[Mercer Law Review](https://digitalcommons.law.mercer.edu/jour_mlr)

Volume 71
Number 4 *Eleventh Circuit Survey*

Article 3

6-2020

Admiralty

John P. Kavanagh Jr.

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Admiralty Commons

Recommended Citation

John P. Kavanagh, Jr., *Admiralty, 2019 Eleventh Circuit Survey*, 71 Mercer L. Rev. 913 (2020).

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Admiralty

by John P. Kavanagh, Jr.

The cases discussed herein represent decisions the United States Court of Appeals for the Eleventh Circuit issued in 2018 and 2019. While not an all-inclusive list of maritime decisions from the court during that timeframe, the Author identified and provided summaries of key cases which should be of interest to the maritime practitioner.[1]

I. CRUISE LINE PASSENGER CLAIMS

"This case arises from a drunken tumble down an escape hatch on a cruise ship."[2] So begins the decision involving Plaintiff Olivier Caron's personal injury, which occurred while Caron was a passenger on the M/V STAR. Caron, a Canadian citizen, bought an all-inclusive package allowing him to drink unlimited beer and wine while on his cruise. During the early morning hours (3:37 a.m.) of July 16, 2015, Caron descended to a midship area of the vessel and proceeded through a door marked "CREW ONLY" into a restricted area. Two crewmembers tried to stop him, but Caron ran away when confronted. Caron then walked through another door marked "CREW ONLY," where he fell into a hole, which served as the escape hatch from the bowthruster room below.[3]

The suit was originally filed asserting both diversity of citizenship and admiralty jurisdiction.[4] Caron's original complaint did not mention anything about alcohol, instead made allegations premised on general theories of negligence. Later, Caron amended his complaint adding an allegation that the cruise line was negligent in overserving alcohol to him. The district court granted a motion to dismiss this amended

1. Many of the decisions were not identified by the court for publication. However, the West National Reporter System "publishes" these nonpublished opinions in the Federal Appendix. Pursuant to Rule 32.1 of the Federal Rules of Appellate Procedure, citation to an unpublished opinion is allowed. FED. R. APP. P. 32.1. Further, Eleventh Circuit Rule 362 notes that, while not binding precedent, unpublished opinions "may be cited as persuasive authority." 11th CIR. R. 36-2.

2. Caron v. NCL (Bahamas), Ltd., 910 F.3d 1359, 1362 (11th Cir. 2018).

3. *Id.* at 1362–63.

4. *Id.* at 1363 (citing 28 U.S.C. § 1332(a)(2) (2018) and § 1333(1) (2018)).

complaint (overserving alcohol) because it was time barred, filed outside the one-year limitation period contained in the passenger ticket contract.[5]

The cruise line moved for summary judgment and the district court granted the same. On appeal, the Eleventh Circuit addressed three issues: (1) Whether the court had subject matter jurisdiction in the first instance, (2) whether the negligent "over-service of alcohol" claim was contractually barred or related back to the original filing, and (3) whether or not summary judgment on the negligence claim was proper.[6] In an apparent case of first impression following the 2012 amendments to the subject matter jurisdiction statutes, the appellate court held that the district court did not have diversity jurisdiction for this suit filed by Caron (a Canadian citizen) and NCL (Bahamas), Ltd., a Bermuda corporation with its principal place of business in Florida.[7] The federal diversity statute requires complete diversity; this is the case whether or not the contest is between citizens of different U.S. states or suits between two aliens (individuals or corporate entities).[8]

Nonetheless, the appellate court agreed with Caron that alternative subject matter jurisdiction did exist based on the federal court's admiralty jurisdiction.[9] The plaintiff's claim of a maritime tort sufficed to invoke the court's jurisdiction in that regard.[10]

Having resolved the threshold jurisdiction issues, the court turned its attention to the relation back of Caron's amended complaint. Caron's attempt to amend his complaint and assert a negligent "over-service of alcohol" claim was barred by the one-year limitation period contained in the ticket contract.[11] The original complaint made no mention of alcohol, instead focused on the physical condition of the ship.[12] The

5. *Id.*

6. *Id.* at 1362.

7. *Id.* at 1364–65. The court referenced the 2012 amendments to 28 U.S.C. § 1332(c), which "explicitly impute[s] to corporations citizenship in every State or foreign state where the company is incorporated and in the State or foreign state where the corporation has its worldwide principal place of business . . . . So a corporation incorporated in a foreign state is specifically deemed a citizen of the foreign state when evaluating jurisdiction." *Id.* at 1365.

8. *Id.* at 1364.

9. 28 U.S.C. § 1333(1).

10. *Caron*, 910 F.3d at 1365–66.

11. *Id.* at 1367.

12. *Id.* at 1368.

court held that relation back under Rule 15 did not salvage the otherwise tardy amendment.[13]

Finally, turning to the substance of the negligence action, the appellate court affirmed the trial court's decision to grant summary judgment in favor of the cruise line. Caron failed to present any evidence that the opening in which he fell down was unreasonably dangerous, or—assuming that the hatch did present a dangerous condition—that NCL had notice of the same.[14]

The decision in *Davis v. Valsamis*,[15] involved claims brought by passengers on an infamous cruise aboard the *CARNIVAL TRIUMPH*. While underway in the Gulf of Mexico, a fire in the ship's engine room disabled the vessel. Hotel services and the expected accoutrements of a comfortable voyage (functioning toilets, air conditioning) simply stopped working.[16] The conditions continued to deteriorate causing much distress and discomfort among those aboard, including 100 passengers who filed the instant lawsuit against Valsamis, Inc. (Valsamis), the contractor hired by Carnival to maintain the ship's engines and appurtenant equipment.[17]

The trial court granted summary judgment, and the decision was affirmed by the Eleventh Circuit. The matter turned on one of contractual interpretation, again with reference to the limitations found in the passenger ticket contract. Like most cruise tickets, Carnival's passenger ticket contract requires putative claimants to notify Carnival of any injury, illness or death within 185 days after the date of the injury, illness or death.[18] Suit must be filed within one year after the conclusion of the cruise.[19] Of particular interest in this case is a "Himalaya Clause," which extended Carnival's rights—including the

---

13. FED. R. CIV. P. 15(c)(1)(B), which allows an amended complaint to relate back to the original filing if it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Caron*, 910 F.3d at 1368 (quoting FED. R. CIV. P. (15(c)(1)(B)).

14. *Caron*, 910 F.3d at 1369–70.

15. 752 F. App'x 688 (11th Cir. 2018).

16. *Id.* at 689. Hence, the headline grabbing nickname "Poop Cruise" given to the unfortunate voyage. *See, e.g.*, Drew Griffin & Scott Bronstein, *Carnival knew of fire danger before cruise documents show*, CNN, https://www.cnn.com/2013/12/17/travel/carnival-cruise-triumph-problems/index.html (last visited Mar. 20, 2020).

17. *Davis*, 752 F. App'x at 689–90.

18. *Id.*

19. *Id.*

notice requirement—to other potential defendants.[20] The Himalaya Clause in the present case extended rights, including exemptions from liability, defenses and immunities otherwise available to Carnival, to its suppliers, ship builders, manufacturers of component parts and independent contractors.[21] The court held that Valsamis clearly fell within the scope and reach of the clause, and was thus was entitled to the protections contained in the passenger ticket contract.[22]

The dispositive question, however, was whether or not notice of claims against Valsamis had to be given in the 185-day notice period. Any claim for which Carnival had not received notice in such window would be barred. Plaintiffs argued the requisite notice period for Carnival should not be extended to its independent contractor, Valsamis.[23] Reviewing the contract as a whole, the Eleventh Circuit rejected this position and held that the Himalaya Clause granted Valsamis the same rights—and imposed the same notice periods—as held by Carnival: "The specific recitation in the Himalaya Clause that Defendant shall have all of Carnival's rights and shall not have any liability different from that of Carnival renders unreasonable any interpretation of the notice provision that holds Defendant liable without receiving notice of Plaintiffs' claims within the allotted time."[24]

In *Eslinger v. Celebrity Cruises, Inc.*,[25] the appellate court affirmed the district court's order dismissing a spouse's claim for loss of consortium. Derek Eslinger was injured while aboard the cruise ship *EQUINOX*, a vessel owned and operated by Celebrity Cruises, Inc.[26] His wife Tara asserted her own claim for loss of consortium ("deprivation of the affection, solace, care, comfort, companionship, conjugal life, fellowship, society, and assurance of her husband that resulted from his

---

20. *Id.* "Himalaya Clauses extend liability limitations to downstream parties and take their name from an English case involving a steamship called Himalaya." *Davis*, 752 F. App'x at 690 n.1 (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 20 n.2 (2004)).

Himalaya Clauses are normally found in cases involving cargo claims, extrapolated from the bill of lading covering the shipment of goods. *See, e.g.*, Robert Koets, et al., "Extension of Limitation of Liability to Third Parties; 'Himalaya Clauses," 80 C.S.J. SHIPPING § 333 (February 2020 update).

21. *Davis*, 752 F. App'x at 689.

22. *Id.*

23. *Id.* at 691.

24. *Id.* at 695. Interestingly, the court observed that there was no evidence in the record that the plaintiffs actually provided notice to Carnival, either, within the 185-day time period. *Id.* at 695 n.4.

25. 772 F. App'x 872 (11th Cir. 2019).

26. *Id.* at 872.

injury").[27] The district court dismissed Mrs. Eslinger's claim, and the appellate court affirmed.[28] Citing *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Alabama.*,[29] along with a Jones Act case,[30] the Eleventh Circuit held that plaintiffs may not recover "punitive damages [sic], including loss of consortium damages, for personal injury claims under federal maritime law."[31]

The court was unpersuaded that the intervening decision of the Supreme Court of the United States in *Atlantic Sounding Co. v. Townsend*[32] required a different result.[33] The Eleventh Circuit felt that *Atlantic Sounding* was inapplicable because it did not apply to loss of consortium claims; further, the appellate court noted that Eslinger failed to explain "why passenger spouses, but not those of seamen, should be permitted to recover for loss of consortium."[34]

The decision in *K.T. v. Royal Caribbean Cruises, Ltd.*,[35] involved claims arising from criminal activity of third parties aboard a cruise ship. The minor plaintiff (K.T.) alleged that she was sexually assaulted after being plied with alcohol by a group of adult men aboard a Royal Caribbean vessel. Her lawsuit included various causes of action, including—for present purposes—(1) a claim based on negligent failure to warn, and (2) negligent failure to prevent such assaults in the first place.[36]

The district court dismissed the complaint for failure to state a claim upon which relief could be granted.[37] The Eleventh Circuit reversed.[38] The opinion is unique for the fact that Chief Judge Ed Carnes not only wrote the opinion, but he also issued a special concurrence. More on that later.

---

27. *Id.*

28. *Id.* at 872–873.

29. 121 F.3d 1421, 1429 (11th Cir. 1997).

30. Lollie v. Brown Marine Serv., Inc., 995 F.2d 1565, 1565 (11th Cir. 1993).

31. *Eslinger*, 772 F. App'x at 872. This might be a typo, with the proper nomenclature being "nonpecuniary" not "punitive" damages.

32. 557 U.S. 404 (2009).

33. *See Eslinger*, 772 F. App'x at 873. In *Atlantic Sounding Co. v. Townsend*, the Supreme Court held that the general maritime law allowed a seaman to pursue punitive damage claims—a species of nonpecuniary damages—for his/her employer's willful and wanton disregard of a maintain and secure obligation. *Atlantic Sounding Co.*, 557 U.S. at 424.

34. *Eslinger*, 772 F. App'x at 873.

35. 931 F.3d 1041 (2019).

36. *K.T,* 931 F.3d at 1043.

37. *Id.*

38. *Id.* at 1047.

The standard of review in appealing an order dismissing suit via a Rule 12[39] motion is fairly lenient; allegations in the complaint are accepted as true, and the court reviews *de novo* the decision of the trial judge.[40] The complaint stated that the cruise line had knowledge (actual or constructive) of sexual assaults, as well as other acts of violence between passengers and crew. This included sexual assaults on minors, which was claimed to be a foreseeable and known danger to Royal Caribbean.[41] "And that foreseeable and known danger imposed on Royal Caribbean and its crew a duty of ordinary reasonable care, which included the duty to monitor and regulate the behavior of its passengers, especially where minors are involved."[42]

The second theory of negligence (failure to warn) was held to be sufficiently stated to pass muster under the pleading standards.[43] Failure to warn arises from foreseeability of a known danger.[44] Citing the fact that cruise lines warn passengers about anticipated dangers in shore-based excursion, the appellate court stated that, "a cruise line certainly owes its passengers a 'duty to warn of known dangers' aboard its ship."[45]

The complaint was sufficiently plead to allege that Royal Caribbean knew or should have known about the dangers of sexual assault aboard its vessels. The allegations demonstrated notice and knowledge sufficient to survive a 12(b)(6) motion.[46]

Chief Judge Carnes wrote an additional concurrence citing to published reports (Cruise Line Incident Reports)—now required under federal law—outlining the number of complaints about criminal activity aboard cruise vessels.[47]

> All of this data supplements the allegations contained in the complaint and reinforces the conclusion that the complaint states a valid claim and adequately pleads that, among other things, Royal Caribbean knew or should have known that there was a serious

---

39. FED. R. CIV. P. 12.
40. *Id.* at 1043.
41. *Id.* at 1044–45.
42. *Id.* at 1045.
43. *Id.* at 1046.
44. *Id.*
45. *Id.* at 1046 (quoting Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989)).
46. *Id.*
47. *Id.* at 1047 (citing 46 U.S.C. § 3507 (Cruise Line Incident Reports)).

problem of violent crime, including passenger-on-passenger sexual assaults, on cruise ships including its own.[48]

The Eleventh Circuit continues to uphold forum selection clauses in passenger ticket contracts, including those directing claimants to foreign venues. In *Lebedinsky v. MSC Cruises, S.A.*,[49] a passenger was required to pursue her personal injury claim in Italy. The *MSC MUSICA* embarked on a European cruise from Venice, Italy with intermediate stops in Italy, Greece and Montenegro. Unfortunately, Ms. Tanya Lebedinsky fell aboard the ship and was disembarked to an Italian hospital before being flown to New York for further treatment.[50] The ticket and passenger contract documents contained a forum selection clause: "for Voyages that do not include a port in the U.S.A., all claims arising out of this Contract or relating to or arising from this Contract or your cruise shall be brought in and be subject to the exclusive jurisdiction of the Courts of Naples, Italy."[51]

Lebedinsky did not dispute receipt of the booking documents, but she did not recall reviewing them before her trip.[52] The documents directed passengers to the cruise line's website where complete terms and conditions of the passenger contract (including the "Applicable Law" section containing the forum selection clause) were located.[53] The contract also incorporated by reference the Athens Convention, an international treaty governing the carriage by sea of passengers and their luggage.[54] The Athens Convention contains a limitation on liability for passengers' personal injury claims.[55]

Lebedinsky filed suit in the Southern District of Florida, and MSC Cruises moved to dismiss for improper venue and on *forum non conveniens* grounds. The district court granted the motion, concluding that the forum selection clause required claims to be filed in Italy.[56] The Eleventh Circuit began its analysis by noting that "[f]orum selection

48. *Id.* at 1049.

49. 789 F. App'x 196 (11th Cir. 2019).

50. *Id.* at 198. The reader is left to assume that Lebedinsky is from New York, although it is not stated in the opinion. What is abundantly clear, however, is that the *MSC MUSICA* never called at any U.S. port during the subject cruise.

51. *Id.* at 199 (quoting referenced portions of the cruise line's "Booking Terms and Conditions" as cited and referenced on the district court's docket).

52. *Id.* at 198.

53. *Id.*

54. *Id.* (citing the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, art. 7, Nov. 19, 1976, 1463 U.N.T.S. 19 [hereinafter The Athens Convention]).

55. *Id.*

56. *Id.* at 199.

clauses are presumptively valid and enforceable unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances."[57] The framework for showing that enforcement of a forum selection clause is unfair or unreasonable is generally limited to four arguments: (1) formation of the contract induced by fraud or overreaching; (2) depriving the plaintiff of her day in court because of inconvenience or unfairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause contravenes public policy.[58]

The district court evaluated these four avenues and rejected each, in turn. Fraud or overreaching is evaluated by assessing whether the terms and conditions were reasonably communicated to the passenger. This includes reviewing the clause's physical characteristics, and whether the plaintiff had the ability to become "meaningfully informed of the clause and to reject its terms."[59] Interestingly, the court observed that the forum selection language was set out in identical type as the rest of the terms and conditions, but did fall under a "clear plain-English heading[]."[60] This sufficed for the physical characteristic prong of the test. Further, the clause was deemed to have been reasonably communicated to Lebedinsky because both she and her travel agent were given the booking confirmation with notice regarding the applicable terms and conditions in advance of the trip.[61] The language was unambiguous, and clearly stated that claims arising out of the voyage were to be brought in Italy.

Turning to the argument that the forum selection clause would deprive plaintiff of her day in court, the court rejected Lebedinsky's argument based on inconvenience associated with travel to Italy.[62] The court reiterated the fact that the *MSC MUSICA* did not travel to any United States port of call; the trip began and ended in Italy with stops in European ports. It was not unreasonable nor unanticipated that disputes, including claims for injuries sustained during the voyage, would be litigated in an Italian forum.[63]

---

57. *Id.* at 200 (quoting, *inter alia*, Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009)).

58. *Id.* (internal citations omitted).

59. *Id.* at 200.

60. *Id.* at 200–201.

61. *Id.* at 201.

62. *Id.* at 202 (noting that the claimed inconvenience requires a "heavy burden of proof" to render a forum selection clause unenforceable).

63. *Id.*

Turning to the argument that foreign law would deprive Ms. Lebedinsky of a remedy, the court disagreed that the application of the Athens Convention would effectively deprive her of proper recourse.[64] The Athens Convention limits damages for personal injury claims to $750,000. This limitation on possible recovery is not so inadequate that enforcement would be fundamentally unfair.[65] Reiterating that "the potential for decreased recovery is not the same as no remedy," the Eleventh Circuit held that the possibility of reduced recovery did not amount to fundamental unfairness nor did it render the forum selection clause invalid.[66]

Finally, application of the Athens Convention would not contravene U.S. law, which prohibits a carrier from imposing limits on passenger liability for its negligence.[67] This public policy argument had been specifically rejected in prior Eleventh Circuit jurisprudence.[68]

Because the forum selection clause "was not induced by fraud or overreaching, [and] would not deprive Lebedinsky of her day in court nor leave her without a remedy, and" the enforcement of the clause did not contravene public policy, the Eleventh Circuit affirmed the summary disposition of her claim based on the cruise lines forum selection clause.[69]

II. SHIPOWNER'S LIMITATION OF LIABILITY

In a decision that your Author is not sure he completely understands, the Eleventh Circuit concluded that the six-month filing deadline in the Shipowner's Limitation of Liability Act[70] is not jurisdictional when it held that failure to file a limitation petition within six months from receiving written notice of a claim does not deprive the federal court of subject matter jurisdiction.[71] The statutory time limit is, instead, "a non-jurisdictional claim-processing rule."[72]

Orion is a marine construction company engaged by the Florida Department of Transportation (FDOT) to rebuild the Pinellas Bayway

64. *Id.*

65. *Id.* at 203.

66. *Id.*

67. *Id.* at 203 (citing 46 U.S.C.§ 30509).

68. *Id.* (citing Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F.3d 1233, 1242–43 (11th Cir. 2012), *superseded on other grounds as recognized by* Caron v. NCL (Bahamas) Ltd., 910 F.3d 1359 (11th Cir. 2018)).

69. *Id.* at 203–04.

70. 46 U.S.C. §§ 30501–30512 (2012).

71. Orion Marine Constr., Inc. v. Carroll, 918 F.3d 1323 (11th Cir. 2019).

72. *Id.* at 1325.

Bridge in Pinellas County, Florida. This work required Orion to drive hundreds of piles into the seabed. Local residents complained that the pile driving caused damage to their property. After being notified of several such claims, Orion filed a limitation of liability action on May 11, 2015. However, more than six months before this filing—namely, before November 11, 2014—nine claimants had already notified Orion, FDOT or Orion's insurer of potential claims involving damage to property. After the November 11, 2014, filing, claims flooded in thanks to the diligent work of a public adjuster. The court noted that 247 claims were eventually filed in the limitation action. The district court dismissed Orion's limitation action, holding that it was untimely since Orion filed the petition more than six months after receiving written notice of a claim.[73]

The Shipowner's Limitation of Liability Act states, in pertinent part: "[t]he owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter. The action must be brought within 6 months after a claimant gives the owner written notice of a claim."[74] The Eleventh Circuit began its jurisdictional analysis by noting that at least two circuits have held that the six-month time bar constitutes a "jurisdictional limitation."[75] The Eleventh Circuit disagreed, citing intervening circuit precedent outlining the distinctions between "true jurisdictional limitations and non-jurisdictional 'claim-processing' rules . . . . "[76] Distilling the import from the Supreme Court's decision in *Musacchio v. United States*,[77] the Eleventh Circuit surmised that the high court intended "to impose some discipline on the previously slippery use of the term 'jurisdictional.'"[78]

The upshot of this instruction is that statutory periods should be treated as jurisdictional only if clearly intended by Congress.[79] For purposes of the Shipowner's Limitation of Liability Act, the appellate

73. *Id.* at 1325–28.

74. 46 U.S.C. § 30511(a). The Act permits a vessel owner to limit its exposure for potential liability to the "value of the vessel and pending freight," following a marine casualty. *Id.* § 30505(a). Limitation will be allowed only if the vessel owner demonstrates that the loss was occasioned without any "privity or knowledge of the owner" in bringing about the loss. *Id.* § 30505(b).

75. *Orion Marine Constr., Inc.*, 918 F.3d at 1328 (citing *In re* Eckstein Marine Serv., L.L.C., 672 F.3d 310 (5th Cir. 2012); Cincinnati Gas & Elec. Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976)).

76. *Id.* at 1328 (citing Sec'y, United States Dep't of Labor v. Preston, 873 F.3d 877, 881–82 (11th Cir. 2007)).

77. 136 S. Ct. 709 (2016).

78. *Orion Marine Constr., Inc.*, 918 F.3d at 1328 (quoting *Preston*, 873 F.3d at 881).

79. *Id.*

court in *Orion Marine* held that the six-month filing period was not jurisdictional because it did not speak in jurisdictional terms or refer in any way to the subject matter jurisdiction of a district court.[80] As such, the language is insufficient, per the court, to plainly show that Congress intended the deadline to carry with it jurisdictional consequences.[81] Finally, the court felt that the statutory context of the six-month limitation period—placed within a discussion about the "mechanics of shipowner suits"—belied any effort to imbue the section with a jurisdictional limitation.[82]

The court then turned to a procedural discussion, having determined that Orion's claim was not jurisdictionally barred by the absence of subject matter jurisdiction.[83] Procedurally, then, it was appropriate to evaluate whether the nine original claims (sent to Orion before November 11, 2014) provided sufficient notice to trigger the six-month procedural timeframe within which to file a limitation petition.[84] In turn, this prompted the Eleventh Circuit to finally decide what standard should apply to determine the sufficiency of a "written notice of a claim" for purposes of notice under the Limitation of Liability Act.

Identifying two competing tests, the court determined that notice is sufficient if it informs the vessel owner of an actual or potential claim that has a reasonable possibility of exceeding the value of the vessels involved in the marine casualty.[85] The court believed it was necessary to include this "reasonable possibility" factor, lest a vessel owner be forced to seek judicial protection at the first hint of any claim, regardless of its value.[86] Clarifying this requirement, the appellate court further held that a vessel owner has a duty to investigate known or potential claims once written notice is received which reveals the reasonable possibility that the matter might exceed the value of the vessels involved.[87]

Frankly, it is not clear to the undersigned why the Eleventh Circuit felt compelled to engage in the first part of its analysis; specifically, the setting up the juxtaposition of a jurisdictional versus procedural bar for the six-month timeframe seems to be unnecessary. At bottom, the

80. *Id.*
81. *Id.* at 1328–29.
82. *Id.* at 1329.
83. *Id.*
84. *Id.* at 1330.
85. *Id.* at 1331–32.
86. *Id.* at 1331.
87. *Id.* at 1336–37. The Court reviewed the "early" claims (*i.e.*, those received by Orion before November 11, 2014), and concluded they did not reveal a reasonable possibility that the claims would exceed the value of Orion's barges. *Id.* at 1334–35.

notices received by Orion were insufficient to start the six-month clock regardless. Accordingly, the filing of the action was timely. The decision seems to have created an unnecessary circuit split on the substantive treatment of the six-month time limitation contained within the statute.

III. MARINE INSURANCE

In *Reliable Marine Towing and Salvage LLC v. Thomas*,[88] an insurance case stemming from a salvage operation, John Thomas' boat partially sank in a storm off the coast of Florida. Reliable Marine Towing and Salvage LLC (Reliable Marine) provided services to rescue the boat, enabling it to return to safe harbor. The vessel was insured by State Farm, which eventually declared the boat to be a total loss. The policy limit for hull insurance coverage was $6,750, and this amount included wreck removal costs. The policy provided if the combined costs of wreck removal and repairs exceeded $6,750, there was an additional 5% for wreck removal expenses ($337.50). Finally, the policy provided an additional $500 for "emergency services."[89]

State Farm paid Thomas the policy limits for loss of his vessel ($6,750).[90] Two weeks later, Reliable Marine sent an invoice to State Farm for $3,109.84, reflecting charges for services rendered to its insured.[91] The insurance policy required State Farm to pay Thomas directly unless another party was "legally entitled to receive payment."[92] Accordingly, State Farm sent Thomas the check for $837.50 (wreck removal contingency plus emergency services payment). However, Thomas did not pay Reliable Marine.[93]

Reliable Marine sued State Farm, claiming that it was a third-party beneficiary under the insurance policy. The salvor also asserted a separate claim against Thomas for salvage efforts. The district court granted State Farm's summary judgment and dismissed Reliable Marine's claims against it. The Eleventh Circuit affirmed.[94] It agreed that State Farm knew Reliable Marine provided rescue services; however, there was no evidence that Thomas assigned his right to the insurance payment, and the plain language of the policy required State

88. 789 F. App'x 805 (11th Cir. 2019).
89. *Id.* at 806.
90. *Id.*
91. *Id.*
92. *Id.* at 807.
93. *Id.*
94. *Id.* at 807–08.

Farm to pay its insured absent legal duty to tender funds to a third party.[95]

The court also rejected an argument that the policy contained a *de facto* sue and labor clause.[96] Sue and labor clauses in traditional marine policies allow recovery of costs expended by an insured to safeguard and recover the vessel and mitigate further loss.[97] The language of the State Farm policy, however, did not warrant such an expansive interpretation.[98]

IV. MARINE REPAIR CONTRACTS

The validity and enforceability of a limitation clause in a contract to repair a vessel was the subject of the decision in *TriLady Marine, Ltd. v. Bishop Mechanical Services, LLC*.[99] TriLady Marine, Ltd. owned the yacht *TRIUMPHANT LADY*. Bishop Mechanical was hired to install a compressor and chiller unit on the vessel. The contract included a clause that limited Bishop Mechanical's liability for possible damages arising from the work, and expressly excluded consequential damages. The chiller unit failed, causing significant damage to the vessel. It was discovered that the water hoses for the chiller unit had been plumbed in reverse. The owners sought to recover for repairs to the vessel, as well as loss of use, loss of charter income and other damages which would be excluded by the repair contract. Bishop Mechanical moved for partial summary judgment arguing that the limitation clause was enforceable, and the district court agreed.[100]

In advancing its position on appeal, TriLady Marine, Ltd. argued that (1) Bishop Mechanical waived the limitation clause because it was not asserted as an affirmative defense, and (2) that the clause was invalid under Eleventh Circuit jurisprudence.[101]

The court rejected the waiver argument, pointing out that TriLady Marine received notice of the defense "by some means other than

---

95. *Id.*

96. *Id.* at 808.

97. A true "sue and labor" clause would include a requirement that an insured must "sue, labor and travel for, in and about the defense, safeguard and recovery of" the named vessel. *Reliable Marine Towing & Salvage, LLC*, 789 F. App'x at 808 (quoting Reliance Ins. Co. v. THE ESCAPADE, 280 F.2d 482, 484 n.4 (5th Cir. 1960)). In contrast, the State Farm policy only required Mr. Thomas to "protect the property from further loss." *Id.*

98. *Id.* at 809.

99. 763 F. App'x 882 (11th Cir. 2019).

100. *Id.* at 883–84.

101. *Id.* at 884–85 (citing Diesel "Repower" Inc. v. Islander Invs. Ltd., 271 F.3d 1318 (11th Cir. 2001)).

pleadings" and had "a chance to rebut it."[102] Specifically, Bishop Mechanical raised the defense in its motion for partial summary judgment. TriLady Marine never objected or argued that it was prejudiced by late notice of the defense. The appellate court held that Bishop Mechanical was entitled to rely on the limitation clause as a defense.[103]

With respect to the enforceability of the clause, the court noted the general maritime law applies to vessel repair contracts and governs the enforceability thereof.[104] To be valid, the parties' intent must be clearly and unequivocally stated, and the clause may not absolve the repair company of all liability.[105] The subject contract was between sophisticated commercial entities and contained a limitation clause, but did not impermissibly exculpate the repair company.[106] The district court's decision with respect to the enforceability of the clause was affirmed.[107]

V. ARBITRATION OF SEAFARER'S CLAIMS

As discussed in the last Eleventh Circuit Admiralty Survey, the appellate court continues to routinely enforce arbitration clauses in seafarers' contracts.[108] In *Cvoro v. Carnival Corporation*,[109] the court affirmed the district court's decision regarding enforcement of a foreign arbitral award.[110] Sladjana Cvoro was employed as a waitress aboard the Carnival *DREAM*, a Panamanian flagged vessel. Prior to commencing service, Cvoro signed a seafarer's employment agreement which contained both mandatory arbitration and forum selection clauses. Disputes arising out of her employment were subject to arbitration in one of several cities listed in the contract, whichever was closer to her home country. The applicable law was the law of the ship's flag (Panama).[111] During her employment aboard the vessel, Cvoro developed carpal tunnel syndrome which eventually prevented her from

102. *Id.* at 885 (quoting Grant v. Preferred Research, Inc., 885 F.2d 795, 797 (11th Cir. 1989).

103. *Id.*

104. *Id.* at 885–86.

105. *Id.* at 886 (citing *Diesel "Repower" Inc.*, 271 F.3d at 1324).

106. *Id.*

107. *Id.*

108. John P. Kavanagh, Jr., *Admiralty, Eleventh Circuit Survey*, 69 MERCER L. REV. 1001, 1003 (2018).

109. 941 F.3d 487 (11th Cir. 2019).

110. *Id.* at 504.

111. *Id.* at 491.

performing her job functions as a waitress. She was repatriated to her home country of Serbia where medical treatment went horribly wrong. Cvoro was eventually left with severe motor deficits in her left hand and wrist, a frozen shoulder, tendonitis of the wrist "and other permanent problems with her left arm."[112]

Cvoro commenced arbitration against Carnival in Monaco, the venue closes to her home country of Serbia. She asserted claims based on U.S. law, specifically the Jones Act.[113] Her contentions included that Carnival was vicariously liable for the alleged malpractice of the shoreside doctors. The arbitrator ignored Cvoro's requests that U.S. law should apply and instead applied Panama law, the jurisprudence from the flag state.[114] Panamanian law does not recognize a claim based on vicarious liability for the malpractice of shoreside doctors.[115] The final award determined that Carnival satisfied its maintenance and secure obligations, there was no basis for vicarious negligence of the physician and Cvoro's tort-based claims failed because she did not establish Carnival was negligent in any way.[116]

The proceedings moved to the U.S., where Cvoro filed suit in the Southern District of Florida seeking to vacate the arbitral award and deny enforcement thereof. She also sought to litigate the merits of her Jones Act claim based on Carnival's vicarious liability for the medical malpractice.[117] Evaluation of the enforceability *vel non* of the arbitral award turned on the application of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards."[118] The stated purpose of the New York Convention was to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . . . "[119]

In challenging the enforcement of an arbitral award, the petitioner must successfully demonstrate the existence of at least one of the seven enumerated defenses set out in the New York Convention.[120] Of the

112. *Id.* at 490–91.

113. *Id.* at 491 (citing Jones Act, 46 U.S.C. § 30104 (2018)).

114. *Id.* at 491–92.

115. *Id.* at 493.

116. *Id.*

117. *Id.*

118. *Id.* (citing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517 [hereinafter The New York Convention]). *See generally*, 9 U.S.C. §§ 201–208 (2018) (recognizing the New York Convention and codifying its application and enforcement federally).

119. *Cvoro*, 941 F.3d at 495 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)).

120. *Id.*

seven defenses available, Cvoro invoked only one: that the enforcement of the arbitral award would contravene the public policy of the United States.[121] This is a very narrow exception, and applies only when confirmation or enforcement of foreign arbitral award would violate the forum state's "basic notions of morality and justice."[122]

The Eleventh Circuit observed that it has not previously addressed whether the enforcement of a foreign arbitral award involving against a Jones Act seaman would suffice to trigger the public policy defense under the New York Convention.[123] The court turned to analogous jurisprudence, also involving a Jones Act seaman's claim, albeit one "at the earlier arbitration-enforcement stage," versus Cvoro's award-enforcement challenge.[124] Lindo was a Jones Act seaman injured while working aboard an NCL vessel. Like Cvoro, Lindo signed a seafarer's agreement containing an arbitration clause which directed that his claim be decided in Nicaragua (the country where Lindo was a citizen).[125] Bahamian law would apply, as the law of the vessel's flag.[126] The district court granted a motion to compel arbitration, rejecting Lindo's argument that doing so would violate U.S. as evinced by the Jones Act and the admiralty courts' solicitude towards seaman.[127] Weighing the competing public policy issues—solicitude towards seaman, promoting international arbitration of disputes, comity which favors recognition of the arbitral award already entered in Monaco—the Eleventh Circuit followed its precedent in *Lindo* and rejected Cvoro's request to overturn her arbitral decision.[128]

VI. SOVEREIGN IMMUNITY

The Eleventh Circuit addressed a claim involving failure of the U.S. Coast Guard to properly record a vessel mortgage in the decision *Evergreen Marine, Ltd. v. United States*.[129] Before purchasing a sixty-foot yacht, Evergreen Marine contacted the United States Coast Guard's National Vessel Documentation Center (NVDC) to assess whether or not mortgages or liens existed on the vessel, and to obtain the vessel's abstract of title. The NVDC reported there was no mortgage

121. *Id.*
122. *Id.* (internal quotations omitted).
123. *Id.* at 496.
124. *Id.* at 497 (citing Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257 (11th Cir. 2011)).
125. *Id.*
126. *Id.*
127. *Id.* at 497–98.
128. *Id.* at 500–01.
129. 789 F. App'x 798 (11th Cir. 2019).

or lien, and the purchase was completed relying on this information. Three years later, Evergreen Marine received notice that M&T Bank held an unsatisfied mortgage on the vessel, despite the clean title previously reported by the NVDC. M&T Bank filed suit to foreclose on the yacht in November 2015.[130] Evergreen Marine eventually settled this claim and filed a lawsuit, under the Federal Tort Claims Act (FTCA),[131] against the United States.[132]

A magistrate judge recommended dismissal of the case because the FTCA does not waive sovereign immunity for claims based on misrepresentation. The district court agreed, and this appeal followed.[133]

The FTCA waives the United States' sovereign immunity in most tort suits, but the statute is strictly construed. If an exception applies, sovereign immunity is not waived and there is no subject matter jurisdiction over the claim asserted.[134] In this case, sovereign immunity did not apply because of an exception involving claims "arising out of . . . misrepresentation, deceit, or interference with contract rights."[135]

Evergreen Marine resisted this exception, arguing that its claims sounded in negligence, based on the failure of the NVDC to properly record the M&T Bank's ship mortgage. It appears that the paper mortgage was not scanned into the electronic system when the NVDC "migrated from a paper file system to an electronic system."[136] Based on its review of the incorrect electronic system, the NVDC represented to Evergreen Marine at the time of purchase no mortgage or lien was in place. This, of course, turned out to be incorrect.[137]

The appellate court said that the plaintiff's selection of terminology used was not dispositive.[138] Rather, the court must consider the "true 'essence' of the plaintiff's claim, regardless of how the plaintiff may have pled her cause."[139] Evergreen's injuries were "based on the communication or miscommunication of information upon which others

---

130. *Id.* at 799.

131. 28 U.S.C. ch. 171, §§ 1346 (2018).

132. *Evergreen Marine, Ltd.*, 789 F. App'x at 801.

133. *Id.* at 800.

134. *Id.*

135. *Id.* (quoting 28 U.S.C. § 2680(h) (2012)).

136. *Id.* at 799.

137. *Id.*

138. *Id.* at 800.

139. *Id.* (citing JBP Acquisitions, LP v. United States, 224 F.3d 1260, 1264 (11th Cir. 2000)).

might be expected to rely in economic matters."[140] Since Evergreen Marine's claim, at bottom, involved a miscommunication, the appellate court had no problem confirming that the exception applied and barred suit against the United States.[141]

VII.MARITIME LIENS AND RELATED MATTERS

In a good primer on general maritime law lien rights, the Eleventh Circuit reversed and remanded the district court's decision to deny a motion to arrest a vessel in *Minott v. M/Y BRUNELLO*.[142] Minott was a repairman injured when attempting to board the yacht *BRUNELLO*. Unfortunately, while crossing the gangway, the crew of the vessel "suddenly and without warning" put the vessel in gear and pulled away. Minott sustained injuries as a result of this act. A lawsuit was filed in the Southern District of Florida; Minott included *in personam* claims, as well as an *in rem* claim supported by a motion to arrest the M/Y BRUNELLO. The district court denied the motion, concluding that a maritime tort (plaintiff's personal injury claims) could not form the basis for a maritime lien.[143]

The appellate court easily concluded it had interlocutory jurisdiction over the appeal of this admiralty claim. The arrest or release of a vessel impacts the a litigant's ability to enforce substantive maritime rights (for example, liens).[144] Should the vessel leave the jurisdiction, the ability to effectuate lien rights could be lost.[145] Accordingly, jurisdiction over the interlocutory appeal was proper.[146]

The court next walked through the fundamentals to establish a maritime tort, which would carry with it maritime jurisdiction over the claim. This consists of a dual inquiry: the location of the incident (situs) and a nexus to maritime activity.[147] The situs test is met even if the injury occurs on land but is otherwise caused by a vessel in navigable water.[148] The nexus or connection element of this test calls for an

---

140. *Id.* at 802 (quoting Zelaya v. United States, 781 F.3d 1315, 1334 (11th Cir. 2015)).

141. *Id.* at 801–02.

142. 891 F.3d 1277 (11th Cir. 2018).

143. *Id.* at 1280.

144. *Id.* at 1282.

145. *Id.*

146. *Id.* (citing 28 U.S.C. § 1292(a)(3) (2012), which allows for interlocutory appeals from decisions "determining the rights and liabilities of the party to admiralty cases in which appeals from final decrees are allowed").

147. *Id.*

148. *Id.* (internal citations omitted). This is codified in the Admiralty Extension Act, 46 U.S.C. § 30101(a) (2012).

evaluation of the event's potential to disrupt maritime commerce. This is often conflated with the "general character of the activity giving rise to the incident," and whether it bears a substantial relationship to traditional maritime activity.[149]

Here, the court had no trouble determining that the egress of repairman onto a vessel in navigable waters clearly established maritime tort jurisdiction, meeting both the potential disruption and substantial relationship tests.[150] Minott's injury affected the repair and further operations of the vessel, which posed the potential to disrupt the vessel's maritime activities.[151] With respect to the general character of the activity (namely, substantial relation to traditional maritime activity), the court focused on the activities of the ostensible tortfeasor, in this case the vessel itself. By engaging its engines and pulling away from the dock, the vessel precipitated the accident.[152]

The vessel, as an *in rem* defendant, is responsible for its torts. This gives rise to lien rights in favor of the tort victim by operation of the general maritime law.[153] This is a well-settled principle, so it is somewhat surprising the district court looked exclusively to statutory guidance for assessing Minott's lien rights.[154] The appellate court reversed and remanded with instructions for the district court to enter an order directing the clerk to issue a warrant for the arrest of the *BRUNELLO*.[155]

The decision rendered in *Martin Energy Services, LLC v. M/V BRAVANTE IX*,[156] is another case stemming from the OW Bunker bankruptcy. Martin Energy Services, LLC (Martin) delivered fuel to the *M/V BRAVANTE VIII*, a ship owned by Boldini Ltd. Boldini Ltd. arranged to have fuel delivered to its ship by contacting an OW Bunker affiliate who, in turn, ultimately engaged the physical supplier (Martin). Martin delivered the fuel but was not paid. OW Bunker subsequently filed for bankruptcy protection.[157]

Seeking to recover the costs of fuel delivered ($286,200), Martin filed an admiralty action asserting *in personam* claims against Boldini Ltd.

---

149. *Minott*, 891 F.3d at 1282–83 (internal citations omitted).

150. *Id.* at 1283–84.

151. *Id.* at 1284.

152. *Id.*

153. *Id.*

154. *Id.* at 1285 (noting that the district court looked to the Federal Maritime Lien Act, 46 U.S.C. § 31342 which covers the provisions of necessaries to a vessel).

155. *Id.*

156. 733 F. App'x 503 (11th Cir. 2018).

157. *Id.* at 504–05.

for breach of contract and *quantum meruit*. Wanting to avoid paying twice for the same fuel, Boldini Ltd. answered, and tendered funds into the court's registry to cover the amount of fuel purchased. Boldini Ltd. also named ING Bank as a cross-defendant; ING Bank was the lender which held a security interest in the accounts receivable of certain OW Bunker entities.[158]

The district court determined that Martin had a valid *quantum meruit* claim under Florida law. Martin was awarded the fair value of the fuel; ING was awarded that portion of the fund which OW Bunker would have been entitled to recover as the "reseller" or "trader" of the fuel ($3,900). Not satisfied, ING pursed an appeal.[159]

The Eleventh Circuit noted the general maritime law would govern this case, unless maritime jurisprudence did not provide specific principles to answer the germane legal question.[160] In that case, it was appropriate to turn to applicable state law. Under Florida law, a *quantum meruit* claim allows a plaintiff to recover upon a showing that it conferred a benefit to the defendant, which the defendant acknowledged and accepted. Further, the circumstances are such that equity requires the defendant pay the fair value of the benefit supplied.[161]

Frankly, this was the absolute correct result. Martin (the physical supplier) delivered fuel and was entitled to payment. ING, stepping into the shoes of OW Bunker, should only be entitled to recover what OW Bunker was going to receive at the end of the day (margin as reseller or trader). This case is an excellent reminder to explore all potential avenues of recovery for your client, looking outside the confines of remedies available under maritime law when possible. For example, if a maritime lien was pursued against the *M/V BRAVANTE XI*, it is likely that Martin would not have prevailed on its claim.[162]

VIII. MARITIME DRUG LAW ENFORCEMENT ACT

In a continuing line of cases discussing jurisdiction under the Maritime Drug Law Enforcement Act (MDLEA),[163] the Eleventh Circuit

---

158. *Id.* at 505.

159. *Id.* at 506.

160. *Id.*

161. *Id.* (internal citations omitted).

162. *See* Barcliff, LLC v. M/V Deep Blue, 876 F.3d 1063 (11th Cir. 2017), where the court determined the physical supplier (Barcliff) was not entitled to a lien under the Federal Maritime Lien Act, 46 U.S.C. § 31342, due to Barcliff's position at the end of the buy-and-sell chain. *See generally* John P. Kavanagh, Jr., *supra* note 108, at 1016–18.

163. 46 U.S.C. §§ 70501–70508 (2018).

in *United States v. Obando*,[164] had occasion to discuss if a flag painted on the side of a vessel is "flying."[165] After stopping the vessel *SIEMPRE MALGARITA* in international waters, personnel from the United States Coast Guard boarded the boat and found a large cache of drugs. Crewmembers aboard the vessel were arrested and later pled guilty to various drug offenses, but reserved their right to challenge the jurisdiction of the United States on appeal.[166]

When stopped, the captain of the vessel could not produce documents evidencing the vessel's nationality, nor did he verbally provide such information. This is important, as the MDLEA grants the United States extraterritorial jurisdiction over vessels without nationality (stateless vessels).[167] The act provides three exclusive methods for the master or individual in charge of the vessel to stake a claim as to its nationality: (1) possession of documents evidencing the same, (2) "flying its nation's ensign or flag," or (3) a verbal claim of nationality.[168] The *SIEMPRE MALGARITA* had a Columbian flag painted on the side of its hull, which is remarkably similar to the flag of Ecuador but without a very distinct coat of arms in the center.[169] On appeal, the defendants contended that the painted flag on the side of the vessel sufficed to demonstrate a claim of Columbian nationality. Thus, the appellants argued, the Coast Guard was obligated to notify and seek boarding permission from Columbian officials.[170] "This argument fails if the Colombian flag painted on the hull was not 'flying.'"[171]

The court engages in an interesting analysis of maritime etiquette and customs that—combined with the plain reading of the statute—supports a finding that the word "flying" means what one thinks; that is the flag or ensign must be hoisted and capable of freely moving in the air.[172] "Because a painted flag does not fly . . . we affirm."[173]

164. 891 F.3d 929 (11th Cir. 2018).

165. *Id.* at 932.

166. *Id.*

167. *Id.* at 932–34 (citing 46 U.S.C. § 70502(c)(1)(A) (2018)).

168. *Id.* at 933.

169. *Id.* at 931–32. This is relevant because the Coast Guard apparently did contact Ecuadorian officials who were, unsurprisingly, unable to identify the registry of the vessel. *Id.* at 932. The confusion was not clarified by the defendants/crewmen, who told the Coast Guard that the painted ensign was the flag of Ecuador. *Id.* at 931.

170. *Id.* at 934.

171. *Id.* (quoting MDLEA, 46 U.S.C. § 70502(e)(2) (2018)).

172. *Id.* at 934.

173. *Id.* at 931 (internal citations omitted).

IX. SEAMAN'S CLAIMS

In one of the few Jones Act cases decided during the survey period, the Eleventh Circuit held that a seaman's failure to disclose preexisting back injury did not foreclose her employer's maintenance and cure obligations.[174] Dorothy Jackson was employed by Norwegian Cruise Lines (NCL) as a utility hand. The day before signing off her vessel, Jackson slipped on an onion peel while walking in a corridor restricted to crew access. Jackson disembarked the vessel and advised NCL that she required medical treatment. NCL directed Jackson to coordinate care with physicians in the NCL network. Jackson's lawyers, however, directed her to other physicians who ultimately performed back surgery.[175]

Suit was filed asserting claims of Jones Act negligence, unseaworthiness and maintenance and cure.[176] After a bench trial, the district court held that Jackson failed to present sufficient evidence on her negligence claim. The established jurisprudence required that Jackson present evidence that the vessel owner had "actual or constructive notice of the risk-creating condition."[177] The district court concluded that Jackson presented no evidence that NCL had actual knowledge of the onion peel and that circumstantial evidence, without more, did not suffice to demonstrate that her employer knew of a potentially dangerous condition.[178]

The more significant issue involved NCL's appeal was that Jackson's cure claim should fail because she did not disclose a preexisting back injury. Under the case law developed post-*McCorpen*,[179] a vessel owner can be relieved of its cure obligations if an employee fails to disclose or misrepresents a preexisting medical condition.[180] To avoid its obligations, the employer must demonstrate (1) intentional misrepresentation or concealment of medical facts, (2) the facts were material to the hiring decision, and (3) a connection between the withheld information and current injury.[181]

---

174. Jackson v. NCL America, LLC, 730 F. App'x 786, 791–92 (11th Cir. 2018).

175. *Id.* at 787–88.

176. *Id.* at 788.

177. *Id.* at 789 (quoting Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990)).

178. *Id.*

179. McCorpen v. Cent. Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968).

180. *Jackson*, 730 F. App'x at 789 (citing *McCorpen*, 396 F.2d 547).

181. *Id.* (citing Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 171 (5th Cir. 2005)).

In this case, although Jackson's prior injury and the subject of her current complaints involved her lower back, there was evidence of disc herniation at different levels.[182] The court rejected NCL's position that it was sufficient to show the injury and/or pain impacted the same body part: "Although the two injuries do not have to be identical . . . simply showing that Jackson's previous pain and her injury from the fall affect the same body part without more specificity does not suffice."[183]

The final charged error involved reimbursement amounts for medical treatment. Because Jackson elected to use physicians of her own choosing, as opposed to the network doctors provided by NCL, she was only entitled to recover charges NCL would pay its network physicians. NCL made repeated efforts to direct Jackson to its network physicians, and informed her (and her lawyers) that any expense above the network reimbursement rates would not be covered by NCL.[184] The court held that the district court's determination on this point was not in error.[185]

---

182. *Id.* at 790.
183. *Id.* (citing *Brown,* 410 F.3d at 176–77).
184. *Id.* at 791.
185. *Id.*