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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (NOVEMBER 11, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEVIN BARRIOS; ET AL.,

Plaintiffs,

versus

CENTAUR, L.L.C.,

Defendant
Cross Defendant
Appellee,

versus

RIVER VENTURES, L.L.C.,

Defendant
Cross Claimant
Appellant.

No. 18-31203

Appeals from the United States District Court
for the Eastern District of Louisiana

Before: JONES, SMITH,
and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Devin Barrios—an employee of Centaur, L.L.C. ("Centaur")—was injured while offloading a generator from a crew boat to a barge. The crew boat was owned and operated by River Ventures, L.L.C. ("River Ventures"); the barge was leased by Centaur. Barrios sued River Ventures and Centaur for vessel negligence under general maritime law and the Jones Act. River Ventures crossclaimed against Centaur for contractual indemnity. The district court granted summary judgment to Centaur, and River Ventures appeals. We reverse and remand.

I.

Before Barrios's accident, non-party United Bulk Terminals Davant, LLC ("UBT"), executed a Master Service Contract (the "MSC") with Centaur, a small marine construction company. The MSC added Centaur to UBT's approved vendor list for work at its dock facility adjoining the Mississippi River (the "Davant Facility").

The MSC contained two provisions relevant to this appeal. The first imposed on Centaur an obligation to indemnify UBT and its contractors:

> CONTRACTOR SHALL RELEASE, DEFEND, INDEMNIFY AND HOLD UBT GROUP (DEFINED AS UBT AND UBT'S OTHER CONTRACTORS AND SUBCONTRACTORS OF ANY TIER . . .) HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS . . . BROUGHT BY ANY PERSON, PARTY OR ENTITY IN RESPECT OF PERSONAL OR BODILY INJURY TO, SICK-

> NESS, DISEASE OR DEATH OF ANY MEMBER OF CONTRACTOR GROUP (DEFINED AS CONTRACTOR GROUP . . . REGARDLESS OF CAUSE OR FAULT, AND EVEN IF CAUSED IN WHOLE OR IN PART BY THE SOLE, JOINT OR CONCURRENT NEGLIGENCE OR FAULT OF ANY MEMBERS OF THE UBT GROUP OR THE UNSEAWORTHINESS OF ANY VESSELS OWNED, OPERATED OR OTHERWISE UNDER THE CONTROL OF ANY MEMBER OF UBT GROUP.

The second required Centaur to obtain insurance covering those same parties:

> Prior to Contractor commencing Work hereunder for UBT, Contractor shall, but only to the extent of the liabilities assumed by Contractor in this Agreement, obtain from each of its insurers a waiver of subrogation in favor of each of the "UBT Group" . . . and, with the exception of Workers' Compensation Coverage . . . and the Hull Insurance . . . name each of the UBT Group as additional insured to each insurance policy . . . , but only to the extent of the liabilities assumed by Contractor in this Agreement. . . . Contractor shall ensure that any endorsement naming the UBT Group as additional insureds shall not exclude from coverage the sole negligence of the insureds. Contractor shall be responsible for payment of all deductibles, premiums, retentions and payment for all expenditures incurred under any sue and labor provision.

The MSC governed future project-specific work orders between the parties.

Centaur and UBT executed several work orders for projects at the Davant Facility. One—for which Centaur submitted a proposal in October 2015—required installation of a concrete containment rail at one of the facility's docks. The dock was principally used to load and offload ships carrying "dry bulk materials," including coal and petroleum coke. The containment rail was necessary to prevent those materials from spilling both onto the dock and into the river.

Centaur's proposal indicated that, at an increased cost, both a barge and a tug boat would be required to complete the project. UBT accepted the proposal and issued a purchase order in November 2015. That purchase order and the MSC, in tandem, formed the contract at issue (the "Dock Contract").

To perform the work, Centaur chartered barge DB-582, which was equipped with a crane. Because DB-582 was a "dumb" barge that couldn't self-navigate, it was moved up and down the river using a tugboat and winch. The Centaur crew used the barge to perform some construction work on the dock, including "drilling holes, cutting rebar, and pouring forms." It also used the barge to store items, pack and unpack tools, hold safety meetings, take breaks, and eat lunch.

Because the dock was most easily accessed by boat, UBT contracted with River Ventures for a crewed vessel—the M/V TROOPER—to transport Centaur's employees from the parking area to their worksite. Centaur also used the crew boat to ferry tools and equipment in addition to its employees.

On the day of the incident, Barrios and other Centaur employees were transporting a portable generator on the crew boat. While attempting to offload the generator, the M/V TROOPER began to separate from DB-582. That movement caused Barrios to fall into the river, where the generator hit him in the head, severely injuring him.

Barrios sued River Ventures and Centaur, alleging, *inter alia*, vessel negligence under general maritime law and the Jones Act.[1] River Ventures—averring that it was a third-party beneficiary of the Dock Contract—cross-claimed against Centaur for contractual indemnity and additional assured status under its insurance policies.

Centaur moved for summary judgment on River Ventures's crossclaim, averring that the Dock Contract was nonmaritime and that its indemnity provision was therefore void under Louisiana law. To determine whether the contract was maritime, the court considered whether "(1) the work Centaur was performing for UBT involve[d] maritime commerce, (2) it involved work from a vessel, and (3) the contract provided or the parties expected that a vessel would play a substantial role in completing the contract."

Applying that test, the court held that the Dock Contract was a "land-based construction contract" governed by Louisiana law. It granted summary judgment because the Louisiana Construction Anti-Indemnity Statute ("LCAIS") "applie[d] to prohibit the indemnity and insurance provisions."

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[1] The Jones Act, 46 U.S.C. § 30104, provides a cause of action for seamen against their employer if they are "injured in the course of employment."

River Ventures filed a notice of interlocutory appeal challenging the summary judgment, averring that this court had jurisdiction under 28 U.S.C. § 1292(a)(3) because its claims against Centaur arose in an "admiralty case" and determined the "rights and liabilities" between the parties. Centaur moved to dismiss that appeal for lack of jurisdiction, maintaining that the appeal "should not go forward until a Final Judgment is entered by the District Court." A panel of this court determined that Centaur's motion should be carried with the case.

While the interlocutory appeal was pending, Barrios's underlying tort claims proceeded to a bench trial. The court ruled for Barrios, holding that River Ventures was liable and that Centaur wasn't liable because Barrios wasn't a Jones Act seaman. The court then entered final judgment.

River Ventures appealed, reasserting its intent to seek review of the summary judgment. It also filed a notice of appeal of the bench-trial findings, but it voluntarily dismissed that appeal after settling with Barrios. River Ventures's crossclaim against Centaur is the only claim remaining on appeal.

II.

"[W]e have a constitutional obligation to satisfy ourselves that subject matter jurisdiction is proper before we engage the merits of an appeal." *Ziegler v. Champion Mortg. Co.*, 913 F.2d 228, 229 (5th Cir. 1990). Therefore, we first consider Centaur's motion to dismiss the appeal.

We need not decide, however, whether we have jurisdiction under § 1292(a)(3). That is because after

final judgment was entered, River Ventures filed a renewed notice of appeal related to its indemnity and insurance claims. Because we have jurisdiction over River Ventures's appeal under 28 U.S.C. § 1291, Centaur's motion to dismiss for lack of jurisdiction is denied as moot.

III.

The indemnity dispute presents issues with which this court is familiar. It boils down to what law governs. If federal maritime law controls, then the Dock Contract's indemnity provision is enforceable. *See Hoda v. Rowan Cos., Inc.*, 419 F.3d 379, 380 (5th Cir. 2005). If Louisiana law applies, then the LCAIS voids the indemnity provision as against public policy. *See* La. Stat. Ann. § 9:2780.1. So the question is whether the Dock Contract is maritime. But before we can resolve that, we must identify the proper test for making that determination, a task that has vexed this court for decades.

A.

From 1990 to 2018, we applied the six-factor test announced in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990), to determine whether a contract was maritime:

> 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker?

> and 6) what work was the injured worker actually doing at the time of injury?

Though *Davis & Sons* was intended to provide clear criteria for courts to apply, the test proved unwieldy in practice, with "final result[s] [often] turn[ing] on a minute parsing of the facts." *Hoda*, 419 F.3d at 380.

Fourteen years after *Davis & Sons*, the Supreme Court erected a guidepost in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004). The Court considered whether a money-damages claim arising from a train derailment fell within its admiralty jurisdiction. The cargo destroyed in the derailment was completing the second, land-based leg of its journey from Australia to Alabama. The first leg had transported the cargo by boat from Australia to Georgia. The two legs of the trip had separate but co-extensive bills of lading.

To determine whether the bills of lading were maritime, the Court noted that it could not merely "look to whether a ship or other vessel was involved in the dispute" or "to the place of the contract's formation or performance." *Id.* at 23-24. Geography couldn't be controlling because "the shore [was] now an artificial place to draw a line." *Id.* at 25. Instead, "the answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Id.* at 24 (cleaned up).[2] That approach vindicated the fundamental interest undergirding maritime jurisdiction: "the protection of maritime commerce." *Id.* at 25.

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[2] The Court rejected the "spatial approach," on which several of the factors in *Davis & Sons* were based. *Kirby*, 543 U.S. at 23-24.

Applying those principles, the Court held that the bills of lading were maritime "because their primary objective [was] to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States." *Id.* at 24 (emphasis added). "[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract." *Id.* at 27 (emphasis added). That some of the performance was land-based did "not alter the essentially maritime nature of the contracts." *Id.* at 24.

In *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir.) (en banc), *cert. denied*, 138 S. Ct. 2033 (2018), we sought to remedy the infirmities of *Davis & Sons* and harmonize our law with *Kirby*. We considered whether a "work order . . . to perform 'flow-back' services on a gas well in navigable waters" was a maritime contract. *Id.* at 570. The work didn't require vessels, and neither party expected to use them. A crane barge was engaged only after the workers "determined that some heavy equipment was needed to complete the job." *Id.* A worker was injured when he was struck by the crane.

In a unanimous opinion, we adopted a two-question test—centering the inquiry "on the contract and the expectations of the parties," *id.* at 576—to determine whether a contract was maritime:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

Id. That standard jettisoned the irrelevant prongs of *Davis & Sons* and made clear that "contract rather than tort principles" control when determining whether a contract is maritime.[3]

Applying the new test, we held that the contract was nonmaritime because "[t]he use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed." *Id.* at 577. The crew had involved a vessel only after it had "encountered an unexpected problem that required a vessel and a crane to lift equipment needed to resolve [it]." *Id.* Even though the vessel's involvement was important, it wasn't substantial because its use didn't comport with the parties' expectations.

Since *Doiron*, we've had only one occasion to apply its standard: *Crescent Energy Services, L.L.C. v. Carrizo Oil & Gas, Inc.*, 896 F.3d 350 (5th Cir.), *cert. denied*, 139 S. Ct. 642 (2018). There, the contract involved the plugging and abandonment of three offshore oil wells on small fixed platforms. *Id.* at 352. About half the job involved "wireline work."[4] To

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[3] *Doiron*, 879 F.3d at 576-77. When announcing the test, we recognized that we dealt "only with determining the maritime or nonmaritime nature of contracts involving the exploration, drilling, and production of oil and gas." *Id.* at 577 n.52. We noted, however, that we expected the standard to be "helpful in determining whether a [non-oil-and-gas] contract is maritime" if that "activity . . . involves maritime commerce and work from a vessel." *Id.*

[4] *Crescent*, 896 F.3d at 361. "A 'wireline' is a continuous cable used to perform various subsurface functions in a well, including the lowering and raising of various tools, instruments, and other devices." *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 371 (5th Cir. 2001).

complete the task, Crescent charted three vessels: a crane barge, a tug boat, and a cargo barge. A Crescent employee's leg was severely injured when a piece of pipe struck him while he was sitting on one of the fixed platforms.

Crescent's insurers, attempting to limit *Doiron*'s reach, made two contentions. First, the insurers posited —relying primarily on circuit caselaw stating that work performed on fixed offshore platforms is non-maritime—that *Doiron*'s first prong wasn't satisfied because "the plugging and abandoning work did not occur on 'navigable waters.'" *Id.* at 356. Second, and relatedly, they averred "that *Doiron* must be read in conjunction with other law," specifically precedents classifying activities as either maritime or not. *Id.* at 357.

We rejected both theories, affirming that, for analyzing whether a contract was maritime, "*Doiron* now control[led] that endeavor." *Id.* at 358. Because the wells at issue "were located within the territorial inland waters of Louisiana and . . . the vessels involved . . . were able to navigate to them," the contract "was to facilitate the drilling or production of oil and gas on navigable waters." *Id.* at 357. And because the "contract anticipated the constant and substantial use of multiple vessels," it was maritime. *Id.* at 361.

Outside of the instant case, only one district court that we know of has applied *Doiron* to a non-oil-and-gas contract. In *Lightering LLC v. Teichman Group, LLC*, 328 F. Supp. 3d 625, 627-29 (S.D. Tex. 2018), the court considered whether a contract for wharfage, storage, and other dockside services was maritime. In determining how to apply *Doiron* outside the oil-and-gas sector, the court first observed that "*Kirby*

state[d] that for a contract to be maritime, its principal objective must be maritime commerce." *Id.* at 636. *Doiron*, the court inferred, "applie[d] *Kirby* to interpret a 'principal objective.'" *Id.*

Based on that, the court determined that *Doiron*'s first factor—*i.e.*, "is the activity at issue oil and gas?"—was a substitute for *Kirby*'s broader question whether a contract involved maritime commerce and work from a vessel. *Id.* "Under *Doiron* and *Kirby*, determining whether a contract is maritime requires three steps: (1) [T]he activity must be maritime commerce; (2) the activity must involve work from a vessel; and (3) the contract must provide or the parties must expect that a vessel will play a substantial role in completing the contract." *Id.* at 637.

Though the analysis is seemingly clear-cut, applying that test—and especially the first prong—was far from straightforward. As the court recognized, the caselaw doesn't clearly define the boundaries of "maritime commerce." *Id.* As a result, "most courts resort to a case-by-case approach, relying heavily on precedent." *Id.* Utilizing that precedent-focused method, the court determined that the contract's wharfage and dockside services were subsumed within a wide range of land-based activities that facilitate maritime commerce but that aren't, themselves, maritime commerce. *See id.* at 637-38. As a result, the contract was "[nonmaritime] in nature and character."[5]

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5 *Lightering*, 328 F. Supp. 3d at 643. Therefore, the court dismissed the case for want of 28 U.S.C. § 1333 admiralty jurisdiction. *Id.*

B.

The parties agree that *Kirby*, *Doiron*, and their progeny govern, but they read those authorities differently.[6] Their primary disagreement centers on how to apply *Doiron*'s first prong outside the oil-and-gas context. River Ventures avers that "this Court should apply a test that the contract be performed or facilitate operations on navigable waters and that the contract provide or the parties expect that a vessel will play a substantial role in the completion of the contract."[7]

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[6] That isn't unreasonable: "Our cases do not draw clean lines between maritime and nonmaritime contracts," *Kirby*, 543 U.S. at 23, and, indeed, they "have long been confusing and difficult to apply," *Doiron*, 879 F.3d at 571.

[7] Centaur posits that River Ventures is estopped from asserting the test for which it now advocates because it "initially agreed with the test applied by the district court." Centaur points to River Ventures's opposition to summary judgment, in which it stated that "as applied to this case, critical determinations for this Court to make are: (1) whether the work Centaur was performing for UBT involved maritime commerce and (2) whether it involved substantial work from a vessel." Because River Ventures stated that "maritime commerce" was an important consideration, Centaur suggests that it cannot be allowed to propose a new test eliminating that requirement on appeal.

Judicial estoppel is an equitable doctrine that prevents a party from gaining an advantage by asserting contradictory positions in different proceedings. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Judicial estoppel has two elements: "First, the estopped party's position must be clearly inconsistent with its previous one, and second, that party must have convinced the court to accept that previous position." *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (quotation marks omitted). "[T]he rule is intended to prevent improper use of judicial machinery" and is therefore within the court's discretion to apply. *Maine*, 532 U.S. at 750 (quotation marks omitted).

Centaur counters that *Lightering* sets forth the proper test. The district court accepted Centaur's position and applied *Lightering*.

River Ventures has the better of the argument: *Doiron* should apply essentially as written. For non-oil-and-gas contracts, *Doiron* would ask whether (1) the contract is "one to provide services to facilitate [activity] on navigable waters," and (2) if so, whether "the contract provide[s] or . . . the parties expect that a vessel will play a substantial role in the completion of the contract." *Doiron*, 879 F.3d at 576. That test is preferable for two reasons: (1) *Doiron* was meant to streamline the inquiry regarding whether a contract is maritime; and (2) *Doiron*'s rule, even applied to non-oil-and-gas contracts, is consistent with *Kirby*.

In *Doiron*, the en banc court clarified that its test was intended to simplify the is-this-contract-maritime inquiry, not complicate it. To do that, we abrogated a significant portion of *Davis & Sons*'s six-factor standard. Chief among those factors that *Doiron* jettisoned was the second, which required courts "to parse the precise facts related to the services performed under the contract and determine whether those services were inherently maritime." *Id.* at 573. That was true even for mixed-services contracts

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Contrary to Centaur's assertion, neither prong of *Gabarick*'s test is satisfied. First, River Ventures advances essentially the same position on appeal as it did in the district court: that *Doiron*'s two-prong test applied. Furthermore, the quote on which Centaur relies must be considered in its appropriate context. Only a few pages earlier in its motion, River Ventures advanced that *Doiron* established a two-part test, and it quoted that test. Second, the district court refused to apply *Doiron*'s two-part test and instead applied *Lightering*.

where none of the services were inherently maritime. *Id.*

That inquiry, *Doiron* held, was irrelevant to whether a contract was maritime because it didn't focus on whether the contract required "substantial work to be performed from a vessel." *Id.* at 573, 576-77. To the extent that the *Davis & Sons* factors remained relevant, they were so only as they helped to explain the "scope of the contract" or "the extent to which the parties expect[ed] vessels to be involved in the work." *Id.* at 577. *Doiron*'s method, in contrast to *Davis & Sons*, ensures that courts aren't determining whether some "service work has a more or less salty flavor than other service work when neither type is inherently salty." *Id.*

Centaur's position would turn *Doiron* on its head and effectively return courts to *Davis & Sons*'s precedent-laden trudge. *Lightering* recognized as much.[8] But *Doiron* and *Crescent* made clear, and for good reason, that we should be out of that business. "[R]egardless of what other Fifth Circuit caselaw there may be, nothing in such caselaw detracts from the clarity of our 2018 en banc decision in *Doiron*."[9]

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[8] *See Lightering*, 328 F. Supp. 3d at 637 ("Though the rule from *Kirby* seems simple in theory, its application proves to be complicated. Thus, most courts resort to a case-by-case approach, relying heavily on precedent." (cleaned up)).

[9] *Crescent*, 896 F.3d at 359. *Crescent*'s rejection of precedent-based arguments was critically important to its outcome because this court's precedent had long held that wireline work was non-maritime even when performed from a vessel. *See*, *e.g.*, *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 398 (5th Cir. 1991); *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 956 (5th Cir. 1988). Moreover, *Lightering*'s analysis didn't consider *Crescent*.

Centaur contends that applying *Doiron* outside the oil-and-gas context would run afoul of *Kirby*'s command that the "principal objective" of the contract must be maritime commerce. That is so because *Doiron* established its two-part test only after it "emphasiz[ed] the importance of first determining whether the activity is 'commercial maritime activity.'"[10] *Doiron*'s first prong, Centaur posits, merely provides "a short-cut for deciding whether a contract's principal objective is maritime commerce, but only for oil and gas contracts." "Outside the oil and gas context, the test first requires the court to ask whether the activity involves maritime commerce and work from a vessel." *Lightering*, 328 F. Supp. 3d at 637 (quotation marks omitted). But Centaur's position, though somewhat supported by language in the caselaw, doesn't adequately grapple with *Kirby*, *Doiron*, or *Crescent*.

In *Doiron*, 879 F.3d at 576, we found "strong support in *Kirby*" for our two-prong test. Several passages provide those buoys. First, *Kirby* states that "[t]o ascertain whether a contract is a maritime one, . . . the answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Kirby*, 543 U.S. at 23-24 (cleaned up). Next, *Kirby* instructs that "[m]aritime commerce has evolved . . . and is often inseparable from some land-based obligations." *Id.* at 25. And finally, *Kirby* declares

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That is understandable, given that *Lightering* was issued only two days later.

[10] Centaur seizes on one paragraph in *Doiron*, 879 F.3d at 575, which begins "[o]ur cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity."

that "[c]onceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract."[11]

Those statements are entirely consistent with *Doiron*'s standard as applied to any mixed-services contract. *Doiron*'s first prong—though requiring some nexus to the traditional maritime predicate of activity on navigable waters[12]—doesn't exclude non-sea-based obligations. And *Doiron*'s second prong clarifies that cursory or unexpected vessel involvement, even if important, isn't enough; the involvement must be substantial. In that sense, both prongs of *Doiron* stand in for *Kirby*'s requirement that the "principal objective" of the contract be maritime commerce.[13]

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[11] *Kirby*, 543 U.S. at 27 (emphasis added). The *Doiron* en banc court found particular support for its rule in that statement. *See Doiron*, 879 F.3d at 576.

[12] "In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water." 1 BENEDICT ON ADMIRALTY § 182 (Joshua S. Force & Steven F. Friedell eds., 2019); *accord Gulf Coast Shell & Aggregate LP v. Newlin*, 623 F.3d 235, 240 (5th Cir. 2010); *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992).

[13] For that reason, applying Doiron to non-oil-and-gas contracts won't cause the sea change that Centaur fears. For example, contracts for the sale of vessels would presumably remain non-maritime. *See*, *e.g.*, *Newlin*, 623 F.3d at 240; *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01*, 625 F.2d 44, 47 (5th Cir. 1980). As would contracts to build ships when the construction doesn't require vessels. *See*, *e.g.*, *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986);

In short, *Doiron*'s two-part test applies as written to all mixed-services contracts. To be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract.

IV.

Having fashioned the appropriate test—and because "the interpretation of a maritime contract is a question of law"—we now apply it. *See Int'l Marine, L.L.C. v. Integrity Fisheries Inc.*, 860 F.3d 754, 759 (5th Cir. 2017).

1.

The Dock Contract easily satisfies *Doiron*'s first prong. It called for Centaur to install a concrete containment rail at one of the Davant Facility's docks. That dock extended into the Mississippi River, a waterway on which both DB-582 and the M/V TROOPER were navigated. The dock was used to load and offload ships carrying dry bulk materials. And the containment rail was meant to prevent those materials—principally coal and petroleum coke—from spilling onto the dock or into the river, which would result in adverse effects to both commerce and the environment. Collectively, those facts establish that the Dock Contract required services to be performed to facilitate the loading, offloading, and transportation of coal and petroleum coke via vessels on navigable

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Thames Towboat Co. v. The Schooner "Francis McDonald", 254 U.S. 242, 243 (1920); *Jones*, 625 F.2d at 47. So too would contracts for wharfage that don't relate to a specific vessel. *See*, *e.g.*, *Lightering*, 328 F. Supp. 3d at 638 (collecting cases).

waters. That some services were also performed on the dock, which was affixed to the land, isn't dispositive.[14]

2.

When considering whether there was substantial involvement of a vessel, "[w]e must remember that the contracting parties' expectations are central." *Crescent*, 896 F.3d at 359. "When work is performed in part on a vessel and in part on a platform or on land, we should consider not only time spent on the vessel but also the relative importance and value of the vessel-based work to completing the contract." *Doiron*, 879 F.3d at 576 n.47. *Doiron* suggests that a rule of thumb similar to the thirty-percent guideline in Jones Act cases might be useful. *Id.*[15] But that "would not include transportation to and from the job site."[16] Even significant vessel involvement isn't enough if that involvement was unexpected. *Crescent*, 896 F.3d at 359-60.

Based on that standard, *Doiron*'s second prong is likewise satisfied. The Dock Contract makes clear that the parties expected DB-582 to play a significant role in the completion of the work. Centaur's project

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[14] *See Kirby*, 543 U.S. at 27 ("Its character as a maritime contract is not defeated simply because it also provides for some land carriage.").

[15] But that "figure . . . serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995).

[16] *Doiron*, 879 F.3d at 576 n.47. River Ventures's contentions regarding the involvement of its crew boat to reach the worksite are irrelevant.

proposal indicated that the "[p]rice is significantly higher due to having [a] crane barge on site to mix the concrete and pour it for the concrete containment rail." It also stated that a "[t]ug boat will . . . need to be present to shift the barge as needed." Far from being "an insubstantial part of the job and not work the parties expected to be performed," *Doiron*, 879 F.3d at 577, the proposal shows that the parties expected the barge to play a critically important role.

Moreover, Taylor Roy, Centaur's lead project manager, admitted that "at the end of the day, Centaur could not have done the job properly without [the] crane barge." That differs materially from *Doiron*, where the vessel was used only after the "crew encountered an unexpected problem." *Id.* Instead, like the situation in *Crescent*, the parties here recognized that DB-582 provided a necessary work platform, an essential storage space for equipment and tools, and a flexible area for other endeavors related to the construction work. *See Crescent*, 896 F.3d at 361.

The district court's findings of fact show that the parties' expectations about the use of the barge were borne out. Just as the proposal indicated, Centaur's crew used DB-582 to perform construction work for the containment rail, including "drilling holes, cutting rebar, and pouring forms." The crew also used the barge for several activities related to the construction, including storing and packing tools, holding safety meetings, taking breaks, and eating lunch. That

Centaur's workers may have worked on the dock a majority of the time doesn't alter that conclusion.[17]

* * * *

In sum, the district court misapplied *Doiron* and erroneously concluded that the Dock Contract was nonmaritime. Because federal maritime law applies, the LCAIS does not. The summary judgment is REVERSED and REMANDED. We place no limitation on the matters that the district court may consider, as appropriate and in its discretion, on remand.

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[17] *See Crescent*, 896 F.3d at 359 ("*Doiron* did not hold that to be a maritime contract, the parties must have contemplated that a vessel will be used for a majority of the work.").

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF LOUISIANA (FEBRUARY 5, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DEVIN BARRIOS ET AL

v.

CENTAUR, LLC ET AL

Civil Action

No. 17-585

Section "H"(3)

Before: Jane Triche MILAZZO,
United States District Judge.

JUDGMENT

Considering the evidence admitted at trial, the arguments of counsel and the Court's findings of fact and conclusions of law (Doc. 181);

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs are entitled to judgment against River Ventures, LLC on their 33:905(b) claim in the amount of $3,308,094.55, plus prejudgment interest at a rate of 4% per annum on all past damages and post judgment interest at a rate of 4% per annum on all future damages until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Centaur, LLC is entitled to judgment in its favor, dismissing with prejudice Plaintiff's claims against it.

Signed in New Orleans, Louisiana this 5th day of February, 2019.

/s/ Jane Triche Milazzo
United States District Judge

FINDINGS OF FACT AND CONCLUSION OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF LOUISIANA (FEBRUARY 1, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DEVIN BARRIOS ET AL.,

versus

CENTAUR, LLC ET AL.

Civil Action

No: 17-585

Section "H"

Before: Jane Triche MILAZZO,
United States District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Devin Barrios and his wife, Megan Barrios, bring claims for damages he sustained in an accident that occurred while he was working a construction job for Centaur, LLC. Plaintiffs bring claims under the Jones Act and general maritime law against Devin Barrios's employer, Centaur, LLC. Plaintiffs also bring claims for negligence under the Longshore and Harbor Worker's Compensation Act against Centaur and River Ventures, LLC. This matter went

to trial November 13 through 19, 2018. Having considered the evidence admitted at trial and the arguments of counsel, this Court makes the following findings of fact and conclusions of law. To the extent a finding of fact constitutes a conclusion of law, and vice versa, the Court adopts it as such.

FINDINGS OF FACT

1. At all material times, Plaintiff Devin Barrios was employed by Centaur, LLC ("Centaur") and was acting in the course and scope of his employment when he was injured on January 25, 2016.

2. Centaur, a marine construction company, was hired by United Bulk Terminals Davant, LLC ("UBT") to build a concrete containment wall around the edge of its dock facility.

3. Barrios worked as a member of Centaur's construction crew performing manual labor.

4. Centaur leased a barge to assist in the containment wall project. The barge moved by winch along the dock to assist in the project.

5. The barge was a vessel in navigation. The mission of the barge was to assist Centaur in building the containment wall.

6. The Court found the testimony of Brandon Lavergne to be unreliable.

7. The Centaur crew stored tools for the containment wall project on the barge. They held safety meetings, took breaks, and ate lunch aboard the barge. They also unpacked and packed up tools aboard the barge.

8. The Centaur crew occasionally performed tasks like drilling holes, cutting rebar, and pouring forms aboard the barge, but the majority of the dock construction work was performed on the dock.

9. Barrios spent less than 30% of his time on the barge in service of its mission.

10. Barrios is not a seaman.

11. UBT hired River Ventures, LLC ("River Ventures") to provide a crew boat, the M/V TROOPER, to ferry Centaur workers and occasionally their equipment from the parking lot to the area of the dock upon which they were working.

12. River Ventures is the owner/operator of the M/V TROOPER.

13. John Hanna is the owner/operator of River Ventures.

14. John Ochello was the Captain of the M/V TROOPER and an employee of River Ventures. Captain Ochello remained in operational control of the M/V TROOPER at all times.

15. Barrios was a passenger on the M/V TROOPER, not a member of its crew.

16. On the morning of January 25, 2016, Plaintiff and other members of the Centaur crew rode from the parking lot to the barge on the M/V TROOPER. They loaded a wheeled, portable generator from a crew member's truck in the parking lot on to the M/V TROOPER for transport to the barge.

17. Plaintiff was injured while transferring the portable generator from the M/V TROOPER to the barge.

18. The generator weighed more than 150 pounds.

19. At the time of the injury, the Centaur crew transferred the generator in a manner that had been done several times before.

20. While transferring the generator with the assistance of another crewmember, Plaintiff placed one foot on the crew boat and one foot on the rub rail of the barge. After the generator was lifted from the crew boat and placed onto the barge, the crew boat and barge began to separate from each other, and Plaintiff fell into the water below. As he was falling, he grabbed onto the generator, which caused the generator to fall into the water and strike Plaintiff on the head.

21. Plaintiff fell into freezing cold water and had to swim out from underneath the barge before being rescued by the M/V TROOPER further down the river.

22. The rope tied to the life ring aboard the M/V TROOPER was tangled around the life ring. A member of the Centaur crew threw the ring and its rope to Plaintiff in the water but could not hold onto the end of the rope because it was tangled.

23. Plaintiff's fall into the water was a harrowing experience. He testified that he "swam toward the light" but did not know to which light he was swimming or, apparently, whether he was dead or alive.

24. Captain Ochello did not moor the crew boat to the barge before allowing the Centaur crew to perform the transfer of the generator.

25. Instead of mooring the crew boat, Captain Ochello used the "twin screwing" method wherein he attempted to hold the vessel against the barge using the thrust of the engines.

26. This Court found the testimony of Robert Borison, an expert in Marine Safety, and Patrick Cuty, an expert in Vessel Operations, Root Cause Analysis, & Transfer of People and Equipment to and from Vessels, credible that tying off the crew boat to the barge would have prevented the separation from occurring.

27. Captain Ochello was negligent for failing to tie the M/V TROOPER to the barge during the transfer and/or for failing to provide mooring lines on the M/V TROOPER.

28. There were sufficient bits available on the barge to tie up the M/V TROOPER.

29. Jerry Hanna testified that River Ventures had no policy regarding tying off its vessels during the transfer of equipment. He testified that he was aware that Captain Ochello allowed pieces of equipment to be offloaded from the M/V TROOPER without first tying off the vessel.

30. The Court found credible the testimony of Borison and Cuty that Plaintiff could not have pushed the crew boat away from the barge as a result of his side straddle. Plaintiff could not have provided enough force to move the vessel if Captain Ochello was holding the vessel steady with his engines.

31. Captain Ochello was negligent in failing to hold the crew boat steady against the barge as the generator was being transferred.

32. Captain Ochello's negligence was the sole cause of the accident in question.

33. The Centaur crew's use of only two people to move the portable generator from the M/V Trooper to

the barge by hand was awkward and ill advised, however, this was not the cause of the accident or injury.

34. The failure to perform a job safety analysis prior to moving the generator was not a cause of the accident or Plaintiff's injury and/or would not have prevented the accident or Plaintiff's injury.

35. Any alleged negligence by Centaur in failing to properly train its employees in proper lifting techniques was not a cause of the accident at issue here.

36. The alleged failure of Plaintiff to wear a chin strap on his hard hat was not a cause of his injury and/or would not have prevented his injury.

37. Plaintiff's decision to side straddle the barge and the crew boat was not a cause of his injury. Plaintiff had no reason to believe that Captain Ochello would not hold the vessel steady as he had done for prior transfers.

38. Plaintiff was 22 years old at the time of the accident.

39. Plaintiff received 28 staples in his head as a result of the accident. He reported suffering neck pain within a few days.

40. Dr. Peter Liechty, MD, Plaintiff's treating neurosurgeon, testified that an MRI of Plaintiff's back showed abnormal discs. Dr. Liechty performed a C4/5, C5/6 anterior cervical discectomy and fusion surgery in May 2017.

41. Dr. Liechty testified that because of Barrios's age, he will likely require an additional surgery to his

cervical spine at some point. Defendants did not submit any evidence to dispute this opinion.

42. The Court found Dr. Gerard Gianoli, MD, Plaintiff's treating neurotologist, to be very credible. Dr. Gianoli testified that Plaintiff suffered a bilateral perilymphatic fistula, labyrinth concussion, bilateral benign positional vertigo, and some hearing loss from the accident. Plaintiff suffers from spinning vertigo and dizziness brought on by pressure-inducing activities. Plaintiff will have to limit activities that cause head pressure for the remainder of his life, including nose blowing, lifting, air travel, and driving. Plaintiff's symptoms have become manageable with medication, diet, and activity restriction. However, absent surgery, Plaintiff's condition will never completely resolve.

43. The Court found the opinion of Dr. Gerald Calegan, an expert in neurology, to be most credible on the issue of Plaintiff's head injury. Dr. Calegan opined that Barrios sustained a mild traumatic brain injury, which contributes to his frequent headaches, impaired balance, intermittent vertigo, insomnia, and worsened mood. Dr. Calegan also opined that most of Plaintiff's disability is a result of his neck pain and headaches, which contribute to his attention and concentration difficulties.

44. Prior to this accident, Plaintiff suffered from depression and anxiety. This accident has significantly exacerbated those conditions.

45. Plaintiff's condition presents a complicated medical picture. Plaintiff continues to suffer from headaches, neck pain, dizziness, inability to focus, and confusion to the date of the trial. His condition is not expected to significantly improve in the future.

46. The Court finds that Plaintiff's continued daily use of narcotics may contribute to some of his ongoing complaints of confusion and inability to focus. A reduction in the use of narcotics may improve some of the symptoms Plaintiff continues to experience.

47. All of the aforementioned injuries were caused by the accident at issue here to a reasonable degree of medical certainty.

48. The Court found the testimony of Dr. Todd Cowen, an expert in physical medicine and rehabilitation, pain management, life care planning & physician life care planning, to be credible. Dr. Cowen is both a life care planner and a medical doctor and is qualified to opine on Plaintiff's future healthcare needs. Dr. Cowen's opinions were consistent with the testimony of Plaintiff's treating physicians.

49. Dr. Cowen estimates that in the future Plaintiff will require physical therapy, pain management, treatment for his inner ear issues, and an additional cervical spine surgery, totaling approximately $587, 509.87.

50. Plaintiff has incurred $289,301.68 in past medical expenses.

51. Plaintiff has not worked since the accident.

52. Plaintiff's work life expectancy from the date of trial is 34.21 years.

53. In 2015, Plaintiff earned $25,724.76 annually.

54. Plaintiff's past loss wages from the time of the accident to the trial date are $65,647.00.

55. Given Plaintiff's age and abilities, this Court finds that it is more likely than not that he would

have received incremental promotions throughout the remainder of his working life.

56. If Plaintiff were unable to return to work for the remainder of his working life, this Court agrees with Randolph Rice's calculation that the present value of his future wage loss would be $1,665,636.00.

57. However, this Court finds that Plaintiff can return to work at light and sedentary duty. Any future employment should avoid the operation of heavy machinery and heights. This Court also finds that Plaintiff cannot secure employment as a draftsman as suggested because of his difficulty in mathematics.

58. Plaintiff can obtain employment in the $7.25–$10.00 per hour range, earning approximately $525,000 during his working life.

59. Plaintiff's lost future earnings amount to $1,140,636.00.

60. Plaintiff Devin Barrios is married to Plaintiff Megan Barrios and they share a 3-year-old son.

61. The Court found the testimony of Meghan Barrios compelling. Plaintiffs' marriage has been adversely impacted by Plaintiff Devin Barrios's injuries. Megan Barrios reports that Devin Barrios is less loving, less social, more depressed, and more withdrawn than prior to the accident. He is unable to help around the house to the same level as before the accident. She cannot trust him to watch their son alone because of his inability to focus and tendency to get confused. In addition, she testified that since the accident she feels like more of a friend than a wife, and their intimate relationship has dramatically changed.

62. Plaintiff's medical condition prevents him from lifting his son or contributing to his care to his desired level.

CONCLUSIONS OF LAW

JONES ACT AND MAINTENANCE AND CURE CLAIMS AGAINST CENTAUR

1. "The Jones Act provides a cause of action in negligence for 'any seaman' injured 'in the course of his employment.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting 46 U.S.C. § 688(a)).

2. In addition, a seaman who becomes sick or injured during his service to the ship is entitled to maintenance and cure. *Cooper v. Diamond M Co.*, 799 F.2d 176, 178-79 (5th Cir. 1986) (citations omitted).

3. To maintain a cause of action under either the Jones Act or for maintenance and cure benefits, the plaintiff must be a seaman. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 346 (5th Cir. 1999); *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984).

4. "The standard for determining seaman status for purposes of maintenance and cure is the same as that established for determining status under the Jones Act." *Hall*, 732 F.2d at 1248.

5. The Jones Act, however, does not provide a definition of a 'seaman.'" *Chandris, Inc.*, 515 U.S. at 355. The Supreme Court has promulgated two requirements for an employee to achieve seaman status. *Id.* at 368. First, "an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission." *Id.* Second, "a seaman must have a connection

to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id.* As a general rule of thumb, "[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.*

6. "[P]laintiff cannot claim time spent sleeping or eating in this [seaman status] analysis, because this time was not spent in the service of a vessel in navigation." *Butcher v. Superior Offshore Int'l, LLC*, No. 07-8136, 2008 WL 5110629 (E.D. La. Dec. 2, 2008); *see Moore v. AEP Memco LLC*, No. 07-1353, 2008 WL 3851574, at *5 (E.D. La. Aug. 13, 2008) ("[E]ating lunch or seeking refuge from rough weather is not the type of connection to a vessel or fleet of vessels that creates seaman status."); *Butcher v. Superior Offshore Int'l, Inc.*, 357 F. App'x 619, 620 (5th Cir. 2009) ("Butcher agreed with counsel's question that he worked thirty percent of his time on board the vessel but this included time spent for meals and breaks, which does not make Butcher a seaman. Furthermore, Butcher's testimony describing his daily activity showed that he spent less than thirty percent of his time actually working on board the MAGGIE.").

7. Given the findings of fact herein, this Court has found that Plaintiff was not a seaman. Plaintiff spent insufficient time in service of the vessel to attain seaman status.

8. Plaintiff cannot succeed on his claims under the Jones Act or for maintenance and cure against his employer, Centaur.

33 U.S.C. § 905(B) VESSEL NEGLIGENCE AGAINST RIVER VENTURES

9. Under 33 U.S.C. § 905(b) of the Longshore and Harbor Worker's Compensation Act ("LHWCA"), an injured worker may bring a claim against a vessel owner for vessel negligence.

10. Section 905(b) "preserves an injured worker's pre-existing right, under general maritime law, to recover for third-party negligence." *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir. 1986).

11. "To establish maritime negligence, a plaintiff must demonstrate that there was a duty owed by the defendant to the plaintiff, breach of that duty, injury sustained by [the] plaintiff, and a causal connection between the defendant's conduct and the plaintiff's injury." *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 376 (5th Cir. 2000).

12. "It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959). "[V]essel owners owe their passengers a duty of reasonable care under the circumstances." *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 357 (5th Cir. 2016). The Fifth Circuit has held that "'shipowners, relatively speaking, are held to a high degree of care for the safety of their passengers.'" *Id.* (quoting *Smith v. Southern Gulf Marine Co. No. 2*, 791 F.2d 416, 420 (5th Cir. 1986)). A duty of reasonable care under the circumstances includes "a duty to provide a safe egress from its vessel and a duty to warn . . . of any dangers of which [the shipowner] knew or should have known."

Gonzales v. River Ventures, LLC, No. 15-2145, 2017 WL 1364842, at *10 (E.D. La. Apr. 14, 2017) (Brown, J.).

13. River Ventures and Captain Ochello owed Plaintiff, a passenger on the M/V TROOPER, a duty of reasonable care, including a duty to provide a safe egress from the vessel.

14. Captain Ochello breached his duty to Plaintiff in failing to provide for a safe transfer. Specificallly [sic], Ochello failed to (1) moor the M/V TROOPER to the barge during the transfer and (2) hold the M/V TROOPER steady to the barge during the transfer.

15. Captain Ochello's negligence caused the M/V TROOPER to separate from the barge during the transfer.

16. Captain Ochello's negligence was the sole proximate cause of the injuries sustained by Plaintiff.

17. River Ventures is liable to Plaintiffs for the negligence of its Captain under 33 U.S.C. § 905(b) for the damages that Plaintiffs sustained as a result of the incident at issue here.

33 U.S.C. § 905(B) VESSEL NEGLIGENCE AGAINST CENTAUR

18. Plaintiff next alleges that Centaur was negligent in its capacity as operator of the barge for failing to provide a crane operator to utilize the crane to move the portable generator.

19. "When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued 'qua vessel' for acts of vessel negligence."

Levene v. Pintail Enterprises, Inc., 943 F.2d 528, 531 (5th Cir. 1991).

20. Plaintiffs have not carried their burden to show that Centaur was negligent for failing to provide a crane operator to move the portable generator.

21. Failure to use a crane to move the portable generator was not a cause in fact of the accident in question.

LIMITATION OF LIABILITY

22. The Limitation of Liability Act provides in relevant part that "the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight." 46 U.S.C. § 30505. "The determination of whether a shipowner is entitled to limitation employs a two-step process. First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." *Farrell Lines Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976). Once, as here, negligence of the vessel has been established, the owner can limit its liability only by proving "it lacked privity or knowledge of the condition." *Petition of Kristie Leigh Enterprises, Inc.*, 72 F.3d 479, 481 (5th Cir. 1996).

23. "There is a duty to inquire about conditions and practices likely to produce or contribute to loss, unless appropriate means are adopted and adhered to in order to prevent loss." *Gabarick v. Laurin Mar. (Am.), Inc.,* 900 F. Supp. 2d 669, 677 (E.D. La. 2012), aff'd, 551 F. App'x 228 (5th Cir. 2014).

24. Given the fact that the owner of River Ventures, Jerry Hanna, was aware of Captain Ochello's unsafe custom of allowing equipment to be offloaded from the M/V TROOPER without first tying up the vessel and Mr. Hanna did not institute a policy regarding the safe transfer of equipment from the M/V TROOPER, River Ventures is not entitled to limitation of liability.

DAMAGES

25. "[I]n actions brought under § 905(b), an injured LHWCA covered employee may recover those items of damages which are recoverable under the general maritime law, including monetary recovery for past and future loss of earning capacity and wages, past and future medical expenses, and pain and suffering resulting from an injury caused by the defendant's negligence. *Associated Terminals of St. Bernard, LLC v. Potential Shipping HK Co.*, 324 F. Supp. 3d 808, 823 (E.D. La. 2018).

26. To determine lost future earnings, the Court must "estimat[e] the loss of work life resulting from the injury or death, calculat[e] the lost income stream, comput[e] the total damage, and discount[] that amount to its present value. [C]alculation of the lost income stream begins with the gross earnings of the injured party at the time of injury." *Mayne v. Omega Protein Inc.*, 370 F. App'x 510, 517 (5th Cir. 2010).

27. "The base figure used to calculate future wage loss is the difference between what a person could have earned 'but for' the accident and what he is able to earn upon returning to work in his partially disabled state." *Masinter v. Tenneco Oil Co.*, 867 F.2d

892, 899 (5th Cir. 1989) *mandate recalled & modified on other grounds*, 934 F.2d 67 (5th Cir. 1991).

28. "Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors" is admissible to show lost future earnings. *Culver v. Slater Boat Co.*, 722 F.2d 114, 122 (5th Cir. 1983)

29. General damages are available "for pain and suffering and impact on one's normal life routines." *Barto v. Shore Const., L.L.C.*, 801 F.3d 465, 473 (5th Cir. 2015).

30. In calculating Plaintiff's general damages, this Court considered the similar injuries sustained by the plaintiff in *Terrebonne v. Goodman Mfg. Corp.*, 687 So. 2d 124 (La. App. 5 Cir. 1996), and took into account inflation since that award was given. The court in *Terrebonne* awarded the plaintiff $875,000 in general damages after he sustained a brain concussion and a concussive injury to his left inner ear after a fall from a truck. *Id.* The plaintiff suffered from constant headaches and dizzy spells, and his family reported that he was moody, irritable, and withdrawn. *Id.*

31. "If an LHWCA employee can properly assert a § 905(b) claim for vessel negligence, then his spouse can properly assert a loss-of-consortium claim." *White v. Cooper/T. Smith Corp.*, 690 F. Supp. 534, 540 (E.D. La. 1988).

32. Plaintiffs are entitled to prejudgment interest at a rate of 4% per annum from the date of judgment until paid on all past damages. *See Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.,*

779 F.3d 345, 351 (5th Cir. 2015); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 591 (5th Cir.), *opinion corrected on denial of reh'g on other grounds*, 848 F.2d 498 (5th Cir. 1988).

33. Plaintiffs are entitled to damages in the following amounts:

Past medical expenses:	$ 289,301.68
Future medical expenses:	$ 587,509.87
Past lost wages:	$ 65,647.00
Future lost earnings:	$ 1,140,636.00
Past and future general damages:	$ 975,000.00
Loss of consortium:	$ 250,000.00
Total:	$ 3,308,094.55

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to judgment against River Ventures, LLC on their 33 U.S.C. § 905(b) claim in the amount of $3,308,094.55. Defendant Centaur, LLC is entitled to judgment in its favor, dismissing with prejudice Plaintiff's claims against it.

New Orleans, Louisiana this 1st day of February, 2019.

/s/ Jane Triche Milazzo
United States District Judge

ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF LOUISIANA (OCTOBER 22, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DEVIN BARRIOS ET AL.

v.

CENTAUR, LLC ET AL.

Civil Action

No. 17-585

Section: "H" (1)

Before: Jane Triche MILAZZO,
United States District Judge.

ORDER AND REASONS

Before the Court are Defendant Centaur LLC's Motion for Summary Judgment (Doc. 72); Defendant River Ventures, LLC's Partial Motion for Summary Judgment (Doc. 75); and Centaur LLC's Motion for Summary Judgment on River Venture's Cross-Claim (Doc. 85). For the following reasons, Centaur's Motion for Summary Judgment is DENIED; River Venture's Motion for Partial Summary Judgment is GRANTED; and Centaur's Motion for Summary Judgment on River Venture's Cross-Claim is GRANTED.

BACKGROUND

Plaintiff Devin Barrios alleges that he was injured while working for Defendant Centaur, LLC ("Centaur") as a Jones Act seaman. Barrios was hired by Centaur, a marine construction company, to work on a construction project to build a concrete containment wall around the edge of a dock facility owned by United Bulk Terminals Davant, LLC ("UBT"). Centaur leased a barge to house its equipment during the project. UBT contracted with River Ventures, LLC ("River Ventures") to provide a crew boat to transport Centaur's employees to and from the project. Plaintiff alleges that he was injured while transferring a portable generator from the crew boat to the barge when the crew boat separated from the barge and he fell into the river, followed by the 100lb generator. Plaintiff brought claims under the general maritime law and Jones Act against both Centaur and River Ventures. River Ventures then filed a cross-claim against Centaur seeking indemnity and insurance pursuant to a Master Service Agreement ("MSA") entered into between UBT and Centaur regarding all construction projects performed by Centaur for UBT.

Defendants Centaur and River Ventures have filed cross-motions for summary judgment regarding Plaintiff's seaman status. Centaur, Plaintiff's employer, argues that Plaintiff is not a seaman and therefore his only remedy against it is for compensation under the LHWCA. River Ventures argues the barge at issue is a vessel in navigation, but that material issues of fact exist as to Plaintiff's seaman status. In addition, Centaur moves for summary judgment on River Venture's cross-claim, arguing that the Louisiana Construction Anti-Indemnity Statute applies to the

MSA to prohibit the indemnity and additional insured provisions therein. This Court will consider each Motion in turn.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[2]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[3] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[4] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[5] "In response to a properly supported

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[1] *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir. 1972).

[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3] *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532 (5th Cir. 1997).

[4] *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial."[6] "We do not . . . in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[7] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[8]

LAW AND ANALYSIS

The summary judgment motions before the Court dispute two issues: (1) Plaintiff's seaman status, and (2) River Venture's entitlement to indemnity and insurance pursuant to the MSA between UBT and Centaur. This Court will consider these issues in turn.

I. Seaman Status

"The Jones Act provides a cause of action in negligence for 'any seaman' injured 'in the course of his employment.'"[9] The Jones Act provides heightened legal protections to seamen because of their exposure

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[6] *John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

[7] *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

[8] *Boudreaux v. Banctec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

[9] *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting 46 U.S.C. § 688(a)).

to the inherent dangers of the high seas and was intended to provide remedial protections to sea-based maritime workers.[10] The Act, however, does not provide a definition of a "seaman."[11] Instead, the Supreme Court has promulgated two requirements for an employee to achieve seaman status.[12] First, "an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission."[13] Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[14] As a general rule of thumb, "[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[15]

These motions present two main issues as to Plaintiff's seaman status: (1) whether the barge was a "vessel in navigation" and (2) how much time Barrios spent working aboard the vessel.

A. Vessel in Navigation

Both Centaur and River Ventures have moved for summary judgment regarding whether the barge was a vessel in navigation. "The term vessel has

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10 *Id.*

11 *Id.* at 355.

12 *Id.* at 355.

13 *Id.* (internal quotations omitted).

14 *Id.*

15 *Id.* at 371.

generally been defined broadly and, in its traditional sense, refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters."[16] "The Supreme Court has specified that the relevant inquiry in determining vessel status is 'whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one.'"[17] "[A] watercraft is not practically capable of maritime transportation 'unless a reasonable observer, looking to the [watercraft's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.'"[18]

The evidence shows that the barge was used to hold equipment and supplies needed for the construction job on the dock, such as pallets of concrete and a cherry picker. Although it was not capable of self-propulsion, it moved approximately every other day by tug boat or winch. The barge moved up and down the dock by winch to assist with the ongoing project. It also moved by tug boat from the dock to land to retrieve additional supplies for the project.

Centaur argues that the facts show that the barge was a work platform and not a vessel in navigation. "[T]he Fifth Circuit has repeatedly held that barges are not vessels when they are permanently attached

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16 *Bernard v. Binnings Const. Co.*, 741 F.2d 824, 828-29 (5th Cir. 1984)

17 *Gautreaux v. Trinity Trading Grp., Ltd.*, No. 12-2851, 2014 WL 1414576, at *1 (E.D. La. Apr. 11, 2014) (quoting *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 497 (2005)).

18 *Id.* (quoting *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735, 745 (2013)).

to land, and when any transportation function is incidental to their primary purpose as a non-vessel work platform."[19] Here, there is no evidence that the barge was permanently attached to land, and although it lacked a means of self-propulsion, it did in fact move frequently. It cannot be said that this movement was merely incidental because it was necessary to provide supplies and equipment to the dock construction project. The movement of the barge at issue here was not simply theoretical, but it was actually used for the transportation of equipment and supplies over water.[20] Accordingly, this Court holds that the barge was a vessel in navigation.[21]

B. Time Working on Vessel

In determining Plaintiff's seaman status, the Court must next consider the amount of time Plaintiff spent working aboard the barge. Centaur argues that Barrios is not a seaman because he spent most of his time working on the dock, not the barge, and the only evidence to the contrary is Barrios's own testimony. River Ventures and Barrios argue that there is a material issue of fact regarding how much time Barrios spent on the vessel and summary judgment is therefore inappropriate.

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[19] *Young v. T.T. Barge Servs. Mile 237, LLC*, 290 F. Supp. 3d 562, 567 (E.D. La. 2017).

[20] *See Gautreaux*, 2014 WL 1414576, at *1; *Michel v. Total Transp., Inc.*, 957 F.2d 186, 190 (5th Cir. 1992).

[21] Centaur makes much ado about the Plaintiff's lack of involvement in the moving of the barge. This Court can find no case law indicating that such a fact has any bearing on the barge's vessel status. The test requires the Court to consider whether the barge moves, not who is involved in its movement.

Centaur is correct that while Barrios testified that he spent 80% of his time on the vessel, at least five other Centaur and dock employees testified that the number was closer to 20%.[22] However, these estimations may conflict with some testimony regarding what work Barrios actually performed aboard the barge. Barrios testified that he welded, grinded, diagramed and moved concrete on the barge. He also testified that the barge was used to "stand on to build—to mount the forms to the dock that you pour the concrete in."[23] In addition, there is testimony from at least one other dock employee that he witnessed the Centaur crew mixing concrete, putting template and rebar in, and pouring concrete from the barge.[24] These facts indicate that substantially more work occurred aboard the vessel than the 20% attested to by some of the Centaur and dock employees, creating a material issue of fact.

Indeed, "[t]he seaman inquiry is a mixed question of law and fact, and it is often inappropriate to take the question from the jury."[25] "[S]ummary judgment

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[22] William Vernor, a dock employee, estimated 20% to 30% of work time was spent on the barge, including break time and lunch time. Craig Rink, Centaur foreman, testified 15% to 20%. Brody Ledet, Plaintiff's direct supervisor, testified 20%. Dylan Ledet, a Centaur laborer, testified 20%, and Andrew Breland, the dock project manager, testified 10% to 15%. The parties dispute the admissibility of Brandon Lavergne's testimony, but this issue need not be reached here.

[23] Doc. 74-2, p. 9.

[24] Robert Rodriguez Deposition, Doc. 74-10.

[25] *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) (internal citations omitted).

on seaman status is proper where the only rational inference to be drawn from the evidence is that the worker is not a seaman."[26] Here, there is sufficient conflicting evidence that a jury might draw more than one inference regarding the amount of time that Barrios spent working aboard the barge, and ultimately his seaman status. Accordingly, summary judgment on seaman status is denied.

II. Contractual Indemnity

In its cross-claim against Centaur, River Ventures seeks indemnity and insurance pursuant to the MSA between UBT and Centaur. Centaur has moved for summary judgment arguing that the Louisiana Construction Anti-Indemnity Statute applies to the MSA to prohibit the indemnity and additional insured provisions therein. River Ventures argues that maritime law, not Louisiana law, applies to the MSA to allow these provisions. The issue then becomes whether the MSA between UBT and Centaur is a maritime contract.

Relying on the Fifth Circuit's decision in *In re Larry Doiron*, the parties appear to agree that a contract is a maritime contract if: (1) the work Centaur was performing for UBT involves maritime commerce, (2) it involved work from a vessel, and (3) the contract provided or the parties expected that a vessel would play a substantial role in completing the contract.[27] Although *Doiron* dealt specifically with

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[26] *Bernard v. Binnings Const. Co.*, 741 F.2d 824, 828 (5th Cir. 1984).

[27] 879 F.3d 568 (5th Cir. 2018), This is the approach taken in *Lightering LLC v. Teichman Group, LLC*, No. H-17-3374, 2018

contracts in the oil and gas context, it stated that, "If an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime."[28] Accordingly, this Court will consider these factors in turn.

1. Maritime Commerce

River Ventures argues that the contract involved maritime commerce because the containment wall was being built on the dock to keep coal and other products being offloaded from barges from falling into the river. Centaur argues that the contract was one for the construction of a concrete lip on a dock and thus does not involve maritime commerce. It argues that the fact that the construction project might have incidentally facilitated maritime commerce is insufficient.

The district court in *Lightering LLC v. Teichman Group* was first to consider the *Doiron* test in a non-oil and gas context.[29] In that case, the contract was one for the wharfage of workboats, the storage of lightering equipment, and the loading and unloading of lightering

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WL 3428561, at *11 (S.D. Tex. July 16, 2018), the only case to have interpreted *Doiron* in a non-oil and gas context so far.

[28] *In re Larry Doiron*, 879 F.3d at 577 n.52. The *Doiron* test asks: "First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?" and "Second, if the answer to the above question is 'yes,' does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?" *Id.*

[29] *Lightering LLC*, 2018 WL 3428561.

equipment from workboats.[30] The court held that although lightering is a traditional maritime activity, the contract at issue was merely one that facilitated lightering.[31] The court stated that, "The fact that the Agreement supported [the] lightering operations is informative, but not dispositive. A wide range of non-maritime activities, entirely land based, can 'facilitate' maritime commerce. Instead, the court must consider the substance of the Agreement."[32] The court concluded that only the loading and unloading component of the agreement was maritime and that this component was incidental to the non-maritime objective of the agreement.[33]

The Supreme Court instructs that the Court should consider whether the "principal objective" of a contract is maritime commerce.[34] Here, the primary objective of the UBT/Centaur MSA is the construction of a concrete lip on UBT's dock. Like in *Lightering*, this objective merely facilitates the traditional maritime commerce activity of loading and unloading vessels. This Court holds that the land-based construction contract at issue here is non-maritime. It therefore need not consider the other *Doiron* factors.

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30 *Id.* at *2.

31 *Id.* at *11

32 *Id.*

33 *Id.*

34 *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004).

2. Louisiana Construction Anti-Indemnity Statute (LCAIS)

Because the MSA is non-maritime, the parties agree that it is governed by Louisiana law. Centaur argues that the Louisiana Construction Anti-Indemnity Statute (LCAIS) applies to prohibit the indemnity and insurance provisions of the MSA. The LCAIS states that provisions in a construction contract are "null, void, and unenforceable" which (1) purport to indemnify, defend, or hold harmless the indemnitee from any liability resulting from its own negligent or intentional acts, or (2) purport to require an indemnitor to procure liability insurance covering the acts or omissions of the indemnitee.[35]

River Ventures responds that the indemnity and insurance provisions in the MSA fall within a particular exception to the LCAIS's prohibition. The exception states that the anti-indemnity rule does not apply when "there is evidence that the indemnitor recovered the cost of the required insurance in the contract price."[36] River Ventures points to testimony from three Centaur employees indicating that it considered overhead costs such as insurance in bidding on the construction job.

This Court finds instructive courts' interpretations of a similar exception to the Louisiana Oilfield Indemnity Act (LOIA). In *Marcel v. Placid Oil Co.*, the Fifth Circuit recognized an exception to LOIA "when the principal pays the entire cost of its own insurance coverage by securing an endorsement naming it as an

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[35] La. Rev. Stat. § 9:2780.1.

[36] *Id.*

insured in the contract or policy."[37] "[T]he exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage."[38] Here, the fact that Centaur may have considered insurance coverage in calculating its bid does not establish that UBT paid the full amount of the premium or that Centaur did not pay any material part. River Ventures has not carried its burden to show that UBT paid the full amount of its insurance premium and that the LCAIS exception applies. Accordingly, LCAIS applies to prohibit the indemnity and insurance provisions of the MSA.

CONCLUSION

For the foregoing reasons, Centaur's Motion for Summary Judgment is DENIED; River Venture's Motion for Partial Summary Judgment is GRANTED; and Centaur's Motion for Summary Judgment on River Venture's Cross-Claim is GRANTED. River Venture's Cross-Claim against Centaur is DISMISSED WITH PREJUDICE.

New Orleans, Louisiana this 22nd day of October, 2018.

/s/ Jane Triche Milazzo
United States District Judge

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[37] *Rogers v. Samedan Oil Corp.*, 308 F.3d 477, 481 (5th Cir. 2002) (discussing *Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994)).

[38] *Marcel*, 11 F.3d at 570.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (DECEMBER 16, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEVIN BARRIOS; ET AL,

Plaintiffs,

v.

CENTAUR, L.L.C.,

Defendant
Cross Defendant
Appellee,

v.

RIVER VENTURES, L.L.C.,

Defendant
Cross Claimant
Appellant.

No. 18-31203

Appeals from the United States District Court
for the Eastern District of Louisiana

Before: JONES, SMITH,
and HAYNES, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

(Opinion 11/11/19, 5 Cir., 2019, 942 F.3d 670)

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Edwin Smith
United States Circuit Judge