* the court began by noting that the standard of review of a district court's application of statutory provisions concerning subject matter jurisdiction is de novo, and, therefore, it would review for clear error the district court's factual findings with respect to jurisdiction.[57] In deciding the question of jurisdiction, the court stated that "[t]he United States generally recognizes the territorial seas of foreign nations up to twelve nautical miles adjacent to recognized foreign coasts."[58] After an initial evidentiary dispute over the position of the vessel at the time of its seizure, McPhee argued that even accepting the navigation chart position offered by the government, the NOTTY was within twelve miles of a point off the coast of the Bahamas called "Saint Vincent Rock" and therefore was within Bahamian territorial waters.[59] The district court concluded that Saint Vincent Rock did not constitute an island for purposes of measuring the Bahamas' twelve-mile territorial limit.[60] The court of appeals reviewed this finding of fact for clear error.[61] After first undergoing a somewhat whimsical analysis of the lyrics of the Simon & Garfunkel song "I Am a Rock,"[62] the court noted that Saint Vincent Rock is normally a submerged rock and does not qualify as land.[63] The court then looked to the 1993 Archipelagic Waters & Maritime Jurisdiction Act[64] of the Bahamas to determine the applicable definition of "island."[65] The court determined that Saint Vincent Rock did not meet the definition of "island" under the Archipelagic Act's "high water elevation" or "low tide elevation" definitions.[66]

In conclusion, the court took notice of the applicable navigation charts, which indicate the presence of Saint Vincent Rock as a "dangerous underwater rock of uncertain depth."[67] Because Saint Vincent Rock was to be considered a rock and not an island, the position of the

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whose registry is claimed" under § 1903(c)(2)(A). *Id.* at 1273 & n.4. The occupants of the NOTTY claimed that the vessel was registered in the Bahamas, yet the Bahamian authorities could not provide confirmation of the registry. *Id.* at 1271.

57. *Id.* at 1271 (citing *Tinoco*, 304 F.3d at 1114).

58. *Id.* at 1273 (citing Proclamation No. 5030, 22 I.L.M. 461 (Mar. 10, 1983)).

59. *Id.* at 1275-76.

60. *Id.* at 1276.

61. *Id.* at 1277.

62. *Id.* at 1276 n.9 (citing PAUL SIMON & ART GARFUNKEL, *I Am A Rock*, on SOUNDS OF SILENCE (Columbia Records 1966)). The court stated that "in the metaphysical sense, [it could] discern no reason why something could not be both a rock and an island at the same time." *Id.*

63. *Id.* at 1277.

64. 22 U.S.C. § 2291 (2000).

65. 336 F.3d at 1277.

66. *Id.*

67. *Id.* at 1278.

NOTTY at the time of its seizure was not within Bahamian territorial waters but was instead in international waters, and thus, the district court had jurisdiction over defendant's case.[68]

VI. JURISDICTION

In *Anderson v. United States*,[69] the Eleventh Circuit examined whether an employee's personal injury claim arose in admiralty, and if so, whether the employee had complied with the jurisdictional requirements of the Extension of Admiralty Jurisdiction Act ("EAJA").[70] Plaintiff, Anderson, was a civilian employee of a United States contractor. The contractor was located at a weapons training facility. An armed aircraft released two bombs at the weapons training facility range. The bombs missed the intended target and impacted near the observation post on the weapons training facility range injuring Anderson. Anderson's claim to the Naval Legal Services Office was denied, and thereafter, Anderson filed a complaint in the district court under the Federal Tort Claims Act ("FTCA"),[71] and, alternatively, under the Suits in Admiralty Act ("SAA"),[72] the Public Vessels Act ("PVA"),[73] and the EAJA.[74] In each claim, plaintiff alleged that the United States negligently failed to provide a safe working environment by causing two bombs to be dropped near his work site, which resulted in physical and mental injuries. The United States filed a motion to dismiss challenging the basis of subject matter jurisdiction, and the district court granted the motion and dismissed with prejudice.[75]

On appeal the Eleventh Circuit considered whether Anderson's claim fell within admiralty jurisdiction.[76] The court explained that if admiralty jurisdiction existed for plaintiff's claim, the claim could not be brought under the FTCA.[77] The Eleventh Circuit discussed the two tests enunciated by the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[78]:

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68. *Id.*
69. 317 F.3d 1235 (11th Cir. 2003).
70. *Id.* at 1239-40; *see* 46 U.S.C. § 740 (2000).
71. 28 U.S.C. § 2680 (2000).
72. 46 U.S.C. §§ 741-752 (2000).
73. 46 U.S.C. §§ 781-790 (2000).
74. 46 U.S.C. § 740 (2000).
75. *Anderson*, 317 F.3d at 1236.
76. *Id.*
77. *Id.* at 1237.
78. 513 U.S. 527 (1995).

> Under the location test, where a court must determine whether the tort occurred on navigable water or whether [the] injury suffered on land was caused by a vessel on navigable water [and under] the connection test, a court[] first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce[, and second,] a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.[79]

The Eleventh Circuit held that the aircraft was on an appurtenance of the ship at the time of plaintiff's injuries, and because injuries caused by an appurtenance to a vessel are deemed to have been caused by the vessel, the court concluded that the location test was satisfied.[80] The Eleventh Circuit also held that the connection test was satisfied because the range had a potential to disrupt maritime commerce and the vessel's activities showed a substantial relationship to traditional maritime activity.[81] Because Anderson's injuries were caused by the vessel and were connected to maritime activity, the Eleventh Circuit held that his claim arose in admiralty and therefore could not be brought under the FTCA.[82]

After determining that Anderson's claim arose in admiralty, the Eleventh Circuit discussed the plaintiff's requirements under the EAJA: (1) filing an administrative claim with the federal agency owning or operating the vessel causing the injury or damage and (2) waiting six months after filing an administrative claim before filing suit against the United States.[83] The Eleventh Circuit strictly construed the EAJA's jurisdictional requirements, holding that Anderson was required to wait six months to file his suit against the United States after his personal injury claim was denied even though the two-year limitation period had expired for a negligence claim under the PVA and the SAA.[84]

VII. MARITIME CONTRACT

In *Merrill Stevens Dry Dock Co. v. M/V Yeocomico II*,[85] the Eleventh Circuit addressed the enforceability of limited liability clauses in a

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79. *Anderson*, 317 F.3d at 1237 (quoting *Grubart*, 513 U.S. at 534).
80. *Id.* at 1238.
81. *Id.*
82. *Id.* at 1239.
83. *Id.* at 1239-40. *See* 46 U.S.C. § 740 (2000).
84. *Anderson*, 317 F.3d at 1240.
85. 329 F.3d 809 (11th Cir. 2003).

contract for ship repair.[86] In this case, YII Shipping contracted with Merrill Stevens for repairs to its ship, M/V YII. The repairs were necessary to bring the ship into compliance with United States Coast Guard regulations. The contract contained exculpatory clauses. Some time after the contract was signed and the repair work had commenced, a fire occurred as a result of the negligence of two of Merrill Stevens's workers who were performing welding work. The fire damaged the ship's accommodations house, and it took an additional eight weeks to repair the damage. While M/V YII was out of service, YII Shipping claimed that it lost certain shipping routes to its competitors and that it could not reclaim these routes when the repairs were completed.[87]

Merrill Stevens sued YII Shipping, claiming that it failed to pay the balance for the repair work that Merrill Stevens completed. Merrill Stevens also sued for prejudgment interest of eighteen percent as provided in the contract. Merrill Stevens claimed that paragraphs in the contract precluded YII Shipping's recovery for incidental and consequential damages. In response, YII Shipping claimed that the contract terms were void because Merrill Stevens had breached the contract by negligently setting fire to the ship. YII Shipping also claimed that the limited liability clauses of the contract were ambiguous and thus unenforceable. Additionally, YII Shipping filed a counterclaim for the fire damage to the ship, lost profits sustained while the ship underwent an additional eight weeks of repair, and lost profits sustained after the ship returned to service. The district court found that the fire was caused by Merrill Stevens's negligence and awarded YII Shipping damages for the fire damage and also for damages resulting from the loss of use. The district court, however, denied YII Shipping's claim for lost profits. Merrill Stevens was awarded prejudgment interest of eighteen percent. Both parties moved for reconsideration and amendment. Upon reconsideration, the district court amended its order in part, finding that the limited liability clauses in the contract were ambiguous and thus unenforceable.[88]

On appeal, four issues were presented: (1) whether the contract was ambiguous and thus unenforceable; (2) whether the district court erred in awarding YII Shipping damages for the fire damage and for the loss of use of the ship during the eight weeks of repair; (3) whether the district court erroneously failed to award YII Shipping damages for lost profits; and (4) whether it erred in awarding Merrill Stevens prejudg-

86. *Id.* at 813-16.
87. *Id.* at 811-13.
88. *Id.*

ment interest.[89] The Eleventh Circuit reviewed de novo whether the contract was ambiguous.[90] The court explained that a limited liability clause is enforceable if it satisfies the three part test set forth in *Diesel "Repower" Inc. v. Islander Investments Ltd.*[91] First, the "clause must 'clearly and unequivocally indicate the parties' intention.'"[92] "Second, 'the limitation must not absolve the repairer of all liability and must . . . provide a deterrent to negligence.'"[93] Finally, "the parties [to] the contract must have 'equal bargaining power.'"[94]

In *Merrill Stevens* the Eleventh Circuit explained that there was no allegation as to the second and third steps, and therefore, the court only had to address the first step of the test to determine whether the limited liability clauses of the contract were unambiguous and thus enforceable.[95] The court explained that the question of whether a contract is ambiguous is one of law for the court to determine.[96] In deciding this, "'a contractual provision should not be construed as being in conflict with another unless no other reasonable interpretation is possible.'"[97] Upon examining the limited liability clauses of the contract at issue, the Eleventh Circuit concluded that the clauses were unambiguous, reversing the district court's finding that the clauses were ambiguous.[98] Accordingly, YII Shipping was entitled to recover incidental or consequential damages resulting from Merrill Stevens's negligence.[99] The Eleventh Circuit affirmed the holdings of the district court on the remaining issues of damages and prejudgment interest.[100]

VIII. ADMIRALTY PRACTICE AND PROCEDURE

In *Velchez v. Carnival Corp.*,[101] the Eleventh Circuit dismissed an appeal, holding that it lacked jurisdiction under the removal statute to review a remand order based on plaintiff's motion to remand for a

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89. *Id.* at 813.
90. *Id.*
91. *Id.* (citing Diesel "Repower" Inc. v. Islander Investments Ltd., 271 F.3d 1318 (11th Cir. 2001)).
92. *Id.* (quoting *Diesel "Repower,"* 271 F.3d at 1324).
93. *Id.* (quoting *Diesel "Repower,"* 271 F.3d at 1324).
94. *Id.* (quoting *Diesel "Repower,"* 271 F.3d at 1324).
95. *Id.* at 813-14.
96. *Id.* at 814.
97. *Id.* (quoting Maccaferri Gabions, Inc. v. Dynateria, Inc., 91 F.3d 1431, 1440 (11th Cir. 1996)).
98. *Id.*
99. *Id.* at 814-15.
100. *Id.* at 815-17.
101. 331 F.3d 1207 (11th Cir. 2003).

procedural defect.[102] Plaintiff Velchez was a seaman onboard a vessel owned by defendant Carnival. Plaintiff sued Carnival in state court asserting claims for Jones Act[103] negligence, unseaworthiness, failure to provide maintenance and cure, and failure to treat.[104] Approximately nineteen months after plaintiff filed suit, Carnival filed a notice of removal to the district court, asserting that because plaintiff was working under an arbitration agreement, removal was proper under 9 U.S.C. § 205.[105] Following removal, plaintiff moved for the district court to remand the action to the state court, arguing that Carnival's notice of removal was procedurally flawed. The district court agreed and granted Velchez's motion.[106]

On appeal, the Eleventh Circuit noted that "'an order remanding a case to the [s]tate court from which it was removed is not reviewable on appeal or otherwise.'"[107] Plaintiff's amended motion for remand asserted that defendant failed to meet the procedural requirements of 28 U.S.C. § 1446[108] because Carnival failed to attach a copy of all process, pleadings, and orders served as required by the statute.[109] This failure to comply with the statute constituted a defect in the removal procedure within the meaning of 28 U.S.C. § 1447(c),[110] and plaintiff's motion was timely, based on the procedural defects of the removal.[111]

The Eleventh Circuit concluded that it lacked jurisdiction over the appeal.[112] Carnival contended that the district court acted on its own to send the case back to the state court because the procedural defect used to remand the case was different from the procedural defect specified by plaintiff.[113] The Eleventh Circuit explained that the appeal turned on whether a remand order based on a procedural defect other than the one asserted by a party in the remand motion amounted to a sua sponte order over which the Eleventh Circuit had jurisdiction.[114] The court held that the Black's Law Dictionary definition of

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102. *Id.* at 1210.
103. 42 U.S.C. app. § 688 (2000).
104. *Velchez*, 331 F.3d at 1208.
105. 9 U.S.C. § 205 (2000).
106. *Velchez*, 331 F.3d at 1208.
107. *Id.* at 1208 (quoting 28 U.S.C. § 1447(d) (2000)).
108. 28 U.S.C. § 1446 (2000).
109. 331 F.3d at 1208.
110. 28 U.S.C. § 1447(c) (2000).
111. 331 F.3d at 1208-09.
112. *Id.* at 1209.
113. *Id.* at 1209-10.
114. *Id.* at 1210.

sua sponte, "without prompting or suggestion; on its own motion,"[115] did not fit the circumstances of the case, because the court was prompted to remand by plaintiff.[116] The court therefore dismissed the appeal.[117]

IX. CONTRIBUTION

Murphy v. Florida Keys Electric Cooperative Ass'n[118] clarified the Eleventh Circuit's muddled history on whether a defendant in an admiralty tort action, who settled with a plaintiff without obtaining a release from liability for other potential defendants, could then be entitled to contribution from the other defendants.[119] In *Murphy* plaintiffs were the parents of Brendan and Steven Murphy, who were on a boat trip with a friend, Raymond Ashman IV, when their boat alluded with an electrical pole abutment support structure owned by defendant. Brendan Murphy was thrown from the boat and killed, and the other two passengers were injured. The Murphys sued defendant in federal district court for the wrongful death of Brendan and for Steven's injuries. Their complaint invoked the court's admiralty jurisdiction and defendant filed a third-party complaint against the Ashmans, invoking the court's admiralty jurisdiction. In response, the Ashmans filed a counterclaim against Florida Keys Electric Cooperative, defendant, to recover for Raymond's injuries. The Ashmans brought their counterclaim as a civil action under the district court's supplemental jurisdiction rather than under its admiralty jurisdiction.[120]

While all of these actions were pending, Florida Keys settled with the Murphys. However, the settlement agreement did not release the Ashmans from liability to the Murphys. As a result, the Ashmans moved for summary judgment on defendant's third-party contribution claim, which the district court granted. The district court also exercised its discretionary powers and dismissed without prejudice the Ashmans' counterclaim against Florida Keys. Defendant appealed both the grant of summary judgment on its contribution claim and the dismissal without prejudice of its counterclaim.[121]

In affirming the district court, the Eleventh Circuit examined its prior decisions on contribution in admiralty cases, which it noted "have

115. *Id.* (quoting BLACK'S LAW DICTIONARY 1437 (7th ed. 1999).
116. *Id.*
117. *Id.*
118. 329 F.3d 1311 (11th Cir. 2003).
119. *Id.* at 1312-13.
120. *Id.* at 1313.
121. *Id.* at 1313-14.

lurched back and forth like a drunken sailor."[122] The Eleventh Circuit followed the United States Supreme Court decision in *McDermott, Inc. v. AmClyde*,[123] together with the Eleventh Circuit's decision in *Jovovich v. Desco Marine, Inc.*,[124] concluding that a settling defendant could not bring a suit for contribution against a nonsettling defendant who was not released from liability to the plaintiff by the settlement agreement.[125] According to the court, the "proportionate share approach" applied.[126] Under this approach,

> if at least one defendant does not settle with the plaintiff and the case goes to trial, the amount of damages and the percentage of liability attributable to each tortfeasor is determined at trial, and any nonsettling defendant is responsible for only the proportion of the total damages attributed to it in the verdict.[127]

Using the proportionate share approach, rather than the pro-tanto approach,[128] the Eleventh Circuit held that a settling defendant could not sue nonsettling, unreleased defendants for contribution in admiralty tort cases.[129]

The appeal also concerned the Ashmans' counterclaim against defendant, Florida Keys, which was brought under the district court's supplemental jurisdiction, rather than its admiralty jurisdiction. Defendant, wishing to stay in federal court, argued that the counterclaim could have been asserted only under the district court's admiralty jurisdiction, and therefore dismissal was an abuse of discretion.[130] The Eleventh Circuit disagreed and explained that once defendants filed the third-party complaint against the Ashmans in federal court, the maritime tort claim became a compulsory counterclaim because it arose from the same transaction or occurrence, the boating accident, as defendant's third-party complaint against the Ashmans for contribu-

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122. *Id.* at 1313.

123. 511 U.S. 202 (1994).

124. 809 F.2d 1529 (11th Cir. 1987).

125. *Murphy*, 329 F.3d at 1315-16.

126. *Id.* at 1314. The proportionate-share approach was adopted by the United States Supreme Court in *McDermott*, and all circuits presently operate under this approach. *See generally* McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994).

127. *Murphy*, 329 F.3d at 1314 (citing *McDermott*, 511 U.S. at 208-13).

128. Under the pro-tanto approach, a nonsettling defendant is liable for the entire amount of the plaintiff's damages, less a set-off for the amount of the other tortfeasors' settlement, regardless of the proportion of the plaintiff's damages attributable to each tortfeasor.

129. *Murphy*, 329 F.3d at 1318.

130. *Id.* at 1318-19.

tion.[131] The court explained that the Ashmans were not required to bring their maritime tort claim under the district court's admiralty jurisdiction because, as a compulsory counterclaim, their maritime tort claim was within the district court's supplemental jurisdiction.[132] Because the Ashmans did not include a statement invoking the district court's admiralty jurisdiction, their maritime tort claim was brought as a civil action under the district court's supplemental jurisdiction and the district court had discretion to dismiss the counterclaim.[133]

X. WRONGFUL DEATH

The Eleventh Circuit examined the issue of whether a non-dependent parent could recover loss of society damages for the wrongful death of his minor child under general maritime law in *Tucker v. Fearn*.[134] Plaintiff Tucker appealed from the district court's order precluding him from recovering loss of society damages in his wrongful death action under the general maritime law. Tucker's son died as a result of a boating collision which occurred in territorial waters, and Tucker sought to recover nonpecuniary damages under general maritime law. Defendants moved to strike Tucker's general maritime claim for nonpecuniary damages because he was not financially dependent on his deceased minor son.[135] The district court certified that its order concerned a controlling question of law as to which there was substantial ground for difference of opinion, and the Eleventh Circuit granted plaintiff's petition for interlocutory review.[136]

In analyzing whether a non-dependent parent may recover loss of society damages for the wrongful death of his minor child under general maritime law, the Eleventh Circuit looked to three Supreme Court cases.[137] First, in *Moragne v. States Marine Lines, Inc.*[138] the Supreme Court created a wrongful death action under general maritime law for deaths occurring in state territorial waters but did not set forth the scope of the remedies that would be available.[139] Next, the Eleventh Circuit discussed *Mobil Oil Corp. v. Higginbotham*,[140] which

131. *Id.* at 1319.
132. *Id.* at 1320. *See* 28 U.S.C. § 1367(c).
133. 329 F.3d at 1320.
134. 333 F.3d 1216 (11th Cir. 2003).
135. *Id.* at 1218.
136. *Id.*
137. *Id.* at 1218-19.
138. 398 U.S. 375 (1970).
139. *Murphy*, 329 F.3d at 1218-20.
140. 436 U.S. 618 (1978).

held that loss of society damages were not recoverable under the Death on the High Seas Act ("DOHSA").[141] The Supreme Court concluded in *Higginbotham* that Congress had "'limited survivors to recovery of their pecuniary losses.'"[142] Finally, in *Miles v. Apex Marine Corp.*,[143] the Supreme Court "addressed whether recovery for loss of society damages was available for seamen under the Jones Act[[144]] (based on negligence) and in a general maritime action (based on unseaworthiness)."[145] In *Miles* the Court held that "'there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.'"[146] Drawing on these three cases, the Eleventh Circuit in *Tucker* determined that non-dependent survivors, such as Tucker, of nonseamen, such as Tucker's son, could not recover loss of society damages in a wrongful death action under general maritime law.[147] The court noted that "[a] strange anomaly would result if [it] were to permit the survivors of nonseamen the right to recover loss of society damages while the survivors of seamen—the traditional wards of admiralty law—are barred from such recovery under the Jones Act and general maritime law."[148]

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141. *Tucker*, 333 F.3d at 1218 (citing *Higginbotham*, 436 U.S. at 618). *See* 46 U.S.C. §§ 761-768 (2000).

142. *Tucker*, 333 F.3d at 1221 (quoting *Higginbotham*, 436 U.S. at 623).

143. 498 U.S. 19 (1990).

144. 42 U.S.C. app. § 688 (2000).

145. *Tucker*, 333 F.3d at 1221.

146. *Id.* (quoting *Miles*, 498 U.S. at 33).

147. *Id.* at 1225.

148. *Id.* at 1222.