No. 18-1318

In The

Supreme Court of the United States

MARQUETTE TRANSPORTATION COMPANY, L.L.C.,

Petitioner,

v.

KELVIN DUNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LISTING OF THE PARTIES TO THE PROCEEDING

The petition correctly states the names of all the parties to this case.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Kelvin Dunn, respectfully opposes the petition for writ of certiorari and requests that the petition be denied.

OPINIONS BELOW

Following trial on the merits, the Honorable Eldon Fallon of the United States District Court for the Eastern District of Louisiana, issued 26 pages of Findings of Fact and Conclusions of Law on September 6, 2017, awarding damages in favor of Respondent. *Kelvin Dunn v. Marquette Transportation Co., LLC*, Case No. 2:16-cv-13545-EEF-MBN, R. Doc. 39 (ROA.198-223). (Pet. App. 6a-34a)

Formal Judgment was issued by the Honorable Eldon Fallon for the United States District Court for the Eastern District of Louisiana on September 7, 2017. *Kelvin Dunn v. Marquette Transportation Co., LLC*, Case No. 2:16-cv-13545-EEF-MBN, R. Doc. 39 (ROA.224). (Pet. App. 4a-5a)

Following briefing and oral argument, the United States Court of Appeals for the Fifth Circuit issued a Per Curiam Opinion and Judgment on December 11, 2018 affirming the District Court in all respects, " . . . essentially on the basis carefully explained by the District Court in its 26 page September 6, 2017 order." It is also important to point out that the U.S. Fifth Circuit

determined its ruling " . . . should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4." This further waters down Petitioner's assertions of lack of uniformity and compelling reasons for review. *Kelvin Dunn v. Marquette Transportation Co., LLC*, Case No. 17-30889. (Pet. App. 1a-2a)

On January 15, 2019, the United States Fifth Circuit Court of Appeals issued an Order denying Petitioner's Motion for Rehearing En Banc. *Kelvin Dunn v. Marquette Transportation Co., LLC*, Case No. 17-30889. (Pet. App. 35a)

JURISDICTION

This Court has jurisdiction over the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254. It also has jurisdiction pursuant to 28 U.S.C. § 1333(1) and Article III, Section 2 of the United States Constitution.

INTRODUCTION

This is a rather straightforward maritime injury case brought by Kelvin Dunn against his employer, Marquette Transportation Company, LLC under the Jones Act and general maritime law of unseaworthiness.[1] On August 21, 2015, Mr. Dunn, who was 39 years of age at the time, suffered catastrophic and life-long

[1] 46 U.S.C. § 30104.

injuries while heroically attempting to save Petitioner's vessel, the M/V ST. RITA. More specifically, Respondent slipped and fell onto the engine room floor when he encountered the accumulation of diesel fuel causing a very slippery and dangerous condition. Mr. Dunn had no part whatsoever in causing this dangerous condition. Rather, the fuel leak was caused by Marquette's negligent repair of the starboard generator fuel guage a mere three days prior to the accident. Under the Jones Act, if a seaman's injury or death was caused by the negligence of his employer, he may recover (in addition to maintenance and cure) damages, including compensation for all past and future loss of income, medical expenses, pain and suffering, and disability (loss of enjoyment of activities of normal life).[2]

Furthermore, Marquette, as the owner and operator of the M/V ST. RITA, owed a duty to Kelvin Dunn to provide a seaworthy vessel, and they are liable for injuries to a seaman resulting from the breach of that duty. If the injury was caused by the unseaworthiness of the vessel, the seaman can collect damages similar to the remedies available under the Jones Act.[3] To be seaworthy, the ship, including its crew and appurtenances, must be reasonably safe to use and perform its assigned tasks.[4] Transitory conditions, even those that may exist only for a few moments may constitute

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[2] *Michigan Cent. R.R. v. Vrieland*, 227 U.S. 59 (1939).

[3] *Cerqueria v. Cerqueria*, 828 F.2d 863, 1988 AMC 662 (1st Cir. 1988).

[4] *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206, 1963 AMC 1649 (1963).

unseaworthiness.[5] Without question, a generator spewing diesel in the engine room, thereby creating a fire hazard and extremely slippery and dangerous walking surface, amounts to an unseaworthy condition which was encountered by Respondent and directly led to his injury.

The District Court found Marquette liable to Kelvin Dunn under both theories of Jones Act negligence and unseaworthiness.[6] The District Court also carefully considered the issue of comparative negligence under the "ordinary prudence" standard set forth in *Gautreaux*, and after analyzing the evidence presented, found Mr. Dunn to be free from fault.[7]

The District Court went on to award significant damages, all supported by the evidence presented and the expert testimony presented at trial. The reader is encouraged to review the entirety of the District Court's 26 page well-reasoned Findings of Fact and Conclusions of Law, which were essentially adopted by the United States Fifth Circuit Court of Appeals in its per curiam Opinion. Their review of same clearly establishes the trial court carefully and thoroughly considered the testimony and evidence presented at trial, and applying the appropriate law to the facts, came up with a fair and just result which was well within the Court's discretion. After the appellate court essentially

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[5] *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 1982 AMC 1823 (10th Cir. 1981).

[6] Pet. App. 24a, paragraph 7.

[7] Pet. App. 24a, paragraph 8-9; Pet. App. 25a, paragraph 10.

"rubber stamped" the trial court's judgment, this final request for review by Petitioner can arguably be construed as a frivolous appeal. The "conflict" purportedly raised by Petitioner is non-existent; the primary duty doctrine is clearly inapplicable in this case; the in extremis doctrine was properly applied; and the remainder of Petitioner's arguments are simply an attempt to relitigate the trial court's findings of facts, which is clearly inappropriate at this juncture.

Petitioner, Marquette Transportation Company, LLC presents the following questions for review:

1. Does the primary duty doctrine still exist as a defense in Jones Act cases, and if so, does it only apply to a captain?

2. If the primary duty doctrine exists, what evidence is necessary for the captain to show he is free from fault when he fails to handle a known hazard according to the safety and emergency protocols he is responsible for training the crew and enforcing?

3. May the in extremis doctrine – previously only recognized in maritime collision – be relied upon to bar the primary duty doctrine and any analysis of comparative fault by the seaman?

4. Also, should the employer's emergency drills be analyzed in determining whether the vessel's captain acted reasonably during an emergency?

5. Does the exclusive management control that a captain has over the operation of a vessel and the safety of crew, passengers, and the public, require a

court to carefully consider physical and mental fitness when determining whether a captain has a reasonable expectation of maintaining future employment in that capacity?

In response, Kelvin Dunn submits that Petitioner is attempting to create a false perception of "lack of uniformity" in the Jones Act in suggesting a conflict in the circuit courts related to the primary duty doctrine, comparative fault, and whether the doctrine of in extremis may be used to bar these defenses in a Jones Act claim.

Petitioner further inaccurately raises the question of whether Marquette's emergency drills were analyzed as well as the physical and mental fitness of Mr. Dunn. The Court clearly analyzed these items and made the appropriate factual finding.[8]

It is respectfully submitted that there are no compelling questions which would warrant this Court's review. The decision of the District Court, as well as the United States Fifth Circuit Court of Appeals, is not in conflict with any other appellate court regarding any issue presented nor have the lower courts decided an important federal question that conflicts with a decision by a state court of last resort. A review of the District Court's well-reasoned twenty-six (26) page ruling, which was adopted by the appellate court in its

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[8] Pet. App. 10a, paragraph 13- Pet. App. 11a, paragraph 14 (Court analyzes Marquette safety policies); Pet. App. 21a, paragraph 29 (Court analyzes Mr. Dunn's physical and mental fitness).

unpublished, per curiam opinion, clearly establishes this matter as unworthy of review by this Honorable Court.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Respondent, Kelvin Dunn, was a relief captain employed by Petitioner, Marquette Transportation Company, LLC ("Marquette") and was injured on August 21, 2015 while working on the M/V ST. RITA, a vessel owned and operated by Marquette. At the time of the subject accident, the M/V ST. RITA was performing fleet work in the intercoastal waterway in Bolivar, Texas, primarily pushing and fleeting hazardous chemical barges. Mr. Dunn was a long-term employee with Marquette, and its predecessor Eckstein Marine; he started off as a deckhand and worked his way up through the ranks to boat captain. He had been assigned to the M/V ST. RITA and piloted said vessel for approximately five years leading up to the day of the accident. Mr. Dunn had been an excellent employee for Marquette, both in his years as a deckhand and a captain. In his history with the company, he had no reprimands, no failed random drug tests, and he received outstanding performance reviews.

The accident in question took place on August 21, 2015 in the early morning hours just prior to day break. At that time, a leak was discovered in the engine room whereby diesel was spraying from a broken fuel

pressure gauge on the starboard generator. The leak was discovered by deckhand, Corey Crespo, who radioed up to the wheelhouse to report the problem. Although Mr. Dunn was not technically on duty, he went down to the engine room to assess and fix the problem. He followed Crespo down into the engine room, and when they reached the lower level, both slipped due to the very slick surface caused by the diesel fuel. Fortunately for Crespo, he was able to catch himself on adjacent equipment and did not fall to the deck. Mr. Dunn was not so fortunate. He fell very hard onto his hip resulting in a comminuted and displaced fracture of his right femoral head, causing him to become immobilized. Shortly thereafter, another deckhand entered the engine room and shut down the starboard generator thus terminating the leak.

The captain on duty, Junius Brown, returned the vessel to the Kirby fleet and called for an ambulance which arrived shortly thereafter. Mr. Dunn was carried out of the engine room and brought to University Texas Branch Hospital in Galveston where he underwent emergency surgery in order to repair his severely fractured femur. This surgery involved the placement of four large screws in order to repair Mr. Dunn's hip.

After he was discharged from the hospital, Mr. Dunn returned to his home in Denham Springs, Louisiana, and he followed up with various physicians in the Baton Rouge area.

Plaintiff/Respondent brought this action against Marquette under theories of Jones Act negligence and

unseaworthiness. Rather than applaud Mr. Dunn for attempting to save its vessel and acknowledge the unseaworthy condition, Marquette resorted to a defense tactic of attempting to disparage Mr. Dunn by calling into question his actions in entering the engine room, as well as his fitness as a captain. In support of Mr. Dunn's claims, he called captain Gregg Nichols as an expert witness in the field of marine safety. Captain Nichols testified in no uncertain terms that Kelvin Dunn's actions under the circumstances were reasonable, prudent, and he was injured through no fault of his own. Mr. Dunn was presented with an emergent situation, and he acted as any other reasonably prudent seaman would have. Furthermore, according to captain Nichols, Marquette's suggestion that Dunn should have used the emergency fuel shut-off outside of the engine room would have resulted in a much greater hazard given that the M/V ST. RITA was not moored and was pushing two loaded chemical barges in a busy ship channel.

II. THE DISTRICT COURT'S JUDGMENT

On September 6, 2017, the District Court entered judgment in favor of plaintiff, Kelvin Dunn, and against defendant, Marquette Transportation Company, LLC in the total amount of $3,359,718.87.[9] In conjunction with its judgment, the District Court issued its Findings of Fact and Conclusions of Law.[10]

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[9] Pet. App. 4a-5a.

[10] Pet App. 6a-24a.

The District Court found that Kelvin Dunn's decision to enter the lower-engine room to shut down the starboard generator and stop the fuel leak " . . . was a reasonable choice under the circumstances."[11] This conclusion was based upon the factual finding that "The tug was approaching a barge fleeting area, pushing two loaded chemical barges."[12]

According to the District Court, Kelvin Dunn was not contributorily negligent in deciding to enter the engine room and shut off the starboard generator.[13] This conclusion was reached after the Court analyzed the facts of the case through the principles announced in both *Gautreaux*[14] and *Fruit Indus., Inc. v. Petty*.[15] The Court cited to *Martinez v. Offshore Specialty Fabricators, Inc.,*[16] for the proposition that "A seaman is obligated under the Jones Act to act with ordinary prudence under the circumstances, which circumstances take account the seaman's experience, training, [and] education."[17] Next, the Court cited to *Fruit Indus.*,[18] for the proposition that "[w]here one is confronted through no fault of his own with a sudden emergency, his

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[11] Pet. App. 26a, paragraph 10.

[12] Pet. App. 11a, paragraph 15.

[13] Pet. App. 25a, paragraph 10.

[14] 107 F.3d 331, 339 (5th Cir. 1997) (en banc).

[15] 268 F.2d 391, 394 (5th Cir. 1957).

[16] 481 F. App'x. 942, 947 (5th Cir. 2012) (*quoting Gautreaux v. Scurlock Marine, Inc*., 107 F.3d 331, 339 (5th Cir. 1997) (en banc)).

[17] Pet. App. 25a, paragraph 10.

[18] 268 F.2d 391, 394 (5th Cir. 1957).

actions in extremis are not to be judged as they would be in ordinary circumstances."[19] Based upon the case law cited, the Court found that:

> "Captain Dunn was faced with an emergency. He had to choose between shutting off all power to the vessel, which was pushing two loaded chemical barges towards the fleeting area, after already been pushed off course by the current or entering the engine room to see if he could stop the leak. The Court finds that Captain Dunn's response to this emergency was reasonable. He chose the response which, based on his training and experience, would expose the other crew members and the vessel to the least amount of risk."[20]

As this passage makes clear, despite Petitioner's assertions to the contrary, the Court did not disregard the comparative fault principles established by *Gautreaux*.[21] Furthermore, the Court addressed the allegations of negligence advanced by Marquette.[22] In response to the allegation that Kelvin Dunn was negligent for not wearing the proper footwear, the Court found that while this failure constituted negligence, it was not a cause of his fall.[23] To the contrary, the Court found that "The evidence clearly supports the conclusion that the cause of his fall, as well as his

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[19] Pet. App. 25a, paragraph 10.

[20] Pet. App. 25a-26a, paragraph 10.

[21] 107 F.3d 331, 339 (5th Cir. 1997) (en banc).

[22] Pet. App. 10a, paragraph 13.

[23] Pet. App. 25a, paragraph 9.

fellow crew member's fall, was the slippery condition of the engine room decks which rendered the vessel unseaworthy."[24]

III. THE FIFTH CIRCUIT AFFIRMS DISTRICT COURT JUDGMENT

On December 11, 2018, a three-judge panel of the Fifth Circuit Court of Appeals found that the District Court committed no reversible error and affirmed the District Court Judgment.[25]

IV. THE FIFTH CIRCUIT DENIES PETITION FOR REHEARING EN BANC

On January 15, 2019, the Fifth Circuit Court of Appeals denied Marquette Transportation Company, LLC's Petition for Rehearing En Banc.[26]

REASONS FOR DENYING THE WRIT

I. THE PRIMARY DUTY DOCTRINE IS NOT APPLICABLE TO THIS CASE

Petitioner remains fixated on the application of the primary duty doctrine as it continues to criticize the District Court's purported lack of analysis regarding Marquette's safety rules. However, in reality, other

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[24] *Id.*

[25] Pet. App. 2a.

[26] Pet. App. 35a.

than wearing his Nike athletic slides down into the engine room, which did not contribute to his accident, Kelvin Dunn did not violate any of Marquette's safety protocols and procedures.[27] Both at trial and throughout this appeal, Marquette has falsely suggested to the courts that certain written policies and procedures related to the fuel leak encountered by Kelvin Dunn when they in fact did not. These policies and procedures cited by Marquette relate to an actual fire which clearly did not exist on the M/V ST. RITA at the time of the accident.[28]

Petitioner questions whether the primary duty doctrine still exists, and if so, whether it only applies to a captain and what evidence is necessary for the captain to show he is free from fault. In reality, the primary duty doctrine was not applied in this matter, so there is no reason for it to be analyzed. Even if the doctrine remains a viable defense, it would clearly be inapplicable to the facts presented, and as such, there is no compelling reason to address the question presented by Petitioner. Marquette's insistence that the primary duty doctrine was applicable in this case is entirely misplaced. Such an assertion is inconsistent with the findings of the District Court and all formulations of the doctrine itself. The doctrine is inapplicable in the following scenarios:

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[27] Pet. App. 11a, paragraph 14-15; Pet. App. 12a, paragraph 15.

[28] App.3a-7a (trial testimony of Byron Thompson) (ROA.450-454).

> First, the 'primary duty' rule will not bar a claim of injury arising from the breach of a duty that the plaintiff did not consciously assume as a term of his employment. Second, the rule does not apply where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated it. Third, the rule applies only to a knowing violation of a duty consciously assumed as a term of employment. It does not apply to a momentary lapse of care by an otherwise careful seaman.[29]

Additionally, the courts have been consistent in only applying the primary duty doctrine in instances where the seaman's " . . . breach of duty constitutes the sole cause of injury."[30]

Kelvin Dunn's injuries, as found by the District Court, were not the result of his negligence. To the contrary, the District Court found that Kelvin Dunn's injuries " . . . were caused directly by the unseaworthy condition of the broken fuel pressure gauge and the Defendant's negligence in failing to provide plaintiff with a safe place to work."[31] As a boat captain, Kelvin Dunn was not responsible for the installation or

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[29] 2 The Law of Seamen § 30:44, *Contributory Negligence* (5th ed. 2015).

[30] *Bartoe v. Missouri Barge Line Co. Inc.*, 635 F.Supp.2d 1020, 1026 (E.D. Mo. 2009) (*citing Peymann v. Perini Corp.*, 507 F.2d 1318, 1322-1323 (1st Cir. 1974)).

[31] Pet. App. 13a, paragraph 17.

maintenance of the broken fuel pressure gauge.[32] As such, he never assumed the duty to maintain the gauge. Moreover, he did not create the dangerous condition and could not have controlled or eliminated the dangerous condition that he encountered at the time of the accident.

II. THE IN EXTREMIS DOCTRINE DOES NOT BAR AN ANALYSIS OF COMPARATIVE FAULT

The District Court found plaintiff, Kelvin Dunn's injuries were solely the result of Petitioner, Marquette Transportation, LLC's negligence.[33] This was based upon the factual finding that Respondent, Kelvin Dunn was confronted with an emergent situation and acted reasonably under the circumstances considering his experience, training, and education.[34]

In a "Hail Mary" attempt at review from this Court, Petitioner erroneously suggests that a "new in extremis rule in the Jones Act" has been created thereby somehow abrogating the Fifth Circuit's ruling in *Gautreaux v. Scurlock Marine*.[35] Interestingly, this argument was never raised until Marquette's Motion for Rehearing En Banc, after its appeal was unanimously rejected by the Fifth Circuit's per curiam

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[32] Pet. App. 12a, paragraph 16- Pet. App. 13a, Paragraph 17.

[33] Pet. App. 13a, paragraph 17.

[34] Pet. App. 25a-26a, paragraph 10.

[35] 107 F.3d 331 (5th Cir. 1997) (en banc).

opinion. This only underscores the desperate nature of this far-fetched argument.

In response, Respondent points out that, after a careful analysis of the facts and the applicable law, the trial court ruled in his favor under well-settled principles of unseaworthiness and Jones Act negligence. More specifically, the Court states as follows:

> "Defendants had a non-delegable duty to provide Plaintiff with a safe place to work and provide seaworthy equipment on the vessel. The credible evidence supports the finding that Marquette breached its duty as it failed to properly maintain its vessel, the M/V ST. RITA, specifically the fuel gauge on the starboard generator. This unseaworthy condition directly caused the fuel leak and the dangerous condition Plaintiff encountered on August 21, 2015.
>
> The Court hereby concludes that the vessel was unseaworthy and **Plaintiff's injuries and resulting damages were proximately caused by the vessel's unseaworthiness, as well as the defendant's negligence in failing to provide him with a safe place to work."**[36]

The court further analyzed carefully the facts and evidence regarding the possibility of comparative negligence. Before discussing the doctrine of in extremis, the court succinctly found that " . . . *the evidence clearly supports the conclusion that the cause of his fall, as*

[36] Pet. App. 24a, paragraph 7. (Emphasis Added).

well as his fellow crew member's fall, was the slippery condition of the engine room deck which rendered the vessel unseaworthy."[37]

A plain reading of the District Court's opinion makes it very clear that the Court did not disregard *Gautreatux*[38] in favor of the in extremis doctrine established in *Fruit Indus., Inc. v. Petty*.[39] Instead, the District Court used the in extremis doctrine to further define the standard of care by which to assess the actions of Kelvin Dunn, as he was a seaman faced with an emergent situation involving a possible vessel collision.[40]

Accordingly, this Court need not even get to the analysis of whether in extremis applies, as the trial court clearly found the cause of the accident to be based upon defendant-appellant's negligence and its unseaworthy vessel. The Court did comment on the emergent situation faced by Kelvin Dunn at the time of the accident, however, the Court never suggested a lack of finding of negligence or unseaworthiness (or the existence of comparative negligence) had this emergent situation not existed. Furthermore, the application of the in extremis doctrine in no way flies in the face of *Gautreaux*.

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[37] Pet. App. 25a, paragraph 9. (Emphasis Added).

[38] *Id.*

[39] 268 F.2d 391, 394 (5th Cir. 1957).

[40] Pet. App. 25a, paragraph 10.

While the doctrine has historically been used in vessel collision cases under the general maritime law, defendant-appellant cannot point to any statute or reported opinion suggesting in any way that the doctrine cannot or should not be applied to a Jones Act injury case.[41] Moreover, to underscore the absurdity of this argument, to suggest that the in extremis doctrine was inappropriately applied under the instant facts, implies that Kelvin Dunn's actions would have been assessed according to a more lenient standard had he used the emergency fuel shut off switch[42] and allowed the vessel to collide with the fleet. It is also pointed out that this case was brought not only under the Jones Act, but also the general maritime law. For all these reasons, Petitioner's untimely manufactured argument regarding in extremis is completely without merit.

III. KELVIN DUNN'S FITNESS AS A CAPTAIN

Marquette takes issue with the District Court's ruling that Mr. Dunn would have continued in his full-time employment as a captain had he not been injured. In support of its position, Marquette blatantly

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[41] For example, see *Fountain v. John E. Graham & Sons*, 833 F.Supp. 873, 879 (S.D. Ala. 1993), *aff'd sub. nom., Fountain v. Graham & Sons*, 16 F.3d 1232 (11th Cir. 1994), where the court found a captain awakened in the middle of the night cannot be held responsible for his failure, under these circumstances of a sudden emergency, to act more quickly and try to prevent a fist-fight.

[42] The appropriate course of action fronted by Marquette.

mischaracterizes Dr. Wissner's testimony. In reality, Mr. Dunn's anxiety and panic disorder had drastically improved in the summer of 2015, as he was cleared to return to work as a captain. Further, Dr. Wissner acknowledged that the last time she had treated Mr. Dunn was March, 2016.[43]

Furthermore, when asked the ultimate question, of whether Mr. Dunn would be able to continue his work as a boat captain had the accident not occurred, Dr. Wissner answered as follows: " . . . at the time that I saw him, on July 13, 2015, I did not expect that he would not be able to continue doing his work."[44] Dr. Wissner further commented, "My impression was he should remain on his daily medication, and that he would do well if he did that."[45] Dr. Wissner also testified that anxiety and panic disorder is very common in the practice of family medicine, and that many of her patients that have these conditions are gainfully employed.[46]

It is even more perplexing to understand why Petitioner would raise this argument when the evidence presented at trial revealed that prior to Mr. Dunn's return to the M/V ST. RITA, he and his medical records

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[43] App. 10a (deposition testimony of Dr. Rachel Wissner) (ROA.2052).

[44] App. 11a (deposition testimony of Dr. Rachel Wissner) (ROA.2057).

[45] App. 12a (deposition testimony of Dr. Rachel Wissner) (ROA.2058).

[46] App. 11a (deposition testimony of Dr. Rachel Wissner) (ROA. 2057).

were examined by Marquette's company physician, Dr. Hawk and he was cleared to return to full duty.[47] Dr. Hawk and Marquette executives were fully aware of Mr. Dunn's medication regimen, and they gladly put him back at the helm of the vessel because they knew he was an excellent pilot.[48] Finally, it is pointed out that the award by the District Court was not based upon "uninterrupted future work," but rather, this award was based on his past earnings as a measure of his earning capacity, which included the time off for the two sabbaticals.

CONCLUSION

The Findings of Fact and Conclusions of Law rendered in this matter by the District Court were thorough, sound, and based on a careful consideration of the evidence and testimony presented at trial. The United States Fifth Circuit Court of Appeals affirmed the lower court judgment based on the "carefully explained" findings and conclusions. In rendering its per curiam opinion, the court of appeals did not find any issue presented by Petitioner worthy of further comment and review. This begs the question: If the court of appeals unanimously finds there is no issue worthy of commentary, how can this matter possibly warrant United States Supreme Court muster? Simply put, the

[47] App. 14a-15a (trial testimony of Mark Landry Kirk, Jr.) (ROA.548-549).

[48] *Id.*

District Court's ruling did not create a conflict in the circuit courts; the primary duty doctrine is not applicable to this case; the in extremis doctrine does not circumvent the "ordinary prudence" standard set forth in *Gautreaux*; and the District Court's factual findings regarding Kelvin Dunn's actions and fitness for duty clearly do not warrant review from this Honorable Court. Accordingly, Respondent respectfully submits Marquette's Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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