

Admiralty

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I. INTRODUCTION

The Eleventh Circuit Court of Appeals handed down eight published opinions during the 2005 calendar year that dealt distinctively with admiralty issues. The cases represented a broad spectrum of traditional maritime issues, as the court issued opinions on such varied topics as salvage, admiralty practice and procedure, limitation of liability, the Longshore and Harbor Workers' Compensation Act, marine insurance, the Vessel Hull Design Protection Act, and the doctrine of forum non conveniens. With this diverse range of topics covered in its 2005 opinions, the Eleventh Circuit remains one of this country's most important admiralty circuits.

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II. SALVAGE-ATTORNEY FEES

In *Offshore Marine Towing, Inc. v. MR23*,¹ the Eleventh Circuit, held (1) attorney fees could not be awarded in an in rem action to enforce a salvage lien,² and (2) the district court acted within its authority under the Federal Arbitration Act³ in modifying the arbitration award to disallow attorney fees.⁴

In that case, a luxury motor yacht, the M/V MR23 (“MR23”), grounded in the Bahamas. The plaintiff towing company, Offshore Marine Towing (“OMT”), responded to the call for assistance. Upon arrival, OMT presented the owner of the yacht with a signed by the owner. The contract called for arbitration of all disputes regarding fees or charges. The contract did not contain any provisions regarding the in personam jurisdiction of the yacht owner. A dispute over the amount of the salvage charges arose in Florida, where the boat was towed.⁵

OMT filed suit in the United States District Court for the Southern District of Florida and sought to arrest the MR23 as security for its salvage lien.⁶ The district court, which had admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333,⁷ issued an arrest warrant in rem for the MR23.⁸ Pursuant to the terms of the salvage contract, the district court ordered the parties to submit the dispute to arbitration. The arbitrator issued an award in favor of OMT in the amount of \$15,852.50 plus interest for salvage and \$29,314.82 for attorney fees and expenses.⁹ “The arbitrator noted [in the award] that it was not clear whether the issue of attorney fees had been submitted to arbitration, but stated ‘if it was not the intention of the court for the issue of fees and costs to be a subject of this award, it can certainly so state and handle those issues as it sees fit.’”¹⁰ OMT moved for confirmation of the award, and the owner of MR23 moved to vacate the award with regard

1. 412 F.3d 1254 (11th Cir. 2005).

2. *Id.* at 1258.

3. 9 U.S.C. §§ 1-16 (2000).

4. 412 F.3d at 1256.

5. *Id.* at 1255.

6. *Id.*

7. 28 U.S.C. § 1333 (2000).

8. Section 8 of the Federal Arbitration Act specifically provides that an aggrieved party with a “cause of action otherwise justiciable in admiralty” may initiate a proceeding in federal court—and thereby take advantage of the ability to seize the vessel or other property in rem as security—without waiving the party’s rights under an arbitration clause. 9 U.S.C. § 8 (2000).

9. *Offshore Marine*, 412 F.3d at 1255.

10. *Id.*

to the attorney fees and expenses. The district court ruled that “attorney[] fees could not be awarded in an *in rem* action and that the issue of attorney[] fees had not been submitted to the arbitrator.”¹¹

On appeal, the Eleventh Circuit held that, under 9 U.S.C. § 11(b),¹² “the district court cannot compel arbitration on an issue not before it.”¹³ According to the court, the value of the salvage lien was the only issue before the district court, so the issue of attorney fees could not have been submitted to the arbitrator.¹⁴ On the issue of attorney fees, the Eleventh Circuit noted that, with very few exceptions,¹⁵ attorney fees are generally not awarded in admiralty cases.¹⁶

Relying on its earlier decision in *Bradford Marine, Inc. v. M/V Sea Falcon*,¹⁷ the Eleventh Circuit ruled that attorney fees could not be collected in an *in rem* action to enforce a maritime lien, and that the *in rem* suit is limited to the value of the lien itself.¹⁸ OMT unsuccessfully argued that *Bradford* was distinguishable because it was an *in rem* action for necessities, while this case was an *in rem* action for salvage.¹⁹ After analyzing the factors for calculation of a salvage award set forth in *The Blackwall*,²⁰ the Eleventh Circuit determined that attorney fees were not a part of the value of the lien itself because attorney fees do not arise until the enforcement of the salvage lien.²¹ Finally, the court noted that while OMT cited several cases where attorney fees were awarded, none of those cases awarded attorney fees against the vessel.²²

11. *Id.*

12. 9 U.S.C. § 11(b) (2000).

13. *Offshore Marine*, 412 F.3d at 1256.

14. *Id.*

15. *Id.* (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 258-59 (1975) (awarding attorney fees when the losing party has acted in bad faith); *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Platoro, Ltd. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 906 n.19 (5th Cir. 1983) (awarding fees to an indemnitee in a suit against the indemnitor); *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1011 (5th Cir. 1984) (awarding fees for a case concerning breach of workmanlike performance)).

16. *Offshore Marine*, 412 F.3d at 1256 (citing *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990)).

17. 64 F.3d 585 (11th Cir. 1995).

18. *Offshore Marine*, 412 F.3d at 1257.

19. *Id.*

20. 77 U.S. 1, 14 (1869).

21. *Offshore Marine*, 412 F.3d at 1257.

22. *Id.* at 1257-58.

III. ADMIRALTY PRACTICE AND PROCEDURE

In *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*,²³ the Eleventh Circuit considered cross-appeals concerning procedural questions.²⁴ Sweet Pea Marine (“Sweet Pea”) and APJ Marine (“APJ”) entered into an oral contract for the refurbishment of Sweet Pea’s luxury yacht. Sweet Pea sued in federal court, based on diversity jurisdiction, alleging breach of oral contract, negligent misrepresentation, fraud in the inducement, breach of an oral express warranty, and breach of fiduciary duties. APJ responded with an in personam breach of contract claim against Sweet Pea and an in rem maritime lien claim against the yacht, based on admiralty jurisdiction.²⁵

The district court consolidated the claims for discovery purposes but allowed the claims to proceed on different dockets because of the different jurisdictional bases.²⁶ At trial on Sweet Pea’s diversity action, the jury found for Sweet Pea on its breach of warranty claim.²⁷ On appeal, APJ argued that the district court lacked subject matter jurisdiction because the parties were not completely diverse.²⁸ The Eleventh Circuit noted that it was undisputed that the amount in controversy requirement of \$75,000 was met; that Sweet Pea was a Cayman Islands corporation; and that APJ was a Florida corporation.²⁹ However, APJ argued that Sweet Pea’s principal place of business was also in Florida, which would divest the court of diversity jurisdiction.³⁰ Noting that the burden for establishing subject matter jurisdiction rests with the party bringing the claim,³¹ the Eleventh Circuit reviewed the district court’s determination of subject matter jurisdiction de novo.³²

The Eleventh Circuit ultimately held that the district court’s determination that Sweet Pea’s principal place of business was not in Florida was not clearly erroneous.³³ There was sufficient evidence that Sweet Pea’s principal place of business was either in the Cayman Islands or Colorado.³⁴ The court held that since “neither Sweet Pea nor

23. 411 F.3d 1242 (11th Cir. 2005).

24. *Id.* at 1245.

25. *Id.* at 1245-46.

26. *Id.* at 1246.

27. *Id.*

28. *Id.* at 1247.

29. *Id.* at 1247-48.

30. *Id.* at 1248.

31. *Id.* at 1247 (citing *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002)).

32. *Id.*

33. *Id.* at 1248.

34. *Id.*

the Vessel had any other regular contacts with Florida either before the contract with APJ was executed or after it was terminated," diversity jurisdiction was appropriate.³⁵

On APJ's claims, the district court allowed the same jury to hear the evidence and give an advisory opinion, but because jurisdiction was based on admiralty, the trial court would make the ultimate findings of fact.³⁶ The jury found that APJ was entitled to damages on its maritime claims.³⁷ Because the jury found against Sweet Pea on its contract-related claims, the district court concluded that *res judicata* did not preclude the court from reaching APJ's maritime contract claims.³⁸ After finding that APJ was entitled under an oral contract to a mark-up on goods and materials supplied to the vessel, the district court awarded APJ \$244,689.31 in damages and imposed a maritime lien on the M/V SWEET PEA in the same amount.³⁹

The Eleventh Circuit noted that for recovery on a breach of oral contract claim under admiralty jurisdiction, APJ had to prove (1) the terms of the contract, (2) that a breach had occurred, and (3) "the reasonable value of the purported damages."⁴⁰ Sweet Pea argued that the final element was not met, and therefore, the imposition of damages was improper.⁴¹ The court noted that there was little case law regarding the reasonableness element, but cited to opinions that measured reasonableness of charges as "customary"⁴² and "in accord with prevailing charges for the work done and the materials furnished."⁴³ First, APJ argued that Sweet Pea waived its chance to contest reasonableness because it had agreed to a mark-up on the materials. The court, however, ruled that agreeing to a mark-up had no relevance to the reasonableness of the actual prices of the goods and materials.⁴⁴

Second, APJ argued that the testimony at trial showed that it had proven the reasonableness of the charges.⁴⁵ However, the court determined that there was neither direct nor indirect evidence that could

35. *Id.*

36. *Id.* at 1246.

37. *Id.*

38. *Id.*

39. *Id.* at 1246-47.

40. *Id.* at 1249.

41. *Id.*

42. *Id.* (quoting *Ex parte Easton*, 95 U.S. 68, 77 (1877)).

43. *Id.* (quoting *Shelly Tractor & Equip. Co. v. The Boots*, 140 F. Supp. 425, 426 (E.D.N.C. 1956)).

44. *Id.* at 1250.

45. *Id.*

have gone to the reasonableness of the charges.⁴⁶ Additionally, the court noted that the elements of the claim for a maritime lien included a “reasonable price” requirement.⁴⁷ Because the reasonableness requirement was not met, both the award of damages and the imposition of a maritime lien were deemed “clearly erroneous” by the Eleventh Circuit.⁴⁸

In *Transamerica Leasing, Inc. v. Institute of London Underwriters*,⁴⁹ the Eleventh Circuit examined an action brought by the lessor of shipping containers against the lessee’s ocean marine insurers to recover for a disappearance of containers.⁵⁰ The appeal brought the case before the Eleventh Circuit for the second time.⁵¹ After remand from the first appeal, the Eleventh Circuit directed the trial court to instruct the jury regarding whether the lessor was an additional insured, a loss payee, or both.⁵² After the jury found that the lessor was a loss payee, the lessee’s marine insurers moved for judgment as a matter of law, and argued that under English law, a loss payee does not have standing to sue on a contract. The district court agreed and granted the motion.⁵³

Transamerica appealed the district court’s decision, arguing that:

1) [T]he district court was prohibited from considering the standing issue based on the law of the case doctrine and the mandate rule; 2) Underwriters waived the standing issue; 3) Underwriters should be judicially estopped from arguing that Transamerica cannot recover under the contract because it is a loss payee; and 4) the district court erred in excluding certain evidence.⁵⁴

46. *Id.*

47. *Id.* at 1249 (citing *S.E.L. Maduro (Florida), Inc. v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1482 (11th Cir. 1987)).

48. *Id.* at 1251.

49. 430 F.3d 1326 (11th Cir. 2005).

50. *Id.* at 1329-31. The action was initiated in Florida state court by the container lessor (Transamerica) against the insurance underwriters for the container lessee (C.A. Venelozana de Navigacion, or “CAVN”) for damages under the insurance policy for the containers, which had been procured by CAVN. Transamerica sued CAVN’s underwriters on the theory that Transamerica was an additional assured under the policy. The case was removed by the Underwriters under diversity jurisdiction. *Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 267 F.3d 1303, 1306-07 (11th Cir. 2001).

51. *Transamerica*, 430 F.3d at 1329. The first appeal in this case dealt with the marine insurance doctrine of *uberrimae fidei*, or “utmost good faith.” See *Transamerica*, 267 F.3d at 1308 (surveyed by Robert S. Glenn, Jr. & Colin A. McRae, *Admiralty*, 53 MERCER L. REV. 1167, 1177-80 (2002)).

52. *Id.* at 1330.

53. 430 F.3d at 1330.

54. *Id.* at 1330-31.

Transamerica's main argument on appeal was that the district court was prohibited from considering the standing question because of the law of the case doctrine and the mandate rule.⁵⁵ After examining both rules, the Eleventh Circuit concluded that the issue of the loss payee's standing to sue was in no way part of the first appeal, and therefore, neither the law of the case doctrine nor the mandate rule prevented the district court from considering that question on remand.⁵⁶

Transamerica next argued that Underwriters waived the issue by not raising it during the first appeal. The Eleventh Circuit once again disagreed, holding that the standing issue was raised on many occasions.⁵⁷ Finally, Transamerica asserted that the Underwriters should be judicially estopped from arguing that the container leasing company was a loss payee because they had previously taken the opposite position in other cases before different courts.⁵⁸ In examining whether judicial estoppel should apply, the Eleventh Circuit explained that, "first, it must be established that the allegedly inconsistent positions were made under oath in a prior proceeding; and, second, the inconsistencies must have been calculated to make a mockery of the judicial system."⁵⁹ The Eleventh Circuit determined that there was no showing in the record that the Underwriters took allegedly inconsistent provisions involving similarly worded policies, and further noted that it could not say that the Underwriters were attempting to make a mockery of the judicial system.⁶⁰ The Eleventh Circuit therefore affirmed the district court's decision to grant the motion for judgment as a matter of law.⁶¹

In *Betty K Agencies, Ltd. v. M/V MONADA*,⁶² the Eleventh Circuit was called upon to decide whether a district court had abused its discretion by dismissing a maritime claim with prejudice, sua sponte, based on the plaintiff's failure to (1) file an answer to the defendant's counterclaim, and (2) perfect service on the defendant vessel.⁶³ In 2003 the plaintiff, Betty K, chartered the cargo vessel M/V MONADA from the defendant, Tidal Wave Ltd., to transport cargo between Miami, Florida and Nassau, Bahamas. The vessel's engine failed with twenty-seven days remaining in its charter period, thereby rendering the vessel

55. *Id.* at 1331.

56. *Id.* at 1333.

57. *Id.* at 1333-34.

58. *Id.* at 1335.

59. *Id.* (citing *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002)).

60. *Id.* at 1336.

61. *Id.*

62. 432 F.3d 1333 (11th Cir. 2005).

63. *Id.* at 1335.

inoperable. Betty K sued the vessel in rem, and Tidal Wave in personam, in the United States District Court for the Southern District of Florida, seeking a return of \$32,650 in unearned charter hire payments and \$6,051 in advances made by Betty K to the vessel while it had been in service. After the district court issued a warrant of arrest, Tidal Wave posted on behalf of the vessel an adequate security bond, in lieu of arrest.⁶⁴

Tidal Wave timely filed an answer and counterclaim, but Betty K failed to file an answer to Tidal Wave's counterclaim, as required by Federal Rule of Civil Procedure 12(a)(2).⁶⁵ The parties continued to litigate the matter, with no indication that either side was aware of this failure to file a responsive pleading to the counterclaim. Despite the absence of a motion to compel an answer or motion to dismiss, the district court entered a sua sponte order dismissing the plaintiff's action with prejudice.⁶⁶ As grounds for the sua sponte dismissal, the district court cited the plaintiff's failure to answer Tidal Wave's counterclaim, and failure to perfect service of process on the vessel.⁶⁷ After the plaintiff's Rule 60(b)⁶⁸ motion to vacate the dismissal order was denied, an appeal was filed.⁶⁹

The Eleventh Circuit sought to determine whether the extreme sanction of dismissal with prejudice was warranted in the case at bar.⁷⁰ The court began by noting that such a sanction is properly imposed when "(1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice."⁷¹ Neither the initial order dismissing the case nor the subsequent order denying the motion to vacate contained any findings that Betty K's failure to file an answer to the counterclaim was the product of willful or contumacious conduct, or that lesser sanctions were inadequate.⁷² On the district court's dismissal for failure to perfect service on the M/V MONADA, the Eleventh Circuit succinctly indicated that the posting of the security bond by Tidal Wave

64. *Id.*

65. *Id.* at 1336; FED. R. CIV. P. 12(a)(2). There is some dispute as to whether Betty K served a copy of an answer to the counterclaim on Tidal Wave, but it is undisputed that no such answer was filed with the court. *Betty K*, 432 F.3d at 1336.

66. *Betty K*, 432 F.3d at 1336.

67. *Id.*

68. FED. R. CIV. P. 60(b).

69. *Betty K*, 432 F.3d at 1336-37.

70. *Id.* at 1337.

71. *Id.* at 1338 (quoting *World Thrust Films, Inc. v. Int'l Family Entm't, Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995)) (internal quotations omitted).

72. *Id.* at 1339-40.

brought the relevant res within the court's jurisdiction.⁷³ Thus, the district court had abused its discretion by dismissing the action with prejudice, and the court of appeals reversed the dismissal and remanded the action to the district court.⁷⁴

IV. LIMITATION OF LIABILITY

The case of *Paradise Divers, Inc. v. Upmal*⁷⁵ provided the Eleventh Circuit with an opportunity to determine the effect of pre-suit correspondence on the time-bar provision of the Limitation of Liability Act.⁷⁶ The plaintiff, Kevin Upmal, was the first mate on the M/V PARADISE DIVER IV who was seriously injured while diving near Marathon Key, Florida, in June 2000. His attorneys sent a letter to counsel for the defendant-vessel owner in March 2002 complaining that Mr. Upmal had not received the maintenance and cure payments to which he was entitled. The plaintiff's counsel sent a follow-up letter to Paradise Divers on May 30, 2002, informing the defendant of Mr. Upmal's intent to file suit on his Jones Act⁷⁷ and general maritime law causes of action, which the plaintiff did on October 24, 2002. The defendant subsequently filed a limitation action under 46 U.S.C. App. § 185⁷⁸ in the United States District Court for the Southern District of Florida on March 31, 2003, seeking to limit the defendant's liability to the value of the M/V PARADISE DIVER IV.⁷⁹

The Limitation Act requires a defendant vessel owner to file its petition in federal court within six months of receiving "written notice of claim."⁸⁰ The plaintiff therefore moved to dismiss the limitation action as untimely, arguing that the six-month period for filing the limitation action began to run when the plaintiff's demand letters were

73. *Id.* at 1341. Interestingly, the Eleventh Circuit pointed out an apparent paradox in the district court's ruling, noting that "if the district court actually lacked jurisdiction over the vessel, the court would have lacked the power to dismiss Betty K's claims against the vessel *with prejudice*." *Id.* (emphasis added) (citing *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1133 (11th Cir. 1994)).

74. *Id.* at 1342-43.

75. 402 F.3d 1087 (11th Cir. 2005).

76. *Id.* at 1088; 46 U.S.C. App. § 181(a) (2000). The Limitation of Liability Act (often referred to as the "Limitation Act") allows a vessel owner to restrict its liability, resulting from any occurrence for which the vessel is liable, to the value of the vessel and its pending freight.

77. 46 U.S.C. App. § 688 (2000).

78. 46 U.S.C. App. § 185 (2000).

79. *Paradise Divers*, 402 F.3d at 1088-89.

80. 46 U.S.C. App. § 185.

sent, either in March or May 2002. The district court agreed, and dismissed the limitation action as untimely.⁸¹

On appeal, the vessel owners argued that the demand letters from the plaintiff's counsel did not constitute sufficient notice to begin the time period for filing an action under the Limitation Act. After a brief discussion of the history and purpose of the Limitation Act, the Eleventh Circuit turned its attention to the two commonly used tests for the sufficiency of such a notice.⁸² Under the first of these standards, known as the *Doxsee* test, a notice is deemed sufficient "if it informs the vessel owner of an actual or potential claim . . . which may exceed the value of the vessel . . . and is subject to limitation."⁸³ Relying on the "modest value of the vessel" of \$50,000, and the tens of thousands of dollars in medical expenses incurred by the plaintiff, the court held that the March and May 2002 correspondence had sufficiently informed Paradise Divers that the amount of the plaintiff's claim exceeded the value of the vessel.⁸⁴

The court also determined that the March and May correspondence provided sufficient notice under the alternative *Moreira* test, which requires that the writing in question "(1) demand a right or supposed right; (2) blame the vessel owner for any damage or loss; and (3) call upon the vessel owner for anything due to the claimant."⁸⁵ The Eleventh Circuit concluded that the May 30, 2002 letter made a sufficient demand for a right or supposed right by virtue of its reference to claims for Jones Act negligence and unseaworthiness and blamed Paradise Divers for the accident.⁸⁶ Furthermore, the letter had called upon Paradise Divers for "anything due by giving notice of [Mr.] Upmal's intent to file suit."⁸⁷ The May 30, 2002 letter was thereby deemed sufficient notice to Paradise Divers of a limitable claim against the vessel, and the dismissal of Paradise Divers' limitation action filed nine months thereafter was affirmed.⁸⁸

81. *Paradise Divers*, 402 F.3d at 1089.

82. *Id.* at 1089-90.

83. *Id.* at 1090 (quoting *Doxsee Sea Clam Co. v. Brown*, 13 F.3d 550, 554 (2d Cir. 1994)).

84. *Id.* at 1091.

85. *Id.* at 1090-91 (citing *Rodriguez Moreira v. Lemay*, 659 F. Supp. 89, 91 (S.D. Fla. 1987)).

86. *Id.* at 1091.

87. *Id.*

88. *Id.*

V. MARINE INSURANCE

In *Continental Insurance Co. v. Roberts*,⁸⁹ the Eleventh Circuit examined a marine insurance policy and the use of the term “household” in the limitation clause for damages sustained by family members.⁹⁰ Mr. Gimopoulos and Ms. Roberts (“defendants”) lived together and were in an intimate relationship. When Gimopoulos dove from Roberts’s boat, he suffered severe injuries resulting in paralysis. Gimopoulos filed a claim against Roberts’s insurance company (“Continental”), whose policy provided \$100,000 in coverage for bodily injuries.⁹¹ A limiting provision specified that “[b]oating liability coverage for any claim . . . by any family member(s) shall be limited to \$25,000.00 per accident.”⁹² “Family member” was defined within the policy as “any member of the named insured’s household.”⁹³ Continental offered Gimopoulos \$25,000, believing that he was subject to the limitation provision for family members. After Gimopoulos declined the offer, Continental filed a declaratory judgment action against the defendants in the United States District Court for the Middle District of Florida, seeking a declaration that the defendants were members of the same “household” at the time of the accident.⁹⁴

Continental argued that the term “household” included all people living together in one dwelling, regardless of whether they were related by blood or marriage, and therefore, Gimopoulos was only entitled to \$25,000. The defendants argued that the term was limited to people sharing a dwelling who were also related by blood, marriage, or adoption, and because that did not apply to the defendants, Gimopoulos was entitled to the full amount of \$100,000.⁹⁵ The district court granted the defendants’ motion for summary judgment and denied Continental’s motion for summary judgment, finding that the term “household” had two reasonable interpretations.⁹⁶ The court held that the term was ambiguous, and therefore must be construed against Continental as the drafter of the policy.⁹⁷

89. 410 F.3d 1331 (11th Cir. 2005).

90. *Id.* at 1332.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1332-33.

96. *Id.* at 1333.

97. *Id.*

On Continental's appeal, the Eleventh Circuit noted that the parties were in agreement on all issues except whether the defendants' interpretation of the term "household" was reasonable.⁹⁸ The defendants did not have to show that their interpretation was correct—only that it was reasonable and created ambiguity in the contract.⁹⁹ The Eleventh Circuit addressed language in cases cited by the defendants.¹⁰⁰ It determined that the language in those cases was stronger than the language in cases cited by Continental¹⁰¹ for the proposition that it was reasonable for the definition of "household" to require kinship by blood, marriage, or adoption.¹⁰² Citing *McDonald's Corp. v. Robertson*,¹⁰³ the court noted that "[dicta] can serve to show the reasonableness of an interpretation."¹⁰⁴ The court explained, "[a]ll [the defendants] have to show is that their position is reasonable, and a net difference of three courts of appeal opinions in their favor is enough to do that."¹⁰⁵ Additionally, the Eleventh Circuit did not conclude that this was a proper issue to certify to the Florida Supreme Court because its decision would only define "household" and would not look at the reasonableness of the defendants' interpretation.¹⁰⁶

Circuit Judge Hill wrote a dissent strongly chastising the majority's reliance on a "single piece of paper"—that is, a marriage license.¹⁰⁷ The dissent believed that the purpose of the court of appeals was not to draft insurance policies and define their language, especially based on the issuance of a marriage license.¹⁰⁸ Judge Hill further reasoned that there were various possible definitions, and that he personally would have reversed the decision of the district court.¹⁰⁹ Ultimately, the

98. *Id.* The court succinctly summed up the situation by stating, "[i]f so, they win; if not they lose." *Id.*

99. *Id.* at 1334.

100. *Id.* at 1333 (citing *Dwelle v. State Farm Mut. Auto. Ins. Co.*, 839 So. 2d 897, 898-99 (Fla. 1st Dist. Ct. App. 2003); *Kepple v. Aetna Cas. & Sur. Co.*, 634 So. 2d 220, 221-22 (Fla. 1st Dist. Ct. App. 1994); *Universal Underwriters Ins. Co. v. Evans*, 565 So. 2d 741, 742 (Fla. 5th Dist. Ct. App. 1990); *Row v. United Servs. Auto. Ass'n*, 474 So. 2d 348, 349 (Fla. 1st Dist. Ct. App. 1985); *Gen. Guar. Ins. Co. v. Broxsie*, 239 So. 2d 595, 597 (Fla. 1st Dist. Ct. App. 1970)).

101. *Id.* at 1334 (citing *Evans*, 565 So. 2d at 742-43; *Broxsie*, 239 So. 2d at 597).

102. *Id.*

103. 147 F.3d 1301, 1314-15 (11th Cir. 1998) (Carnes, J., concurring specially).

104. *Continental Ins. Co.*, 410 F.3d at 1334.

105. *Id.*

106. *Id.* at 1335.

107. *Id.* (Hill, J., dissenting).

108. *Id.* at 1336 (Hill, J., dissenting).

109. *Id.* (Hill, J., dissenting).

dissent concluded that the question should have been certified to the Florida Supreme Court because no federal interest was implicated.¹¹⁰

VI. VESSEL HULL DESIGN PROTECTION ACT

In *Maverick Boat Co. v. American Marine Holdings, Inc.*,¹¹¹ the Eleventh Circuit addressed claims brought under the Vessel Hull Design Protection Act (“VHDPA”).¹¹² Maverick Boat Company (“Maverick”) introduced its Pathfinder 2200 V-Hull bay boat in 1998. Shortly thereafter, Maverick discovered that the boat’s sheer line, style line, and chine line were defective as a result of mistakes in the design process. Maverick corrected the defects and began producing boats under the revised design. For a period of time, Maverick sold boats under both the original design and the revised design without disclosing this to its dealers or customers. On February 27, 2001, Maverick submitted its application under the VHDPA to the United States Copyright Office for the original design of the boat as Registration Number DVH 0049. Maverick admitted in its pleadings that pursuant to 17 U.S.C. § 1302(5),¹¹³ DVH 0049 was invalid, because it was for the original design of the boat which was made public more than two years before the date of its application.¹¹⁴

Maverick’s second application (DVH 0056) for the same boat was submitted on April 10, 2001.¹¹⁵ In its registration, Maverick stated that the design was a “[n]ew improved version of earlier design. Revised original hull (forward) shape, style line location.”¹¹⁶ From the summer of 2001 to January of 2002, Maverick learned that both American Marine Holdings, Inc. (“AMH”) and Blazer Boats, Inc. (“Blazer”) were marketing boats very similar to its Pathfinder. After some investigation, Maverick sent cease-and-desist letters to the other manufacturers and threatened each of their dealers with liability under the VHDPA if they continued to sell the boats with the allegedly copied hull designs. Maverick filed suit for copyright infringement under the VHDPA against

110. *Id.* at 1337 (Hill, J., dissenting).

111. 418 F.3d 1186 (11th Cir. 2005).

112. *Id.* at 1188; 17 U.S.C. §§ 1301-1332 (2000). Congress promulgated the VHDPA to provide copyright protection to the owners of certain hull designs, including original designs and substantial revisions, adaptations, or rearrangements of original designs. 17 U.S.C. § 1303 (2000).

113. 17 U.S.C. § 1302(5) (2000).

114. *Maverick*, 418 F.3d at 1189.

115. *Id.*

116. *Id.*

AMH and Blazer, who counterclaimed against Maverick for unfair competition.¹¹⁷

The district court rejected Maverick's argument that its revised design was a substantial revision of the original design and therefore entitled to protection pursuant to 17 U.S.C. § 1303.¹¹⁸ The court's opinion specifically stated that the design registered in DVH 0056 was not a "substantial revision, adaptation, or rearrangement" of the original design as required by 17 U.S.C. § 1303.¹¹⁹ In addition to denying Maverick's claim for copyright infringement, the district court cancelled Maverick's copyright registration and awarded the defendants their attorney fees.¹²⁰

On appeal, the Eleventh Circuit considered the plain language of 17 U.S.C. § 1303, which provides that only a "substantial" change to a design may be protected.¹²¹ The Eleventh Circuit determined that the district court had used the proper factors in its analysis.¹²² The district court had applied the following factors in reaching its conclusion: "(1) the nature of the changes made to the 'original' . . . design; (2) the similarities between the 'original' design and the 'revised' design; and (3) the lack of evidence of the revision process, including, for example, the lack of evidence to support the veracity of the publication date on DVH 0056."¹²³ After a review of these factors in conjunction with the evidence presented, the Eleventh Circuit concluded that "the district court correctly determined that the changes made to the original design were merely corrections to a mistake, and not substantial."¹²⁴

Maverick could not proffer any expert testimony as to the differences between the original design and the revised design.¹²⁵ Further, Maverick did not secure an original design for a comparison with the revised design; point to specific differences between the boats; introduce any records to reflect the actual changes; or change the name or model number of the boat.¹²⁶ Instead, Maverick held out the boats as the same to the public, advertised them as the same boats, and sold both boats simultaneously as the same boat.¹²⁷ According to the Eleventh

117. *Id.* at 1186-87.

118. *Id.* at 1191.

119. *Id.* (internal quotations omitted).

120. *Id.* at 1188.

121. *Id.* at 1191; 17 U.S.C. § 1303.

122. *Maverick*, 418 F.3d at 1191.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1191-92.

127. *Id.*

Circuit, this evidence was sufficient to uphold the ruling of the district court that Maverick was not entitled to protection under the VHDPa for hull design DVH 0056.¹²⁸

The Eleventh Circuit noted that because Maverick was not afforded copyright protection, its infringement claims against both AMH and Blazer must fail.¹²⁹ The court briefly addressed them, however, in dicta. According to the court, the differences between the competitors' boats and Maverick's were greater than the minimal differences between Maverick's own two designs.¹³⁰ The Eleventh Circuit remarked that "at a minimum, Maverick cannot credibly claim that DVH 0056 is valid over the admittedly invalid DVH 0049, while at the same time claiming that AMH's accused boat (which is substantially different) is an infringement of DVH 0056."¹³¹

The Eleventh Circuit also held that the district court had acted within its discretion when it awarded attorney fees to AMH and Blazer under the VHDPa's attorney fees provision, 17 U.S.C. § 1323(d).¹³² The district court had appropriately based the award of attorney fees on Maverick's "careless conduct" and its impact on AMH and Blazer's business.¹³³ The court then affirmed, without discussion, the district court's denial of AMH and Blazer's individual claims against Maverick.¹³⁴

VII. FORUM NON CONVENIENS

In *Membreño v. Costa Crociere S.P.A.*,¹³⁵ a Honduran seaman brought a cause of action under the Jones Act¹³⁶ and general maritime law to recover for injuries he sustained while working on an Italian-flag cruise ship.¹³⁷ The plaintiff injured his wrist when a smokestack door closed while the vessel was in international waters. The plaintiff's complaint, filed in the United States District Court for the Southern District of Florida, alleged counts under the Jones Act and general maritime law relating to his wrist injury. The defendants filed a motion to dismiss based on forum non conveniens. The district court deter-

128. *Id.* at 1192.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1193.

135. 425 F.3d 932 (11th Cir. 2005).

136. 46 U.S.C. App. § 688 (2000).

137. *Membreño*, 425 F.3d at 935.

mined that United States law did not apply to the lawsuit and granted the defendants' motion to dismiss based on *forum non conveniens*.¹³⁸

The Eleventh Circuit reviewed the district court's choice of law determinations *de novo*.¹³⁹ First, the Eleventh Circuit explained that it must determine whether United States law should be applied.¹⁴⁰ Examining the *Lauritzen*¹⁴¹ factors, the district court determined that six of the eight factors pointed in favor of the defendants' contention that United States law did not apply.¹⁴² The choice of law determination turned on whether the defendants had a substantial base of operations in the United States, and the district court concluded that the plaintiff's argument—that the defendants had substantial operations through an intermediary—was insufficient.¹⁴³

After concluding that the plaintiff's claims were governed by foreign law, the Eleventh Circuit proceeded with the *forum non conveniens* analysis.¹⁴⁴ The court explained that: “[a] party seeking to have a case dismissed based on *forum non conveniens* ‘must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.’”¹⁴⁵ The Eleventh Circuit concluded that the first and third elements were “clearly satisfied.”¹⁴⁶

Next, the Eleventh Circuit weighed the public and private interest factors.¹⁴⁷ With respect to the private interest factors (“ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive”¹⁴⁸), the Eleventh Circuit concluded that all of the private interest factors except for the U.S. residence of the plaintiff's surgeon weighed in favor of dismissal.¹⁴⁹ The court held

138. *Id.* at 934-35.

139. *Id.* at 935.

140. *Id.* at 936.

141. *Lauritzen v. Larsen*, 345 U.S. 571, 583-93 (1953).

142. *Membreño*, 425 F.3d at 936.

143. *Id.*

144. *Id.* at 937.

145. *Id.* (quoting *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001)).

146. *Id.*

147. *Id.*

148. *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 508 (1947)).

149. *Id.*

that the “‘practical problems’ of litigation favored an alternative forum.”¹⁵⁰

The court then examined the public interest factors, which include the “‘sovereigns’ interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law’”.¹⁵¹ The court further explained that “[t]he need to apply foreign law is a public-interest factor . . . mitigat[ing] strongly in favor of dismissal.”¹⁵² The court concluded that the public interest factors favored dismissal because there was no significant relationship between the parties or the wrongful act and the United States, the plaintiff was foreign, and foreign law would apply.¹⁵³ As such, the court held other countries had a stronger interest in adjudicating disputes involving their citizens, corporations, and vessels.¹⁵⁴ Concluding that the *forum non conveniens* factors weighed in favor of dismissal, the Eleventh Circuit affirmed the district court’s decision.¹⁵⁵

150. *Id.*

151. *Id.* at 937-38 (quoting *Republic of Panama v. BCCI Holdings (Luxemborg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997)).

152. *Id.* (citing *Sigalas v. Lido Mar., Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985)).

153. *Id.* at 938.

154. *Id.*

155. *Id.*