

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40022

JOHN GLEN PITRE,

Plaintiff-Appellant,
Cross-Appellee,

VERSUS

MESA OPERATING LIMITED PARTNERSHIP,

Defendant-Appellee,
Cross-Appellant,

PRODUCTION MANAGEMENT CORPORATION
and WAVELAND MARINE SERVICE,

Defendants-Appellees.

No. 94-40305

JOHN GLEN PITRE,

Plaintiff-Appellee,

VERSUS

MESA OPERATING LIMITED PARTNERSHIP, ET AL.,

Defendants,

MESA OPERATING LIMITED PARTNERSHIP
and WAVELAND MARINE SERVICE,

Defendants-Appellants,

PRODUCTION MANAGEMENT CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana

(92-CV-1256)

(May 17, 1995)

Before WISDOM, GARZA, REYNALDO G., and GARWOOD, Circuit Judges.
WISDOM, Circuit Judge:*

The plaintiff filed this personal injury suit against four defendants, including the owner of a vessel, alleging admiralty jurisdiction under 28 U.S.C. § 1333. After some decisions regarding the merits of the case, the district court determined that it lacked jurisdiction. We AFFIRM.

I.

On July 3, 1991, while working as a borrowed employee for the defendant, Mesa Operating Limited Partnership (Mesa),¹ the plaintiff, John Pitre, allegedly sustained injuries when he slipped on empty nitrogen bottles located in a "cargo basket" on the Mesa dock in IntraCoastal City. The cargo basket filled with the empty

* Local Rule 47.5.1 provides:

"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ There are four defendants. Oilfield Production Contractors, Inc. (Oilfield Production) employed the plaintiff who was, at the time of the accident, serving as a borrowed employee for the second defendant, Mesa. The plaintiff also sued Waveland Marine Services, Inc. (Waveland), the owner of the vessel, and Production Management Corporation, Inc. (Production Management) whose employees assisted Mesa employees in loading the cargo.

nitrogen bottles had been transported from a Mesa platform offshore to Intracoastal City by the M/V Arlington, a vessel owned by the defendant, Waveland Marine Services, Inc. (Waveland). The bottles were loaded into the cargo basket by employees of Mesa and Production Management Corporation, another defendant. The cargo basket was unloaded by Mesa's land crew with the aid of a land-based crane. The crew of the M/V Arlington was involved with neither the loading nor the unloading of the cargo basket. Approximately seven hours after the cargo was unloaded from the vessel, the plaintiff, while attempting to unload the empty nitrogen bottles on his own, fell and allegedly sustained an injury to his back.

The plaintiff filed suit in the Western District of Louisiana seeking damages for his personal injuries. The stated basis for jurisdiction was admiralty jurisdiction under 28 U.S.C. § 1333. Mesa filed a cross-claim against Waveland seeking indemnity and a third party claim against Oilfield Production also seeking indemnity.

The district court granted Mesa's summary judgment motion which sought dismissal of the plaintiff's complaint because the plaintiff was a borrowed employee and, as such, Mesa was immune from the plaintiff's suit.² The district court also granted Waveland's summary judgment motions which sought dismissal of both the plaintiff's complaint and Mesa's cross-claim for indemnity. Then, on March 1, 1994, the district court entered an order

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The plaintiff does not appeal this decision.

dismissing the entire case based on a determination that the court lacked maritime or admiralty jurisdiction under 28 U.S.C. §1333. Before the order regarding maritime jurisdiction, however, both the plaintiff and Mesa appealed the district court's decision to grant the summary judgment motions of Waveland on the plaintiff's complaint and Mesa's cross-claim.³ Currently, Waveland and Mesa appeal the district court's final order dismissing the entire case for lack of subject matter jurisdiction.⁴

II.

We consider first whether the district court correctly determined that it lacked subject matter jurisdiction. Both Mesa and Waveland contend that there is admiralty jurisdiction over the case under 28 U.S.C. § 1333 and the Admiralty Extension Act. Subject matter jurisdiction is a question of law that we review on a *de novo* basis.⁵

28 U.S.C. §1333 carries out Article III's grant of admiralty jurisdiction:

The district court shall have original jurisdiction exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime

³ This Court can hear an appeal of an interlocutory decision in an admiralty case pursuant to 28 U.S.C. §1292.

⁴ This is a consolidated appeal which includes the plaintiff and Mesa's appeals of the district court's summary judgment decisions in favor of Waveland (civil action no. 94-40022) and the appeals of Mesa and Waveland to the district court's determination that it lacked subject matter jurisdiction (civil action no. 94-40305).

⁵ *DeCell and Associates v. FDIC*, 36 F.3d 464 (5th Cir. 1994).

jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . .

Traditionally, a determination of admiralty jurisdiction in personal injury cases rested solely on geography. That is, a case was considered within the jurisdiction granted by §1333 only "if the tort occurred on navigable waters".⁶ The Supreme Court, however, altered this pure locality test in 1972 in its decision in *Executive Jet Aviation v. Cleveland* where it set up a two-prong test to determine whether a personal injury case was within admiralty jurisdiction.⁷ The Court retained the situs test used previously but also required that the "wrong bear a significant relationship to traditional maritime activity".⁸ Thus, the current test requires an examination of both the situs of the tort and its relationship to maritime commerce.

In this case, the plaintiff's injuries were sustained on the Mesa dock and not on navigable waters. Thus, the plaintiff's claims against Mesa, Oilfield Production, and Production Management are not within admiralty jurisdiction under §1333. The plaintiff's case against Waveland, however, may fall within the jurisdiction

⁶ *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297, 299 (5th Cir. 1984); see also *Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 810-11 (5th Cir. 1989); *Richendollar v. Diamond M Drilling Co., Inc.*, 784 F.2d 580, 583 (5th Cir. 1986), aff'd in part and rev'd in part, 819 F.2d 124 (5th Cir. 1987) (en banc).

⁷ 409 U.S. 249 (1972).

⁸ *Christoff*, 748 F.2d at 299. (citations omitted). For a discussion of admiralty jurisdiction and how it developed over time, see Warren J. Marwedel, Admiralty Jurisdiction and Recreational Craft Personal Injury Issues, 68 *Tulane. L. Rev.* 423 (1994).

granted by §1333 in light of the Admiralty Extension Act which provides:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury may be done or consummated on land.⁹

This Court has interpreted the Admiralty Extension Act, and the Supreme Court cases following the Act, as requiring that the alleged negligence of the vessel owner or crew contribute directly to the plaintiff's injuries before admiralty jurisdiction will be found. This Court has held that:

. . . to invoke jurisdiction under the Admiralty Extension Act, a plaintiff injured on shore must allege that the injury was caused by a defective appurtenance of a ship on navigable waters. It is not enough that the plaintiff alleges he was engaged in stevedoring activities and the accident would not have occurred but for the presence of the ship alongside the dock. The vessel or its defective appurtenances must be the proximate cause of the accident. This Court has refused to extend the reach of the Act absent proximate cause.¹⁰

⁹ 46 U.S.C. §740. The Admiralty Extension Act applies only to damage caused by a vessel on navigable waters. Thus, it cannot extend §1333 to include the allegations that the negligence of Mesa, Oilfield Production, and Production Management contributed to the plaintiff's injuries. Both Mesa and Waveland, however, argue that jurisdiction over the non-vessel defendants exists under 28 U.S.C. §1367 since the entire case arises out of the same nucleus of operative facts. This argument, of course, assumes that the plaintiff's claim against the vessel falls within the jurisdiction granted by §1333.

¹⁰ *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973 (5th Cir. 1987). Mesa and Waveland argue strongly that their contention that there is admiralty jurisdiction over the case against Waveland is supported by an early Supreme Court case, *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963). In *Gutierrez*, the Supreme

The issue here, then, is whether an appurtenance of the M/V Arlington, or the M/V Arlington itself was the proximate cause of the plaintiff's injuries.

The plaintiff alleges that the nitrogen bottles were improperly loaded into the cargo basket by employees of Mesa and Production Management. Specifically, he claims that the bottles should have been secured in some manner, rather than just placed in the cargo basket. As for the plaintiff's allegations against Waveland, the vessel owner, the plaintiff contended in his complaint that his accident was caused "in whole or in part" by the negligence of Waveland's crew "in failing to properly transport the nitrogen bottles to allow their safe offloading and handling at the dock and/or in failing to insure that materials and equipment transported onto the vessel were properly loaded and secured".¹¹ In other words, the plaintiff's complaint against Waveland is that the crew did not remedy a dangerous loading technique used by Mesa, not that the basket was defective.

Court held that "a longshoremen suing for injuries sustained when he slipped on beans that had become scattered about a dock during their unloading from defective cargo containers properly raised a claim within maritime jurisdiction under the Act." *Margin*, 812 F.2d at 975. That holding, however, has since been limited by the Supreme Court's more restrictive view of the Admiralty Extension Act in the later case of *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) where the Supreme Court stated "the decision in *Gutierrez* turned, not on the function the stevedore was performing at the time of his injury [unloading a ship] but, rather, upon the fact that his injury was caused by the appurtenance of a ship . . ." *Victory Carriers*, 404 U.S. at 210-11.

¹¹ Plaintiff's first amended complaint, Waveland's Record Excerpts, item 7 at 1-2.

Even assuming an allegation that the basket was defective, the cargo basket is not an appurtenance to the M/V Arlington. Waveland does not own the baskets and played no part in the decision to use the basket to transport nitrogen bottles. Also, as stated earlier, the bottles were loaded and unloaded by employees of Mesa and Production Management, no member of the Arlington crew participated. Thus, the baskets and their contents were simply cargo carried by the Arlington but handled and managed exclusively by Mesa and its sub-contractor.

Since we agree with the district court that the baskets were not a defective appurtenance to the vessel which proximately caused the plaintiff's injuries, it is unnecessary to consider the second prong of the *Executive Jet* test, the relationship of the tort to maritime commerce.¹² There is no admiralty jurisdiction in this case.

Further, we note that the district court's order dismissing the case for lack of jurisdiction effectively vacated the district court's previous orders regarding the merits of the plaintiff's complaint or Mesa's cross-claim. Thus, neither Mesa nor Waveland can rely on the summary judgments in their favor since the district court lacked the constitutional power to decide the merits of the case. Likewise, those judgments cannot be appealed to this Court. Accordingly, we AFFIRM the district court's decision to dismiss the case for lack of jurisdiction.

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Margin, 812 F.2d at 975-77.