No. 18-_____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves an injury claim by a Jones Act captain and raises questions on fitness for duty and his ultimate responsibility to implement safety and emergency procedures. A writ is necessary to resolve a significant conflict in the circuit courts related to the Primary Duty Doctrine, comparative fault and whether In Extremis may be used to bar these defenses in a Jones Act claim. Historically, U.S. courts have approached the issue as the Primary Duty Doctrine, but its application has become so varied between and within the circuit courts that its existence as a uniform standard is not known to the admiralty bar.

In Jones Act cases, the standard of care by the seaman has uniformly been to use ordinary prudence under the circumstances to protect himself. Until this case, the In Extremis Doctrine had never been used to circumvent both the Primary Duty Doctrine and this standard of care. A writ is necessary to resolve this conflict with Supreme Court precedent and maintain uniformity in the Jones Act. The questions presented are:

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?

CORPORATE DISCLOSURE STATEMENT

Marquette Transportation Company, LLC is a Delaware Limited Liability Company. No publicly traded company owns a 10% interest in the entity, or any corporate parents or any affiliated company.

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STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to consider petitions for certiorari from cases decided by the United States Court of Appeals. It also has jurisdiction under 28 U.S.C. § 1333(1) and Article III, Section 2 of the United States Constitution.

The Court of Appeals for the Fifth Circuit issued its original ruling on December 11, 2018. Marquette Transportation Company, LLC timely filed a Petition for Rehearing *En Banc* on December 24, 2018, which was denied on January 15, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **The Jones Act,**
  Codified at 46 U.S.C. § 30104
  Personal Injury to or Death of Seamen

  A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

- **The Federal Employers Liability Act, FELA,**
  Codified at 45 U.S.C. § 53
  Contributory Negligence; Diminution of Damages

  In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by

> the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

This matter involves a personal injury claim by Captain Kelvin Dunn against his employer, Marquette Transportation as the owner/operator of the ST. RITA. Dunn brought claims under the Jones Act for negligence, unseaworthiness under the general maritime law, and maintenance and cure.[1]

Marquette defended the claims under the Primary Duty Doctrine, and also sought comparative fault as Dunn's actions jeopardized both his safety and that of his crew when a deckhand trainee reported diesel fuel spraying in the lower engine room. At that moment, Dunn was in the wheelhouse of the vessel and had just finished helping the relief pilot deliver two barges at a fleet in the Intracoastal Waterway near Galveston, Texas. The deckhand trainee who radioed the fuel leak to the pilot house returned after untying and delivering the barges to the fleet At this point, the relief pilot was proceeding light boat (with nothing in tow) away from the fleet such that no emergency existed. Dunn was

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[1] ROA.7-11 (Complaint).

standing just outside the wheelhouse smoking a cigarette and overheard the radio call. He perceived a risk of fire but followed none of the company fire drill procedures. Despite a fuel cut-off valve outside the entrance, a safety protocol that calls for its use and also for mustering the crew to ensure use of personal protective gear and to set a plan of response, Dunn immediately ran down the stairs of the engine room wearing slippers. He ran directly into the spray of fuel which was coming from the starboard generator, slipped on the fuel, broke his hip, and became incapacitated on the deck.[2] Dunn was unable to direct further response to the emergency. Another deckhand came down and was able to turn off the generator and start an alternate generator on the port side. Both this deckhand and the deckhand trainee who followed Dunn into the engine room were wearing proper personal protective gear and were not injured.

In the total response to the incident, only one person was injured—the captain, Kelvin Dunn. Only one person failed to follow any form of safety rule aboard the vessel—the captain, Kelvin Dunn. Dunn's response actually brought three crewmembers into the lower engine room, and directly into contact with spraying diesel fuel while the main engines were running. Dunn later claimed that he thought that was necessary because it would have been dangerous to shut down the main engines using the remote fuel shut-off outside of the engine room, and risk a collision with the barges that he thought the ST. RITA was still pushing ahead. Dunn's "belief" defied the direct testimony of the pilot who was in control of the vessel in the wheelhouse at

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[2] App.77a-85a (Dunn testimony)(ROA.719-726).

the time of the incident. Dunn also knew he had just assisted the pilot in dropping off two barges at the fleet, and the deckhands had just returned to the tow boat after dropping off the barges. To be certain, ST. RITA was not pushing ahead any barges and a simple plan of mustering the crew to address the fire risk would have easily determined this. Following this protocol also would allow use of the remote fuel shut-off, and the pilot to radio for any number of fleet boats to come to their assistance once they lost power (particularly since the vessel was only a few yards away from the bank).

Despite this evidence, the district court never addressed the Primary Duty Doctrine in its findings and conclusions. Likewise, the district court did not address any of the evidence on safety protocols and Dunn's decision not to follow them to evaluate comparative fault. Similarly, the district court never evaluated either the duty of Dunn to use ordinary prudence under the circumstances to protect himself or the ordinary prudence utilized by Marquette in developing and implementing the safety protocols and training Dunn largely ignored to control a fuel leak—a common casualty in vessel operations. The district court instead disregarded recognized burdens of proof requirements and evidentiary presumptions created by adopting a lower standard for *extremis*, and without any corresponding analysis of the vessel's emergency rules.

Without careful consideration of the conflict created by citing land-based law covering commercial trucking and passing motor vehicles, the district court

used *Fruit Industries Inc. v. Petty E*[3], to circumvent *Gautreaux v. Scurlock Marine, Inc.*[4] To amplify this error, the same court reached the opposite result in *Dean v. Sea Supply, Inc.*[5] Using *Fruit Industries* again, the same judge found a captain solely at fault for wearing tennis shoes in the engine room contrary to the same protocol used by Marquette in this case. However, no emergency existed in *Dean*, and the Fifth Circuit has created a recognizable exception to *Gautreaux*,[6] Supreme Court precedent,[7] and the numerous circuit courts that apply uniform principles of comparative fault to seamen.[8]

To emphasize, the decision cited, *Fruit Industries*, now endorsed as an exception to *Gautreaux* by the Fifth

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[3] 268 F.2d 391, 394 (5th Cir. 1957).

[4] ROA.215-16, 107 F.3d 331 (5th Cir. 1997)(en banc).

[5] 2018 U.S. LEXIS 115816 (E.D. La. July 12, 2018).

[6] *Dean*, 2018 U.S. Dist. LEXIS 115816 at *15, fn. 2.

[7] *Jacob v. New York City*, 315 U.S. 752, 755 (1942) ("Although proof of negligence is essential to recovery under the Jones Act, [citations omitted], contributory negligence and assumption of the risk are not available defenses. The admiralty doctrine of comparative negligence applies.") *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939) (Recognizing comparative negligence as an "established admiralty doctrine." This case involved a Seaman's action for injury under Jones Act.)

[8] *Gaylor v. Canal Barge Co.*, 2015 U.S. Dist. LEXIS 121322, at 5 (E.D. La. 2015) ("The Jones Act simultaneously obligates the seaman to act with ordinary care under the circumstances. *Id.* at 339. The seaman must act with the care, skill, and ability expected of a reasonable seaman in like circumstances. *Id.*)

Circuit—contrary to all the other circuit courts[9]—involved a collision between a truck driven by the defendant in fog with a vehicle driven by the plaintiff. The plaintiff was exonerated from fault by a jury instructed under an Iowa passing statute governing motor vehicles. On appeal, the Fifth Circuit agreed the truck driver was solely at fault.[10]

Specifically, the *Fruit Industries* court wrote:

> In Iowa, *Mongar v. Barnard*, 248 Iowa 899, 82 N.W.2d 765, *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552, *Smith v. Darling & Co.*, 244 Iowa 133, 56 N.W.2d 47, and generally elsewhere, where one is confronted through no fault of his own with a sudden emergency, his actions *in extremis* are not to be judged as they would be in ordinary circumstances. Under that rule, the evidence certainly supported, indeed it almost demanded, the verdict that Petty was not contributorily at fault.[11]

Until now, there was no such *Extremis Rule* recognized in the law of personal injury and duties owed under the Jones Act. Instead, all the circuit courts applied uniform principles of comparative fault to assess whether a similarly situated seaman acted with reasonable prudence to protect himself.[12] The use of *extremis* only applies to collision law in admiralty, a

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9 *Id.*

10 268 F.2d at 394.

11 *Id.*, ROA.215-216.

12 *Gaylor*, 2015 U.S. Dist. LEXIS at 5.

situation that did not exist in this case.[13] Specifically, the Fifth Circuit ignored the pilot's eyewitness testimony that the ST. RITA was light boat and already dropped off the two barges before the leak started. By doing so, the purported reason for the emergency—the barges in tow were in a fleeting area[14]—allowed the courts to circumvent *Gautreaux*, Supreme Court precedent, and creates a conflict in the circuit court's uniform application of comparative fault.[15] To illustrate, pilot Brown testified:

> Brown. After we got the barge tied off—well, after Kelvin [Dunn] got the barge tied off, I took the sticks back over, went and fleeted our load. After fleeting the load, we was coming back light boat because the LADY LORD was pushing that—or emptying it for us.
>
> Brown. Coming back light boat, deckhand Corey [Crespo] said there's diesel shooting out of the main.
>
> Q. . . . When he–Corey said that, where was Kelvin [Dunn]?

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[13] *City of Chicago v. M/V Morgan*, 375 F.3d 563, 566-67 (7th Cir. 2004).

[14] App.108a-110a (Pilot Brown testimony)(ROA.2077-78).

[15] *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 908 (6th Cir. 2006) ("It is well established that comparative negligence applies to unseaworthiness claims as well as Jones Act claims.") (Cited by *Baucom v. Sisco Stevedoring, LLC.*, 560 F.Supp.2d 1181, at 1207 (S.D. Ala. 2008)). *Thibodeaux v. Ensco Offshore Co.*, 300 F. Supp. 3d 792, 801-02 (W.D. La. 2017) ("Comparative negligence applies in both Jones Act and unseaworthiness actions.")

Brown. He was in the wheelhouse with me still.

Q. But you had taken the sticks back?

Brown. Yes, sir.[16]

Setting aside *Gautreaux*,[17] the uniformity the decision stands for and despite these specific facts showing no emergency created *extremis*, the district court found one. And then the Fifth Circuit essentially adopted the district court's opinion. There are fundamental errors in this approach which challenged the uniform application of the General Maritime Law and scrambled any orderly application of the standard of care for Jones Act seamen. In particular, the courts avoided evaluating the standard of care for a vessel's captain, and whether those standards are changed if the court believes an *extremis* situation exists. Initially, there is no concise standard for how a court should determine if an *extremis* situation exists in a Jones Act injury case. This failure on another significant doctrine in admiralty, allowed the courts to entirely ignore the testimony of the pilot in control of the vessel who said that they were not pushing ahead any barges and that they had just finished using an assist boat to land the two barges that were delivered to the fleet. Without focusing on whether an emergency truly existed, the courts never evaluated the use of the remote fuel shut-off.

Accordingly, without analyzing the comparative weight of the testimony between the pilot in control of the vessel, the captain who was off watch and ran into the engine room, and the sequence of events described

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16 App.108a-110a (Pilot Brown testimony)(ROA.2077-78).

17 107 F.3d at 339.

by the deckhand, the court found an *extremis* situation when none existed. By relying on whether one crewmember perceived there was an *extremis* situation, and not whether an *extremis* situation existed also disturbs circuit precedent on this doctrine.

The next major flaw with this approach is that the district court (and by adoption, the Fifth Circuit) found that a captain's perceived *extremis* situation lowered the standard of his care, which must be based on those similarly situated under the established General Marine Law. Instead, the analysis did not take into account that the plaintiff was the captain and that the captain had a set of emergency rules that he trained the crew to follow and which he did not follow himself. Stated another way, the approach allowed by the district court and the Fifth Circuit changes the standard of care without any method of analyzing what constitutes reasonable conduct in an emergency situation, particularly when the emergency situation is part of the crew training that is provided by the captain.

The resulting flawed analysis did not put the burden of proof on the plaintiff to prove he was free of fault as required for *in extremis*,[18] and creates a conflict in the uniformity of both doctrines. It also circumvented an important question on whether the Primary Duty Doctrine applied.[19] Again, to the contrary,

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[18] *City of Chicago* at 566-67 (citing *Grosse Ile Bridge Co. v. American Steamship Co.*, 302 F.3d 616 at 625-26 (6th Cir. 2002)).

[19] Specifically, the policy on full protection provides:

> Approved steel-toed safety boots/shoes must be worn by all personnel when outside of the vessel on any

extensive testimony was put on to demonstrate a broad range of measures Marquette took in advance to train its crew on how to avoid just this kind of potential hazard.[20] Using this new exception, and avoiding uniform rules on comparative fault under circuit precedent, the district court assessed Marquette as solely at fault under commercial truck law and awarded damages of $3,359,718.87.

Challenging these flaws in the district court analysis, an appeal followed and oral argument occurred on December 3, 2018. Despite focusing on these issues, the Panel affirmed and adopted *Fruit Industries* on December 11, 2018. A Petition for Rehearing *En Banc* followed. On January 15, 2019, the Petition was denied.

1. Statement of Facts Establishing Primary Duty and Comparative Fault

By creating this new exception to *Gautreaux*, and contrary to uniform application of comparative fault by most circuits, the courts below adopted *Fruit Industries* and force collision law *in extremis* into the Jones Act. The resulting analysis requires granting the writ

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> deck level. Approved steel-toed safety boots/shoes must be worn by all personnel in the engine room.

This applied to Dunn "when he entered the engine room," (ROA.518) even in an emergency situation. (ROA.519). Also applicable to Dunn when he entered the engine room is the directive to wear a life jacket suitable for abandoning the ship. (ROA.534). Dunn did neither and should have been assessed 50% liability, at least. *See, e.g., Parlor Drilling Offshore*, 179 F.Supp.3d 687, 691 (N.D. La. 2016).

[20] ROA.80. The use of protective measures and gear, including wearing steel-toed closed shoes is discussed at ROA 513, 516-518.

petition to assess whether the Primary Duty Doctrine and comparative fault may be barred.

To illustrate a factual basis requiring either an analysis of the Primary Duty Doctrine or applying comparative fault principles, many key facts were proven on these issues. Dunn knew there was a fuel leak in the engine room before he ever entered the space.[21] Dunn knew the fuel leak was a slip hazard before he entered the engine room.[22] More importantly, Dunn knew the fuel leak was a fire hazard.[23] Dunn also knew there was a remote fuel shutoff on the main deck of the vessel, outside of the engine room, which he never asked another crewmember to use and which he never tried to use himself.[24] Dunn knew and taught

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21 App.83a-84a (Dunn testimony)(ROA.725).

Q: You knew that before you got there?

A: Yeah, I knew the diesel was leaking.

22 App.91a-92a (ROA.732).

Q: You knew there was a fuel leak and you knew it was a slip hazard?

A: Yeah.

23 App.83a-84a (ROA.725).

Q: You knew there was a fire risk before you got there?

A: Yeah, that's why I was trying to get there to stop it;

App.84a-85a (ROA.726).

Q: You were very concerned of a fire risk?

A: Yes.

24 App.49a-51a (ROA.692-693).

Marquette's safety rules and understood their importance.[25]

Dunn also knew the importance of using personal protective gear and he knew that he was entering the engine room without using any.[26] Dunn also knew the importance of maintaining situational awareness,[27] and that if there was an emergency and risk of fire that he was supposed to marshal the crew, form a response plan, make sure everyone was properly outfitted, and then execute on the plan.[28] Dunn disregarded all these company rules he used in crew training.[29]

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25 App.81a-85a (ROA.723-724).

> Q: You understand the importance of drills . . . to teach routine behavior . . . even under a stressful situation.
>
> A: Yes.

26 App.74a-76a (ROA.716-717); App.82a-83a (ROA.724).

> Q: . . . using the personal protective gear is a critical part of working on a towboat?
>
> A: Yes.
>
> Q: Did you stop to assess what protective gear you may need to put on before you entered the engine room?
>
> A: No.

27 App.82a-83a (ROA.724).

> Q: Maintaining situational awareness is an important safety responsibility for any job you do onboard a vessel?
>
> A: Yes.

28 App.74a-75a (ROA.716).

29 App.74a-75a (ROA.716), App.88a-91a (730-731).

REASONS FOR GRANTING THE PETITION

This action involves a Jones Act seaman, Captain Dunn, who ran into an engine room wearing slippers while responding to an engine room casualty—spraying fuel. He also failed to utilize an emergency fuel shut-off switch located outside the engine room specifically designed to secure the main engines and eliminate the need for any personnel to enter the space until after the leak was stopped.

At trial, Marquette presented the Primary Duty Doctrine and comparative fault as defenses because Captain Dunn violated company safety policies and protocols specifically designed to prevent the injury he suffered when he slipped on the spraying engine room fuel.

Overall, this factual evidence was completely ignored because the Fifth Circuit endorsed *in extremis* as a bar to any analysis of the Primary Duty Doctrine and comparative fault. The decision thwarts the uniformity in the General Maritime Law developed from this Court's announcement of the use of comparative fault in Jones Act cases since its early decision in *Socony-Vacuum Oil*,[30] *Jacob*,[31] and the more recent decision in *Reliable Transfer*.[32]

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[30] 305 U.S. at 431 (1939).

[31] 315 U.S. at 755 (1942).

[32] *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397 (1975).

Indeed, relying on these principles, uniform rules for comparative fault are well established by the federal district and circuit courts. In his leading treatise on this uniform body of law, Schoenbaum precisely explains the standard for comparative fault routinely cited by this Court:

> Under "pure" comparative fault, when the negligence of multiple parties contributes to the loss, the court must make a complete apportionment of damages between the negligent parties based on their respective degrees of fault.
>
> According to the rule of comparative negligence, the degree of fault of the plaintiff which proximately caused his injury reduces the total damage award by that percentage.[33]

Thus, the former denotes apportionment between multiple tortfeasors causing the harm, whereas the "comparative negligence" pertains to apportionment between wrongdoer and the injured. However, the terms are used interchangeably on occasion.

As to comparative fault by the seaman, the law is also clear.

> "The Jones Act simultaneously obligates the seaman to act with ordinary care under the circumstances. *Gautreaux*, 207 at 339. The seaman must act with the care, skill, and ability expected of a reasonable seaman in

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[33] Schoenbaum, *Admiralty and Maritime Law* § 5:7., Comparative Fault (6th ed., 2018) (citations omitted).

> like circumstances. *Id.* Thus, comparative negligence applies under the Jones Act, "barring an injured party from recovering for the damages sustained as a result of his own fault." *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989) *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). "[T]he defendant has the burden of proving that the plaintiff was contributorily negligent and that such negligence was the proximate cause in producing his injury." *Id.* If an accident is caused solely by the plaintiff's own fault, there can be no recovery. *Miles*, 882 F.2d at 984."[34]

An additional conflict is created in the *extremis* doctrine because the rule does not automatically bar comparative fault. Instead, it merely allows the court to assess a captain's collision avoidance actions with more leniency—not to bar and circumvent comparative fault under circuit precedent.[35]

Despite this precedent and under these undisputed facts, both the district court and U.S. Court of Appeals for the Fifth Circuit never applied the Primary Duty Doctrine—an apparent determination that the rule no longer applies. On this issue, the silence on this rule is of significant importance in defending a Jones Act seaman case and warrants Supreme Court review,

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[34] *Gaylor v. Canal Barge Co.*, 2015 U.S. Dist. LEXIS 121322, at 5 (E.D. La. 2015).

[35] *City of Chicago*, 375 F.3d at 566-67.

especially in light of its decision in *Tiller v. Atl. Coast Line R.R. Co.*[36]

Specifically, in *Tiller*, this Court acknowledged the Primary Duty Doctrine remained a viable defense even after the abolishment of assumption of risk.[37] Since *Tiller*, the circuit courts and federal district courts have developed uniformity on the use of comparative fault principles in Jones Act cases under this guidance. As illustrated by the Fifth Circuit in *Gautreaux*,[38] the standard for determining the comparative fault by a seaman is simply whether he used ordinary prudence under the circumstances to protect himself.[39]

Notwithstanding these principals, the courts below relied on *in extremis*—a doctrine only recognized in collisions and never applied to defend a Jones Act seaman's actions–to bar the use of the primary duty and comparative fault analysis. A writ is required to clarify if, and whether *in extremis* may be used to bar the defenses of the Primary Duty Doctrine and a seaman's comparative fault. Otherwise, the uniformity established by *Gautreaux*'s mandate that a seaman must take reasonable precautions to protect himself is thwarted.

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[36] 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943).

[37] *Id.*

[38] 107 F.3d 331, 339 (5th Cir. 1997)(en banc).

[39] *Id.*

I. A WRIT IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUIT COURTS ON THE VALIDITY AND APPLICATION OF THE PRIMARY DUTY RULE IN VIEW OF THIS COURT'S DECISION IN *TILLER*.

Initially, this court in *Tiller* found the Primary Duty Rule remained a valid defense even after amendments to FELA abolished assumption of risk as a defense for those claims, and ultimately as also applied to the Jones Act. At the heart of this case—the last Supreme Court decision to address the Primary Duty Doctrine, Justice Frankfurter unequivocally acknowledged the viability of this defense. Specifically, he noted that the Amendments did not disturb the notion that employees cannot recover on the basis of risks by virtue of employment in circumstances where the employer is not at fault. Specifically, he stated:

> But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. Congress has to some extent alleviated the doctrines of the law of negligence as applied to railroad employees. By specific provisions in the Federal

> Employers' Liability Act, it has swept away "assumption of risk" as a defense once negligence is established. But it has left undisturbed the other meaning of "assumption of risk," namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.[40]

Despite clear acknowledgement of the viability of this defense, both the circuit and federal district courts have used the decision to improperly question the existence of the Primary Duty Rule.[41] The split occurs because some courts rely on the majority's determination that FELA amendments "swept into discard" defenses based on assumption of the risk. Citing this language, and not Frankfurter's reference to the employer's due care under the other meaning of "assumption of risk," a circuit split emerged. The split is now deeply rooted in whether the Primary Duty Doctrine still exists. For example, the Fifth Circuit interpreted this language to mean that the Primary Duty Rule (which was mentioned once in *Tiller*) was overruled or explicitly limited by the Court. Nonetheless, not all courts adopted such an interpretation—including *Walker v. Lykes Brothers S.S. Co.*,[42] which was decided nearly ten years after *Tiller*.[43] Notably, Judge

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40 *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 71, 63 S.Ct. 444, 453, 87 L.Ed. 610, 619-20 (1943) (emphasis added).

41 *Tiller*, 318 U.S. 54 (1943).

42 193 F.2d 772, 774 (2d Cir. 1952).

43 318 U.S. 54 (1943).

Learned Hand refers to the rule in *Walker*, but this Court in *Tiller* had already confirmed its existence.

On the other hand, Justice Frankfurter's reasoning by his concurrence in *Tiller*, provides support for the continued viability of the Primary Duty Doctrine. He acknowledged that while FELA abolished the assumption of risk, the statute did not disturb the reverse. Namely, an employer could still be found without negligence whereas here, he exercises his duty of reasonable care, yet an injury occurs. Subsequent decisions require granting the writ to clarify when and how the Primary Duty Doctrine is applied in an emergency situation.

Granting the writ will also allow this Court to clarify circuits split on whether the Primary Duty Doctrine as a defense in Jones Act cases applies and in what context.[44] While there are disparaging views on when, and if it may apply, some circuits have adopted the rule, others have limited or rejected it completely. Post-*Walker* cases establish this disharmony across federal courts.

For example, the Fifth Circuit, in large part relying on dicta from *Tiller*[45], essentially ignores the Primary Duty Doctrine. In this case, neither the district court nor the Fifth Circuit acknowledged its existence either.

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[44] *See Bartoe v. Mo. Barge Line Co.*, 635 F.Supp.2d 1020 (E.D. Mo. 2009) (this case offers a thorough analysis of the doctrine in Jones Act cases, and highlights the discord among circuit courts in its application and availability as a defense).

[45] *Tiller*, 318 U.S. 54 (1943).

Other Fifth Circuit cases such as *Whitman*[46] and *Dejean*[47] signify this trend, though the decision in *Atchinson*[48] (cited by *Walker*) was a basis for the Doctrine, and cases like *Krall*[49] utilized a restricted variation of the Doctrine. Fourth Circuit cases, such as *Mason*[50] and *Long*;[51] limit/rarely apply the Doctrine. Notably, the Fourth Circuit's variance of the application of the Doctrine arguably depends on whether the plaintiff is a general seaman as opposed to captain of a ship. The Second Circuit, where *Walker* was decided, is inconsistent in its application as evidenced in *Dunbar*,[52] *Lombas*,[53] and *McSpirit*.[54]

Nonetheless, the Doctrine remains a viable defense in most circuits, and even has a Model Jury Instruction to support it. To illustrate, the Ninth Circuit most recently acknowledged the Doctrine and the context of its limitations:

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46 *Whitman v. Hercules Offshore Corp.*, 2006 U.S. Dist. LEXIS 90717 (W.D. La. 2006)

47 *Dejean v. Caillou Island Towing Co.*, 2017 U.S. Dist. LEXIS 110359, 2017 WL 3024264 (E.D. La 2017).

48 *Atchinson R.R. v. Ballard*, 108 F.2d 768 (5th Cir. 1940).

49 *Krall v. United States*, 1990 U.S. Dist. LEXIS 15998 (E.D. La. 1990).

50 *Mason v. Lynch Bros.*, 228 F.2d 709 (4th Cir. 1956).

51 *Long v. United States*, 339 F.Supp.2d 729 (E.D. Va. 2004).

52 *Dunbar v. Henry Du Bois' Sons Co.*, 275 F.2d 304 (2d Cir. 1960).

53 *Lombas v. Moran Towing & Transp. Co.*, 899 F.Supp. 1089 (S.D.N.Y. 1995).

54 *McSpirit v. Great Lakes Int'l*, 882 F.Supp. 1430 (S.D.N.Y. 1995).

> The Ninth Circuit has defined three limitations on the application of the Primary Duty Rule. First, the Primary Duty Rule will not bar a plaintiff's claim of injury if the plaintiff did not consciously assume the duty 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. Third, the rule applied only to a knowing violation of a duty consciously assumed as a term of employment.[55]

The conflict is also well documented. As one district court in the Fourth Circuit observed,[56] the Ninth Circuit's application of the Doctrine does not rest on the concept of causation. Whereas, that same court observed, in the First and Seventh Circuits, "the Primary Duty Rule only applies when there is no other cause for the injury but a breach of an employment duty by the plaintiff . . . [i]t does not apply when the employer is also at fault in any degree."[57]

Yet another recent Eighth Circuit district court opinion, authored by Judge Sippel, emphasizes the disharmony across the circuit courts. In issuing the opinion, Judge Sippel noted—as did the parties involved in that matter—"the Eighth Circuit has never addressed whether the Primary Duty Rule prevents recovery under

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[55] *Baigi v. Chevron USA Inc.*, 2019 U.S. Dist. LEXIS 45290, 10-11 (N.D. Cal. 2019).

[56] *Long*, 339 F.Supp.2d at 734 (E.D. Va. 2004).

[57] *Id.*

the Jones Act."[58] He conceded that, irrespective of the Supreme Court's rejection of contributory negligence as a bar in Jones Act cases, "some courts have adopted the Primary Duty Doctrine."[59]

To further illustrate the conflict, according to Judge Sippel, in the First Circuit "[t]he defense is only available when (1) the injured seaman owed a duty to the defendants, (2) he breached that duty, and (3) that breach was the sole cause of his injury." Citing *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 11 (1st Cir. 1998). "The defense is not available where 'plaintiff breached his duty but the ship's owner was also independently at fault' . . . [t]he bar to recovery is 'not based on the contributory negligence of the officer, but on a finding of no negligence of the employer.'" *Id.*

However, Judge Sippel explained that the Ninth Circuit, in *Reinhart v. United States*, 457 F.2d 151, 154 (9th Cir. 1972), was persuaded by Judge Harlan's opinion in *Dixon v. United States*, 219 F.2d 10, 16-17 (2d Cir. 1955), which maintains that "the primary duty defense turns 'not upon any question of proximate cause, assumption of the risk or contributory negligence, but rather upon the employer's independent right to recover against the employee for the nonperformance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.'"

Judge Sippel also noted that in the Fifth Circuit, under *Louisiana & Arkansas Ry. Co. v. Johnson*, 214

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58 *Id.* at 1025.

59 *Id.*

F.2d 290, 292 (5th Cir. 1954), "the circuit has rejected the Primary Duty Rule as obsolete," and the Seventh Circuit, in *Kelly v. Sun Transp. Co.*, 900 F.2d 1027, 1031-32 (7th Cir. 1990), "also concludes that the doctrine is inconsistent with the Jones Act." *Bartoe*, 635 F. Supp. 2d at 1027.

Seemingly, "the defense is not available in the Fourth Circuit unless the plaintiff was the master of the vessel." *Id.* (previously citing Fourth Circuit case *Mason v. Lynch Bros. Co.*, 228 F.2d 709, 711-12 (4th Cir. 1956).

Judge Sippel explained that the "Eleventh Circuit has refused to apply the primary duty in cases where no misconduct or actual knowledge of an unsafe condition existed, even in the case of a vessel's captain." *Id.* (citing *Villers Seafood Co., Inc. v. Vest*, 813 F.2d 339, 342-43 (11th Cir. 1987). Likewise, as Judge Sippel noted, "in the Sixth Circuit, 'the rule only applies to a knowing violation of a duty consciously assumed as a term of employment.'" *Id.*, at 1028 (citing *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 910 (6th Cir. 2009).

These cases illustrate the need for this Court to conclude the Primary Duty Rule does exist. A writ is necessary for this clarification and to return the defense to the employer/vessel owner. Absent guidance, and a statement by this Court that *Tiller* and Judge Frankfurter never intended to reject the Primary Duty Rule, the circuit and district courts will continue to struggle with whether the doctrine exists.[60]

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60 *See e.g.* Geraghty, *Every Seafarer Has a Primary Duty That May Provide the Basis of a Defense in a Personal Injury Action*, 29 J.L. & Com. 25, 93 (2010).

To further illustrate the confusion and need for clarity, the Federal Model Jury Instructions recognize the Primary Duty Rule exists. According to these Model Jury Instructions, a defendant asserting the Primary Duty Rule must prove the following elements:

> The defendant has introduced evidence that the injury to the plaintiff was caused solely because the plaintiff failed to perform a duty which he or she had consciously assumed as a term of employment.
>
> If you find that the defendant has proven by a preponderance of the evidence all three elements of this defense as I shall describe them, then you should render a verdict in favor of the defendant.
>
> First, the defendant must prove that plaintiff's injury was caused by the plaintiff's failure to perform a duty which he or she had consciously assumed as a term of employment. This means that it was one of the plaintiff's principal duties as a member of the crew to protect against the existence of the unsafe condition which caused the accident.
>
> Second, the defendant must prove that the plaintiff was injured by a dangerous condition that the plaintiff either created or knew existed and, in the proper exercise of his or her employment duties, should have controlled or protected against.
>
> Third, the defendant must prove that the plaintiff's injury was caused by a knowing failure to carry out his or her responsibilities to

> protect against that unsafe condition. This means that the plaintiff must have known of the dangerous condition and failed to act to correct it after having a reasonable opportunity to do so, and that the accident was not caused simply by a momentary lapse of attention for his or her own safety.[61]

Despite this confirmation in the Model Rules, many circuit and district courts, including the Fifth Circuit in this case, have refused to apply the Primary Duty Rule.

II. UNDER THE PRIMARY DUTY RULE, A WRIT IS NECESSARY TO CLARIFY THE EVIDENCE NECESSARY FOR THE CAPTAIN TO SHOW HE IS FREE FROM FAULT.

With this Court's decision in *Tiller*, the Primary Duty Doctrine cannot simply be ignored. Instead, a writ is necessary to clarify the evidence necessary for the captain to show he is free from fault when, and if, the rule only applies to a captain.

First, under established maritime precedent, a seamen's employment is subject to different public policies than shoreside employment, and a more stringent review of key evidence is required. As stated by this Court in *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31 (1942):

> Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew as well as the safety of ship and cargo are

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61 5-90 *Modern Federal Jury Instructions: Civil* ¶ 90.03 (Matthew Bender).

> entrusted to the master's care. Every one and every thing depend on him.

Other cases make the same distinction requiring different approaches to key evidence.[62]

Despite these policy concerns, the district court and the Fifth Circuit found that Dunn's actions in not using the remote fuel shut-off were reasonable because there was a greater risk of collision presented by shutting down the vessel while it was pushing ahead two loaded chemical barges. This led to the use of *Fruit Industries* to show an *extremis* situation when none existed. This finding runs contrary to the logical sequence of events established by both Dunn and pilot Brown and then by deckhand Crespo.[63] This testimony also showed the vessel was light boat and without any barges.[64] No emergency existed to excuse the use of safety protocols,[65] which should have been the result even if the proper *extremis* analysis is applied.

Second, under policy decisions announced by the Supreme Court in *Southern S.S. Co.*, 316 U.S. at 32, medical evidence on fitness for duty must include the testimony from competent medical professionals. Specifically, if the *extremis* rule applies, the captain

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62 *In re Den Norske Amerikalinje A/S,* 276 F. Supp. 163 (N.D. Oh. 10/27/1967) (citing cases).

63 App.108a-110a (Pilot Brown testimony) (ROA.2077-2078).

64 App.131a-133a (Deckhand Crespo testimony) (ROA.3642-3643).

65 App.108a-110a (Pilot Brown testimony) (ROA.2077-2078). (An important point because it also meant that an assist boat would be readily available if you shut down the ST. RITA's engines.)

must prove he is free of fault.[66] He cannot without referring to 46 C.F.R. § 10.301, entitled "Medical and Physical Requirements." The statute requires competent medical professionals to establish fitness.[67]

By ignoring key evidence required by competent medical professionals, and relying on the Extremis Doctrine, the analysis did not weigh the significant public safety role carried by this position. Likewise, the Extremis Rule resulted in a bar to any comparative fault by the captain.

III. A WRIT IS NECESSARY TO RESOLVE WHETHER THE IN EXTREMIS DOCTRINE—PREVIOUSLY ONLY RECOGNIZED IN MARITIME COLLISIONS—MAY BE RELIED UPON TO BAR AN ANALYSIS OF THE PRIMARY DUTY DOCTRINE AND COMPARATIVE FAULT.

Thus, by using an unrecognized exception (*in extremis*) to established comparative fault principles, the writ must be granted to clarify what evidence is necessary to show a captain is free of fault and exonerated from the Primary Duty Rule. Further, clarity and guidance are necessary to resolve how to apply these different doctrines under established maritime law.

The result under a proper analysis should address Captain Dunn's comparative fault. On this specific issue, a writ is necessary to apply prior Supreme Court precedent under *Miles v. Apex Marine Corp.*[68] to these

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66 *City of Chicago* at 576.

67 *Id.*

68 498 U.S. 19 (1990).

competing doctrines, namely, the Primary Duty Rule, the In Extremis Rule, and comparative fault principles.

In *Miles*, this Court set forth the requirements for comparative fault. Through the application of pure comparative negligence, a seaman's contributory negligence reduces recovery in a Jones Act case.[69] The Fifth Circuit, by adopting the district court's opinion, has injected a new doctrine into the law of seaman's personal injury actions and duties owed under the Jones Act. Until now, *in extremis* only applied in collision law. In *Miles*, the court recognized a defendant's burdens of proving the contributory negligence of a plaintiff and that this negligence proximately caused the injuries sustained.[70] Further, a plaintiff would be barred from recovery for an accident caused solely by his own fault.[71]

The efficiency and fairness of both comparative negligence/fault legitimizes its utility. As one Fifth Circuit Panel previously observed, parties have traditionally relied upon it, recognizing its proper application as "integral to an essentially uniform and unitary body of law."[72] That same court noted:

> [C]omparative fault has long been the accepted risk-allocating principle under the maritime

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[69] 45 U.S.C.A. § 53.

[70] *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989) *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

[71] *Id.*

[72] *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1433 (5th Cir. 1983) (discussing maritime comparative fault in products liability context) (emphasis added).

> law, a conceptual body whose cardinal mark is uniformity. These values of uniformity, with their companion quality of predictability, a prized value in the extensive underwriting of marine risks, are best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit.[73]

IV. A WRIT IS NECESSARY TO PRESERVE THE UNIFORM RULE THAT A CAPTAIN'S ACTIONS SHOULD BE EVALUATED AS A SIMILARLY SITUATED PLAINTIFF, WHICH REQUIRES A REVIEW OF EMERGENCY RULES AND PROCEDURES.

The decision in this case conflicts with established precedent on comparative negligence. Specifically, a captain's actions must be evaluated with ordinary care under the circumstances, including his qualifications and position of trust. By using *in extremis* to bar any analysis of comparative fault, the primary goal of uniformity in admiralty and maritime law is thwarted. It is well understood that a seaman will not be found contributory negligent when the seaman complies with an order resulting in harm, notwithstanding his recognition of the danger and failure to consider safer alternatives.[74] The Fifth Circuit has now determined that a Jones Act captain will not be found contributorily negligent when he is injured in an emergency, irrespective of his conscious indifference to the very employment duties imposed upon him designed to prevent the injury in the precise circumstances which it was sustained,

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[73] *Id.* at 1428.

[74] *Simeonoff v. Hiner*, 249 F.3d 883 (9th Cir. 2001).

merely by virtue of the captain's acting *in extremis*. This completely distorts the realm of comparative negligence under the Jones Act.

The last time a circuit court considered *en banc* the duty of a Jones Act employer to his seaman/captain and the captain's duty to protect himself occurred over 20-years ago in *Gautreaux*. In that decision, the Fifth Circuit reversed any prior holdings requiring a "slight" duty by either the captain to protect himself and his Jones Act employer's duty to protect employees.[75]

In rejecting the "slight" duty of a Jones Act seaman to protect himself, the Fifth Circuit also emphasized that a captain must also "act with ordinary prudence under the circumstances."[76] The decision also rejected any contrary holdings as "repugnant" to these principles.[77] This decision has been followed by the circuit courts and federal district courts to establish a uniform principle for comparative fault.[78]

Finally, *Fruit Industries* should not be used to inject the *extremis doctrine* into the Jones Act. Presently, the general maritime law only recognizes the doctrine under collision avoidance.[79] Second, the burden of proof differs than *Gautreaux*, leaving the plaintiff responsible for proving he is free from fault. Finally, the

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75 107 F.3d at 339.

76 *Id.* at 339.

77 *Id.* at 339.

78 *Churchwell*, 444 F.3d at 908; *Thibodeaux*, 300 F.Supp.3d at 802-02; *Miles*, 498 U.S. at 24.

79 *City of Chicago*, 375 F.3d at 566-67.

Extremis Doctrine does not prevent a finding of liability.[80] Instead, it allows the court more leniency to evaluate a captain's collision avoidance actions.[81] This analysis, even if a new exception is recognized, was not applied.[82]

With the Primary Duty Doctrine raised as a defense, the factual circumstances in this case required an analysis of the litany of safety rules that were covered and the policies that underpinned why Marquette had those rules in place.[83] Further, the Primary Duty Rule could apply because Dunn admitted his lack of situational awareness was precisely what caused his injury.[84] Dunn's other actions related to the fuel leak should also trigger more detailed findings on whether the Primary Duty Rule applies, especially in view of the new *extremis* exception.[85]

Using *Fruit Industries*, the Panel decision upsets the uniformity maintained under *Gautreaux* and the hundreds of decisions citing to it. By using the *extremis* exception, there is no discussion of the safety rules violated by the captain to protect himself under the circumstances. There is no comparison between

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80 *Id.*

81 *Id.*

82 *Id.*

83 ROA.514.

84 App.82a-83a (Dunn testimony) (ROA.724).

85 App.91a-92a (Dunn testimony) (ROA.732), App.81a-84a (ROA. 723-725), App.74a-76a (ROA.716-717) (showing use of personal protection not followed). Crespo testimony (if we took time to assess, accident would not occur). App.152a-153a (ROA.3666).

the captain's conduct and that of the other crewmembers under the same situation. In *Gautreaux*, less evidence resulted in a reversal on the comparative fault decision in the district court after *en banc* review. Even under the existing *extremis* law in maritime cases involving vessels and the inland rules, the party relying on the Extremis Doctrine must prove he is completely free from fault prior to the emergency occurrence.[86]

V. A WRIT IS NECESSARY TO ADDRESS POLICY CONCERNS CREATED BY A CAPTAIN'S EXCLUSIVE MANAGEMENT AND CONTROL OVER A VESSEL, INCLUDING CAREFUL CONSIDERATION OF HIS PHYSICIAL AND MENTAL FITNESS FOR DUTY.

As a licensed captain, Dunn held significant responsibilities for the safety of the crew, the vessel, and the public who encountered the vessel. His license to serve in this capacity was regulated by the United States Coast Guard.[87] The USCG mandates standards for drug and alcohol usage by vessel captains, and the uncontroverted testimony at trial was that the prescription medication Ativan was prohibited by the USCG.[88] It was also undisputed that Dunn had been prescribed Ativan after taking two voluntary sabbaticals due to panic attacks that he sustained while trying to work as a captain aboard other towing vessels.[89] His

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86 *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 6 (1st Cir.1990).

87 *Southern S.S. Co.*, 316 U.S. at 32; 46 C.F.R. § 10.301, Medical and Physical Requirements.

88 App.80a-81a (Dunn testimony) (ROA.722).

89 App.78a-82a (Dunn testimony) (ROA.720-723).

incident aboard the ST. RITA occurred on his first attempt to go back aboard a towing vessel as a captain.[90]

The evidence was also undisputed that Dunn's treating physician, Dr. Rachel Wissner, had documented a lifelong issue with panic attacks, and that once she prescribed Ativan for Dunn, he reported back to her that was the only medication which was working for him.[91]

Despite this evidence, the district court and the Fifth Circuit found that Dunn was able to prove a reasonable expectation of uninterrupted future work as a licensed pilot but for his hip injury.[92] In reaching this conclusion, the courts did not consider the important public safety role of a vessel captain; the licensing regime of the USCG; Dunn's own testimony as to his voluntary sabbaticals and why they were needed; the reality that this incident occurred on Dunn's first attempt to return to a vessel; or, the testimony of his treating physician about his prescription for Ativan and how that appeared to be the only medication which was effective. Against all of these factors, the district court

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[90] App.81a-82a (Dunn testimony) (ROA.723).

[91] App.79a-81a (Dunn testimony) (ROA.721-722); ROA.2052-2053, 2059-2061 (Dr. Wissner deposition).

[92] The finding is also contrary to existing law. He must prove that his lost income occurred by reason of the injury sustained from the accident. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 664 F.2d 36, 39 (5th Cir. Unit A 1981) (allowing plaintiff seaman no award for lost wages after his full recovery from injury), rev'd on other grounds, 458 U.S. 564, 73 L.Ed.2d 973, 102 S.Ct. 3245 (1982). In the present case, plaintiff failed to demonstrate that his injuries caused any reduction in his earnings because he was not fit for duty as a captain.

and the Fifth Circuit found the plaintiff here was able to meet his burden of proof solely with testimony that he would not use Ativan while working as a pilot.

Petitioner would respectfully submit that the overwhelming public policy on the fitness of a licensed captain must require a trier of fact to carefully evaluate all of the relevant factors to maintain that particular role aboard a vessel. A writ is necessary to clarify the interplay between these policy concerns and the evidence necessary to establish a captain's fitness for duty. Simple reliance on the testimony of the individual who is himself seeking to recover future wage losses cannot suffice to meet this burden.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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