NO. 21-_____

SUPREME COURT OF THE UNITED STATES

WALTER SKIPPER,

Petitioner

vs.

A&M DOCKSIDE REPAIR, INCORPORATED, & HELIX RESOURCES, LLC

Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	CIVIL ACTION
VERSUS	NO. 18-6164
A&M DOCKSIDE REPAIR, INC., ET AL.	SECTION "R" (4)

ORDER AND REASONS

Before the Court is A&M Dockside Repair, Inc.'s and Helix Resources, LLC's joint motion for partial summary judgment.[1] Because A&M was Skipper's borrowing employer for the purposes of the LHWCA, the Court grants the motion.

I. BACKGROUND

This case arises out of a workplace accident. At the time of the accident, plaintiff Walter Skipper was employed by third-party defendant Helix Resources, LLC, as a painter and blaster.[2] On August 11, 2017, plaintiff was working on a barge in a shipyard that is owned and operated by

[1] R. Doc. 48.
[2] R. Doc. 15 at 2 ¶ 5.

defendant A&M Dockside Repair, Inc.[3] In the course of performing his duties, plaintiff allegedly fell into an open manhole cover on the barge and suffered severe injuries.[4]

On June 22, 2018, Skipper filed a complaint alleging negligence against A&M and Cashman Equipment Corporation, a party that owned the barge and has since been dismissed from the case.[5] On January 17, 2019, the Court granted A&M's motion for leave to file a third-party complaint against Helix.[6] A&M and Helix have now filed a joint motion for partial summary judgment on the basis that Skipper was a borrowed servant of Helix, that A&M was acting as Skipper's borrowing employer, and that therefore compensation and medical payments are Skipper's sole remedy under the Longshore & Harbor Workers' Compensation Act.[7]

II. LEGAL STANDARD

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v.*

3 *Id.*
4 *Id.*
5 *See* R. Doc. 1; *see also* R. Doc. 23.
6 R. Doc. 25.
7 R. Doc. 48-1.

Catrett, 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). "When assessing whether a dispute to any material fact exists, [the Court] consider[s] all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985) (quoting 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2738 (2d ed. 1983)); *see also Little*, 37 F.3d at 1075. "No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014).

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991) (quoting *Golden Rule Ins. Co. v. Lease*, 755 F. Supp.

948, 951 (D. Colo. 1991)). "[T]he nonmoving party can defeat the motion" by either countering with evidence sufficient to demonstrate the "existence of a genuine dispute of material fact," or by "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party." *Id*. at 1265.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. *See Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See id*. at 324. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue for resolution. *See, e.g.*, *id*.; *Little*, 37 F.3d at 1075 ("Rule 56 '*mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" (quoting *Celotex*, 477 U.S. at 322 (emphasis added))).

III. DISCUSSION

A&M and Helix argue for partial summary judgment under the Longshore & Harbor Workers' Compensation Act. The LHWCA limits the remedy of a longshoreman or harbor worker against his employer to compensation and medical benefits. *See* 33 U.S.C. § 933(i) ("The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong doing of any other person . . . in the same employ."). It is undisputed that Skipper is a longshoreman or harbor worker and is thus covered by the LHWCA. A&M and Helix argue that Skipper was the "borrowed servant" of Helix, that A&M was borrowing plaintiff, and therefore Skipper's remedies are limited by the LHWCA. *See Gaudet v. Exxon Corp.*, 562 F.2d 351, 355 (5th Cir. 1977) (analyzing the borrowed servant defense in the context of the LHWCA).

Skipper opposes the motion for partial summary judgment on two grounds. First, Skipper argues that the borrowed servant defense has been waived, because it was not properly asserted in A&M's answer. Second, Skipper argues that genuine issues of fact remain that preclude a grant of summary judgment. The Court addresses each argument in turn.

A. Waiver

Skipper argues that defendants' motion for partial summary judgment must be denied because both A&M and Helix failed to raise it as an affirmative defense in their answers. Affirmative defenses are pleadings governed by Rule 8 of the Federal Rules of Civil Procedure. A defendant is required to "state in short and plain terms its defenses to each claim asserted against it" and "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(b)(1)(A), 8(c)(1). In *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999), the Fifth Circuit held that affirmative defenses are subject to the same pleading requirements as a complaint and articulated a "fair notice" standard for pleading affirmative defenses. *Id.* at 362. Under this standard, a defendant is required to plead an affirmative defense "with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced." *Id.* (citation omitted). Failure to adequately plead an affirmative defense can result in a waiver of the defense. *Rogers v. McDorman*, 521 F.3d 385 (5th Cir. 2008).

But failure to strictly comply with Rule 8(c) does not always result in waiver. The purpose of the rule "is to give the opposing party notice of the affirmative defense and a chance to argue why it should not apply." *Pasco v. Knoblauch*, 566 F.3d 572, 578 (5th Cir. 2009) (citation omitted). Therefore,

"an affirmative defense is not waived if the defendant 'raised the issue at a pragmatically sufficient time and [plaintiff] was not prejudiced in its ability to respond.'" *Id.* at 577 (quoting *Allied Chem Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)). The Court does "not take a formalistic approach to determine whether an affirmative defense was waived." *Id.* Rather, it "look[s] at the overall context of the litigation" to determine whether "evidence of prejudice exists and sufficient time to respond to the defense remains before trial." *Id.* Indeed, the Fifth Circuit has "repeatedly rejected waiver arguments when a defendant raised an affirmative defense for the first time at summary judgment—or even later." *Motion Med. Tech., LLC v. Thermotek, Inc.*, 875 F.3d 765, 772 (5th Cir. 2017).

It is therefore necessary to determine whether defendants raised the defense "at a sufficiently pragmatic time," and whether plaintiff was prejudiced in his ability to respond. *Motion Med. Tech.*, 875 F.3d at 771. Here, Skipper first had reasonable notice the borrowed servant defense may be asserted months ago, when Helix appeared in the suit. Indeed, in its answer to A&M's third-party complaint, which is part of the record of this case, Helix asserts that "Mr. Skipper was on a mission for his employer and performing employment-related activities"[8] and that because Helix was

[8] R. Doc. 29 at 9.

Skipper's employer, Skipper has "no right to seek tort remedies from Helix, nor any other party to attempt to pass through alleged fault to Helix."[9] Helix also alleged that Skipper's "sole remedy against it is for compensation under the Louisiana Worker's Compensation Act or, alternatively, under the Longshoremen's and Harbor Workers' Compensation Act."[10] Although Helix does not incant the words "borrowed servant defense" these allegations offer reasonable notice to Skipper that the defense would be asserted in this case. Given that Helix's answer was submitted in February, plaintiff had reasonable notice, and the defense was raised in a sufficiently pragmatic time.

Skipper is not prejudiced by the Court's consideration of the borrowed servant defense at this juncture. Plaintiff provides fulsome, reasoned responses to defendants' arguments in his opposition.[11] Skipper even cites to various exhibits, including deposition testimony, in his response.[12] And although plaintiff asserts that there still exist genuine issues of fact, he argues these are issues the trier of fact must decide—not that additional discovery is required to resolve the issues. Indeed, Skipper does not request additional

9 *Id.*
10 *Id.*
11 *See* R. Doc. 51.
12 *See* R. Doc. 51 at 4.

time for discovery or suggest that additional discovery would cure any prejudice he may face.

Because Skipper had adequate notice that the borrowed servant defense would be asserted and is not prejudiced in responding to the defendants' motion for partial summary judgment, the Court finds that defendants did not waive the borrowed servant defense.

B. Genuine Issues of Fact

Skipper also avers that the motion for partial summary judgment must be denied because issues of material fact still exist with respect to whether A&M was acting as Skipper's borrowing employer. The Fifth Circuit has held that "in absence of substantial evidence to the contrary . . . the issue of whether a relationship of borrowed servant exist[s] is a matter of law." *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 341 (5th Cir. 1969). Here, the relevant facts are not in dispute. Rather, plaintiff disputes the legal conclusion that should be drawn from the facts. This is a question of law for the Court.

Courts have developed a nine factor test to determine whether borrowed servant status exists. The nine factors are:

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
>
> (2) Whose work is being performed?

> (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> (4) Did the employee acquiesce in the new work situation?
>
> (5) Did the original employer terminate his relationship with the employee?
>
> (6) Who furnished tools and place for performance?
>
> (7) Was the new employment over a considerable length of time?
>
> (8) Who had the right to discharge the employee?
>
> (9) Who had the obligation to pay the employee?

Gaudet v. Exxon Corp., 562 F.2d 351, 355 (5th Cir. 1977). "No single factor, or combination of them, is determinative." *Brown v. Union Oil Co. of Cal.*, 984 F.2d 674, 676 (5th Cir. 1993). Although in the *respondeat superior* context, the first factor—control—is often emphasized, in the tort immunity context, the Fifth Circuit has focused on the fourth, fifth, sixth, and seventh factors. *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1245 n.12 (5th Cir. 1988) (citing *Gaudet*, 562 F.2d at 356-57). This is because "these factors deal with the question of whether the circumstances of the employee's employment are such that the defendant 'should be considered an employer and not a third party under the LHWCA.'" *Id.* (citing *Gaudet*, 562 F.2d at 357).

1. *Control*

The first inquiry is control. The evidence establishes that A&M, as a borrowing employer, exerted significantly greater control over Skipper than did his nominal employer, Helix. Brian Mayon, the yard superintendent at A&M, testified that Mr. Skipper's only supervisors on the barge where he worked and was injured were A&M foremen, and that they were "in charge of all of [Helix's] workers."[13] He also testified that he was to direct Mr. Skipper's work.[14] Skipper similarly testified that A&M Dockside was "the boss"[15] and that Helix employees "were just laborers."[16] Skipper testified that A&M dockside had responsibility for him and his co-workers,[17] and he refers to Mayon as "boss man."[18] This testimony from both plaintiff and the yard foreman strongly indicates that A&M exercised control over Skipper and directed his work, not Helix.

Skipper argues that genuine issues of material fact exist as to control that would preclude summary judgment. In particular, he argues that Skipper and the foreman were equals and that Skipper was not subordinate

13 Motion for Partial Summary Judgment Exhibit 2 at 45:13-17.
14 *Id.* at 45:18-46:1.
15 Motion for Partial Summary Judgment Exhibit 4 at 89:5-10.
16 *Id.* at 89:13.
17 *Id.* at 90:16-19.
18 *Id.* at 94:20-22.

to Mayon or to A&M employees. This argument is plainly refuted by the evidence discussed above. Plaintiff cites to a separate portion of Skipper's deposition to support his argument. But the deposition testimony Skipper cites in no way indicates that Skipper was not subordinate to Mayon. Mayon stated that Skipper "seemed very familiar with the oilfield" and "worked with the oilfield his whole life."[19] This does not suggest that Skipper and Mayon were equals, or that Mayon was not directing Skipper's actions. Indeed, immediately after that statement, Mayon listed directions he gave Skipper, stating: "I told him he was going with the other hands we had and a couple of guys from my crew [to] clean tanks. He asked how they were cleaning them. I told him we had some big vacuum systems . . . I showed him who he was going to be working with . . . ."[20] Accordingly, the Court finds that the "control" factor favors a finding of borrowed servant status.

2. *Whose Work?*

The second factor—whose work was being performed—also weighs in favor of borrowed servant status. Mayon testified that Skipper's work was to do the repairing and cleaning of the barge for A&M.[21] Skipper does not contest these facts. Rather, Skipper argues that as a hired laborer, he was

19 Opposition Exhibit 1 at 22:4-6.
20 *Id.* at 22:6-14.
21 Motion for Partial Summary Judgment Exhibit 2 at 45:21-46:21.

truly doing the work of Helix, whose business is hiring out laborers. He therefore argues he was only *incidentally* doing the work of A&M.

Skipper's argument is without merit. That Helix's business is hiring out labors does not negate that Skipper was doing A&M's work at the time of his injury. Skipper cites two cases in support of his argument. He first cites to language from *Rollans v. Unocal Exploration Corp.*, No. 93-431, 1993 WL 455731 (E.D. La. Nov. 4, 1993).[22] In that case, a cook who worked for a company that supplied food services was hired to cook for the crew on an offshore drilling platform, and he was injured after slipping on bacon grease. *Id.* at *1. There, the court found that the cook was performing the work of the catering company, not the oil platform. *Id.* at *2. But the court in *Rollans* emphasized that the plaintiff was supervised by someone from the catering company and did not answer to any of the defendant's personnel. *Id.* And the job of a cook, who works for a catering company hired to provide catering to an oil platform's workers, is different from the case at hand. Here, Helix hires out laborers such as Skipper to do the actual work of A&M—servicing

[22] Skipper's citation for this language is *Mathis v. Union Exploration Partners, Ltd.*, No. 90-2009, 1991 WL 42570 (E.D. La. Mar. 26, 1991). But the relevant language is absent from that case, which does not analyze this factor in depth. The Court therefore focuses its analysis on *Rollans*.

and repairing boats—not to do a task ancillary to that, such as cooking, which is not A&M's work.

Skipper also cites to *Boston Old Colony Insurance. Co. v. Tiner Associates, Inc.*, 288 F.3d 222 (5th Cir. 2002). But that case states only that under Louisiana law, where a general employer's business is hiring out its employees and it retains control of the employee at the time of the negligence, it remains liable for the torts of those borrowed employees. *Id.* at 229 (citing *Morgan v. ABC Mfr.*, 710 So. 2d 1077 (La. 1998)). It does not speak to whose work is being performed. The Court therefore finds that this factor, too, weighs in favor of borrowed servant status.

3. *Agreement*

The agreement between A&M and Helix states that Helix's employees, including Skipper, "shall at all times be deemed an independent contractor and the relationship of these parties to Client shall not at any time constitute any relationship other than that of an independent contractor."[23] The Court finds this factor weighs against the finding of a borrowed servant relationship.

Skipper argues that the existence of this clause necessarily creates a material issue of fact, and the partial summary judgment must be denied.

[23] Partial Motion for Summary Judgment Exhibit 1 at 1.

But there are no facts in dispute here—all parties agree on the language of the contract and that it was binding. And courts have found borrowed servant status notwithstanding the existence of such a clause. *See, e.g.*, *Gaudet v. Exxon Corp.*, 562 F.2d 351, 358 (5th Cir. 1977) (finding a borrowed servant relationship when other factors other than agreement weighed heavily in favor of finding the employee was a borrowed servant); *Crawford v. BP Corp., N.A.*, 2015 A.M.C. 1119 (E.D. La. 2015) (finding the parties' performance had modified the contract so that the independent contractor clause was not dispositive). The Court therefore finds that although this factor weighs in plaintiff's favor, it does not require the Court to forgo granting the motion for partial summary judgment.

4. *Did the Employee Acquiesce?*

There is every indication that Skipper acquiesced to the work arrangement with A&M. He knew he would be working for A&M, and there is no evidence he took issue with working for that company. Skipper took instructions from Mayon seemingly without issue[24] and viewed A&M as "the boss."[25] Indeed, Skipper does not present any argument with respect to this

[24] Opposition Exhibit 1 at 22:6-14.
[25] Partial Motion for Summary Judgment Exhibit 4 at 89:9-13.

factor. The Court therefore finds this factor weighs in favor of finding a borrowed servant relationship.

5. *Did the Original Employer Terminate its Relationship?*

As both parties recognize, this factor asks not whether Skipper's relationship with Helix was severed, but whether he maintained contact with Helix, and whether he was supervised exclusively by A&M. *See Hotard v. Devon Energy Prod. Co. L.P.*, 308 Fed. App'x 739, 742 (5th Cir. 2009). Although Skipper avers that there is no evidence that he lacked communication with Helix or that he was supervised solely by A&M employees, he offers no evidence to suggest he communicated with Helix or was otherwise supervised by Helix employees. And the evidence refutes Skipper's position. Skipper testified that there were no Helix supervisors at the job site.[26] And, as discussed above, Skipper was taking directions exclusively from A&M foremen.[27] The Court therefore finds that this factor weighs in favor of borrowed servant status.

6. *Tools and Place*

Although Helix did provide some personal protection equipment, the primary tools used to be complete the work of cleaning the barge were

[26] Partial Motion for Summary Judgment Exhibit 4 at 89:2-7.
[27] *See, e.g.*, *id.* at 89:9-13.

provided by A&M.[28] This includes the vacuum that Skipper was directed to use.[29] All of the relevant work was to take place on the Chasman Equipment barge, which A&M dockside was hired to clean.[30] Skipper presents no argument that this factor weighs against finding he was a borrowed servant. The Court therefore finds this factor weighs in favor of finding a borrowed servant relationship.

7. *Length of Time*

It is undisputed that Skipper worked for A&M for only six days, and that the job at issue was to last only two weeks. This is a brief period of time and cannot weigh in favor of finding a borrowed servant relationship. But it also does not weigh *against* finding a borrowed servant relationship. Caselaw in the Fifth Circuit states that this factor is "significant only when the special employer employs the employee for a considerable length of time." *See Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 618 (5th Cir. 1986). But when an employee is injured early in his employment, the factor is neutral. *Id.* Indeed, the Fifth Circuit has found this factor neutral even when an employee worked for a borrowing employer for as long as a month. *See Brown v. Union Oil Co. of California*, 984 F.2d 674, 679 (5th Cir. 1993).

[28] *See* Partial Motion for Summary Judgment Exhibit 2 at 47:18-48:8.
[29] *Id.*
[30] *Id.* at 45:21-46:18.

The Court therefore finds this factor neutral. Even were the Court to find that the short duration of Skipper's employment with A&M weighed against finding a borrowed servant relationship, the Court would still find that a borrowed servant relationship exists because of the number of the other factors that weigh heavily in favor of finding Skipper was a borrowed servant.

8. *Right to Discharge*

The inquiry under this factor is not which entity had the power to terminate the injured plaintiff's employment outright, but whether the borrowing employer had the authority to terminate the employee's services with the borrowing employer itself. *See Melancon*, 834 F.2d at 1246. Mayon testified that A&M had the right to fire Mr. Skipper and ask Helix to replace him with another employee, and could have "rejected Mr. Skipper as a temporary worker if they wanted to."[31] Skipper presents no argument that this factor weights against a finding of borrowed servant status. The Court therefore finds that this factor weighs in favor of finding borrowed servant status.

9. *Obligation to Pay*

The final factor asks who had the obligation to pay Skipper. Plaintiff points out that the contract between A&M and Helix required Helix to pay

[31] Partial Motion for Summary Judgment Exhibit 2 at 50:19-23.

Skipper's wages.[32] But this does not end the inquiry. When the funds the general employer uses to pay the employee are received from entity the employee is contracted out to, that entity in effect pays the employee. *See Capps*, 784 F.2d at 618. That is the case here. Mayon testified that A&M paid Helix, which in turn paid Skipper.[33] Skipper does not dispute this arrangement. The Court therefore finds this factor weighs in favor of borrowed servant status.

10. *Conclusion*

In sum, seven of the nine borrowed servant factors favor a borrowed servant relationship, while only one suggests that a borrowed servant relationship does not exist. One factor is neutral. Notably, the fourth, fifth, and sixth factors—three of the four factors the Court must weigh most heavily—favor a borrowed servant relationship. Accordingly, the Court finds that A&M was Skipper's borrowing employer for the purposes of the LHWCA, and that therefore A&M and Helix are entitled to partial summary judgment.

[32] Partial Motion for Summary Judgment Exhibit 1 at 1 (requiring the contractor, Helix, to "[A]ssume responsibility for the payment of wages to each employee furnished to Client [A&M] hereunder.").

[33] Partial Motion for Summary Judgment Exhibit 2 at 51:6-10.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the defendants' motion for partial summary judgment.

New Orleans, Louisiana, this 2nd day of January, 2020.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 16, 2020
Lyle W. Cayce
Clerk

No. 20-30278
Summary Calendar

WALTER SKIPPER,

Plaintiff—Appellant,

versus

A&M DOCKSIDE REPAIR, INCORPORATED,

Defendant-Third Party Plaintiff—Appellee,

versus

HELIX RESOURCES, L.L.C.,

Third Party Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-6164

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

Plaintiff-appellant Walter Skipper appeals the district court's decision granting partial summary judgment in favor of defendants-appellees A&M Dockside Repair ("A&M"), Inc., and Helix Resources, L.L.C. ("Helix"). The district court based its decision on the application of the borrowed servant defense. We AFFIRM.

I.

On August 11, 2017, Skipper was working on a barge in one of A&M's shipyards when he allegedly fell into an open manhole cover and suffered severe injuries. At the time of the accident, Skipper was employed by Helix as a painter and blaster. Helix provided Skipper's services to A&M pursuant to a services agreement.

Following the accident, Skipper filed a negligence action against A&M, and A&M then filed a third-party complaint against Helix. After A&M and Helix resolved the dispute between them, they filed a joint motion for partial summary judgment. The district court granted the joint motion on the grounds that "A&M was Skipper's borrowing employer for the purposes of the [Longshore & Harbor Workers' Compensation Act (the "LHWCA")]." If this conclusion holds, compensation and medical payments are Skipper's sole remedy under the LHWCA. *See* 33 U.S.C. § 933(i) ("The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee who is injured . . . by the negligence or wrong of any other person . . . in the same employ."). Skipper filed a timely notice of appeal.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

II.

We review a district court's order granting summary judgment de novo viewing all facts and evidence in the light most favorable to the non-moving party. *Burrell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016). Whether an employee is a borrowed servant is a question of law and, therefore, also reviewed de novo. *See Gaudet v. Exxon Corp.*, 562 F.2d 351, 358 (5th Cir. 1977); *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 314 (5th Cir. 1969). But we review a district court's decision regarding whether a party has waived an affirmative defense for abuse of discretion. *Motion Med. Techs., L.L.C. v. Thermotek, Inc.*, 875 F.3d 765, 771 & n.8 (5th Cir. 2017).

Skipper makes two arguments why summary judgment was improper. First, Skipper argues that A&M and Helix waived the borrowed servant defense. Second, Skipper argues that even if the defense was not waived, there is a genuine dispute as to material facts that precludes summary judgment. We address each argument in turn.

The district court concluded that the borrowed servant defense was not waived. We agree. Federal Rule of Civil Procedure 8 requires a defendant to "state in short and plain terms its defenses to each claim asserted against it" and "affirmatively state any avoidance or affirmative defense." FED. R. CIV. P. 8(b)(1)(A), (c)(1). Although Skipper is correct that neither A&M nor Helix expressly raised the borrowed servant defense as an affirmative defense in their answers, this failure does not necessarily result in waiver. *See Motion Med.*, 875 F.3d at 772 (observing that we have "repeatedly rejected waiver arguments when a defendant raised an affirmative defense for the first time at summary judgment—or even later"). As we have previously held, "an affirmative defense is not waived if the defendant 'raised the issue at a pragmatically sufficient time and [the plaintiff] was not prejudiced in its

ability to respond.'" *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)).

In this case, the district court concluded that Skipper had reasonable notice and was not prejudiced by the district court's consideration of the borrowed servant defense at the summary judgment stage. First, the district court observed that Helix made various assertions in its answer that implicated the borrowed servant defense. For example, Helix asserted that Skipper was on a "mission" for Helix and had "no right to seek tort remedies from Helix, nor any other party to attempt to pass through alleged fault to Helix as no Helix employees or supervisors were present at the time of the incident and Helix relinquished control, supervision, and direction to A&M." Additionally, Helix asserted that Skipper's sole remedy was for compensation under the Louisiana Worker's Compensation Act or, alternatively, the LHWCA.[1] Second, the borrowed servant defense was raised explicitly in a partial summary judgment motion filed months before trial. Third, Skipper made thorough and reasoned responses to the arguments that A&M was Skipper's borrowing employer and made no argument that he needed additional discovery on this issue. Therefore, the district court did not abuse its discretion in concluding that the defense was not waived.

Next, Skipper argues that there remains a genuine dispute as to material facts as to whether A&M was acting as his borrowing employer. In *Ruiz v. Shell Oil*, we set out nine factors relevant to whether the borrowed servant defense applies. No one factor is dispositive. *See Brown v. Union Oil*

[1] Skipper's argument that these assertions did not put him on notice of the borrowed servant defense because they were raised in Helix's answer to A&M's third-party complaint is unavailing. To be sure, as the district court correctly observed, Helix's answer is part of the record in this case.

Co. of Ca., 984 F.2d 674, 676 (5th Cir. 1993). Skipper argues that there is a genuine dispute as to material fact regarding four of the nine factors and that two of the factors are neutral. We address each of the nine factors in turn.

(1) Who has control?

This inquiry focuses on whether A&M or Helix exerted greater control over Skipper. Skipper argues that because a trier of fact could conclude that he was acting in cooperation with A&M employees rather than in subordination to their directions, there is a genuine dispute as to material fact regarding control that precludes summary judgment. But Skipper's own testimony refutes this argument. Specifically, Skipper established that he followed the directions of A&M's yard superintendent, referring to A&M as the "boss." Additionally, the yard superintendent testified that Skipper's only supervisors were A&M foremen and that he directed Skipper's work. Indeed, Helix did not have *any* supervisors at the jobsite. Skipper also argues that his status as an independent contractor per the terms of the services agreement between A&M and Helix, creates a genuine dispute as to material fact regarding control. This argument is meritless. In fact, we have previously upheld the application of the borrowed servant defense despite this type of clause. *See, e.g.*, *Gaudet*, 562 F.2d at 358 (observing that the "trial court could have concluded that the test for borrowed employee status was met regardless of the ultimate resolution of the factual matter of the agreement between the employers"). Therefore, we find that this factor favors borrowed servant status.

(2) Whose work is being performed?

This inquiry focuses on whether Skipper was performing A&M's or Helix's work. Skipper argues that there is a genuine dispute as to material fact regarding whose work was being performed. He argues that he was only incidentally performing A&M's work and instead performing Helix's work,

whose business as a temporary labor company is the hiring out of personnel. Skipper's argument is meritless. The yard superintendent testified that Skipper repaired and cleaned the barge for A&M. In other words, Skipper performed A&M's work. To that end, Skipper's reliance on cases where a contracted laborer was performing ancillary work is misplaced. In this case, it is clear that Helix hired out its employees to do A&M's work. Therefore, we find that this factor favors borrowed servant status.

(3) Was there an agreement or understanding between Helix and A&M?

Skipper argues that there is a genuine dispute as to material fact regarding this factor in light of the independent contractor clause in the agreement between Helix and A&M. Specifically, the agreement provides that Skipper "shall at all times be deemed an independent contractor and the relationship of these parties to [A&M] shall not at any time constitute any relationship other than that of independent contractor." First, no one disputes the existence of this clause, and second, as discussed above, we have previously found borrowed servant status despite the presence of this type of clause. *See Gaudet*, 562 F.2d at 358. Although this clause weighs in Skipper's favor, there is no genuine dispute as to any material fact regarding this factor. Therefore, this factor does not compel a denial of summary judgment.

(4) Did Skipper acquiesce in the new work situation?

This factor focuses on whether the employee agreed to the work arrangement. There is no evidence that Skipper took issue with working for A&M, and in any event, he does not argue that there is a genuine dispute as to any material fact regarding this factor. We find that this factor favors borrowed servant status.

(5) Did Helix terminate its relationship with Skipper?

Skipper argues that this factor should have weighed against the borrowed servant defense or have been considered as neutral because there is no evidence that Helix terminated its relationship with him. Skipper mischaracterizes the focus of this inquiry. Specifically, this inquiry focuses on whether Skipper maintained contact with Helix and not whether his actual employment relationship was severed. *See Hotard v. Devon Energy Prod. Co. L.P.*, 308 F. App'x 739, 742 (5th Cir. 2009) (citing *Amoco Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1246 (5th Cir. 1988)). To that end, Skipper offers no evidence to show that he was in communication with or supervised by Helix employees. In fact, the evidence cuts against Skipper's position given his testimony and the yard superintendent's testimony that there were no Helix supervisors at the jobsite. Therefore, we find that this factor favors borrowed servant status.

(6) Who furnished the tools and place for performance?

Skipper does not make arguments about this factor. In any case, the majority of the tools were provided by A&M, and the place of performance was A&M's shipyard. We find that this factor favors borrowed servant status.

(7) Was the new employment over a considerable length of time?

There is no dispute that Skipper worked for A&M for six days. Skipper argues that this factor should have weighed against the borrowed servant defense or have been considered as neutral. The district court did, in fact, consider this factor to be neutral. We agree with the district court. Indeed, we have previously found that this factor is "significant only when the [borrowing] employer employs the employee for a considerable length of time," but where an employee is injured early in the employment, the factor is neutral. *See Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 618 (5th Cir. 1986). Therefore, we find this factor to be neutral.

(8) Who had the right to discharge Skipper?

This inquiry focuses not on which entity had the power to terminate Skipper's employment outright but simply whether A&M had the authority to terminate Skipper's services with A&M. *See Capps*, 784 F.2d at 618 (explaining that the proper focus of the inquiry is whether the borrowing employer has the "right to terminate [the borrowed employee's] services with itself"). Skipper does not make arguments about this factor. In any case, A&M had the right to discharge Skipper from the jobsite and request a new worker. Therefore, we find that this factor favors borrowed servant status.

(9) Who had the obligation to pay the employee?

Skipper argues that there is a genuine dispute as to material fact regarding this factor. He is incorrect. A&M paid Helix, which in turn paid Skipper, in effect, out of the funds from A&M. When the funds used to pay the employee are received from the entity the employee is contracted out to, we have held that that entity, in effect, pays the employee. *See id.* Therefore, we conclude that this factor weighs in favor of borrowed servant status.

Despite Skipper's arguments to the contrary, there is no genuine dispute as to any material fact, and the district could determine that A&M was Skipper's borrowing employer. Because seven of the nine borrowed servant factors favor borrowed servant status, we conclude that Skipper was a borrowed employee and A&M his borrowing employer. Therefore, A&M and Helix were entitled to partial summary judgment.

III.

For the foregoing reasons, the decision of the district court is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 20-30278

WALTER SKIPPER,

Plaintiff—Appellant,

versus

A&M DOCKSIDE REPAIR, INCORPORATED,

Defendant-Third Party Plaintiff—Appellee,

versus

HELIX RESOURCES, L.L.C.,

Third Party Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-6164

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 09/16/2020 , 5 CIR., _____ , _____ F.3D _____)

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on 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 also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause En banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	:	CIVIL ACTION
v.	:	NO. 18-6164
A&M DOCKSIDE REPAIR, INC., et al	:	SECTION "R"(4)
	:	JUDGE VANCE
	:	MAG. JUDGE ROBY

: : : : : : : : : : : : : : : : :

FINAL JUDGMENT

IT IS HEREBY ORDERED all claims of Walter Skipper against A&M Dockside Repair, Inc. are hereby dismissed, with prejudice, in accordance with the Order and Reasons issued by this Court on January 2, 2020 (R.Doc. 60), with each party to bear their own costs; and

IT IS FURTHER ORDERED that the claims asserted against Helix Resources, LLC by A&M Dockside Repair, Inc. are hereby dismissed, with prejudice, as of compromise, with each party to bear their own costs.

New Orleans, Louisiana this 1st day of April, 2020.

Sarah Vance

UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 16, 2020
Lyle W. Cayce
Clerk

No. 20-30278
Summary Calendar

WALTER SKIPPER,

Plaintiff—Appellant,

versus

A&M DOCKSIDE REPAIR, INCORPORATED,

Defendant-Third Party Plaintiff—Appellee,

versus

HELIX RESOURCES, L.L.C.,

Third Party Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-6164

Before KING, SMITH, and WILSON, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Oct 22, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

(2) promptly file a supplemental statement if any required information changes.

(As added Apr. 29, 2002, eff. Dec. 1, 2002; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;

- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

Rule 9. Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General*. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues*. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(5) *Third-Party Defendant's Claim Against a Nonparty*. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) *Third-Party Complaint In Rem*. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the ''summons'' includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) WHEN A PLAINTIFF MAY BRING IN A THIRD PARTY. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) ADMIRALTY OR MARITIME CLAIM.

(1) *Scope of Impleader*. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff—for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) *Defending Against a Demand for Judgment for the Plaintiff*. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS BEFORE TRIAL.

(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond*. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) AMENDMENTS DURING AND AFTER TRIAL.

(1) *Based on an Objection at Trial*. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent*. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) RELATION BACK OF AMENDMENTS.

(1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States*. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Pub. L. 102–198, §11(a), Dec. 9, 1991, 105 Stat. 1626; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PURPOSES OF A PRETRIAL CONFERENCE. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) SCHEDULING.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order*.

(A) *Required Contents*. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

(4) *Modifying a Schedule*. A schedule may be modified only for good cause and with the judge's consent.

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

(1) *Attendance*. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration*. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) PRETRIAL ORDERS. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) FINAL PRETRIAL CONFERENCE AND ORDERS. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) SANCTIONS.

(1) *In General*. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs*. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

TITLE IV. PARTIES

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) REAL PARTY IN INTEREST.

(1) *Designation in General*. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit*. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest*. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) CAPACITY TO SUE OR BE SUED. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	*	CIVIL ACTION
VERSUS	*	NUMBER: 18-6164
A&M DOCKSIDE REPAIR, INC. and CASHMAN EQUIPMENT CORP.	*	SECTION: R
* * * * * * *	*	MAGISTRATE: 4

AMENDED COMPLAINT

NOW INTO COURT, through undersigned counsel, comes the plaintiff, Walter Skipper, a person of the full age of majority and resident of the State of Louisiana, and for his Amended Complaint respectfully represents as follows:

1.

Plaintiff realleges and reavers each and every allegation of his original Complaint as if set out here in full. A copy of the Complaint is annexed hereto as Exhibit 1.

2.

JURISDICTION

This Honorable Court has federal question jurisdiction pursuant to 28 U.S.C. 1331. In the alternative, the Court has jurisdiction in admiralty pursuant to 28 U.S.C. 1333.

3.

Made defendants herein are:

1. A&M DOCKSIDE REPAIR, INC., on information and belief, a corporation authorized to do and doing business in the State of Louisiana and within the jurisdiction of this Honorable Court.

2. CASHMAN EQUIPMENT CORP., on information and belief, a corporation authorized to do and doing business in the State of Louisiana and within the jurisdiction of this Honorable Court, and at all times pertinent hereto, the owner and/or operator of the barge on which plaintiff was injured.

3. OSPREY LINE, LLC, on information and belief, a corporation authorized to do and doing business in the State of Louisiana and within the jurisdiction of this Honorable Court, and at all times pertinent hereto, the owner, owner *pro hac vice*, charterer and/or operator of the barge on which plaintiff was injured.

4.

WALTER SKIPPER was at all times mentioned herein an employee of a third party, Helix Resources, LLC., and the defendants herein are liable unto him pursuant to 33 U.S.C. § 905(b), and/or pursuant to the General Maritime Law of the United States of America, and under the law and statutes of the State of Louisiana, for the following reasons:

5.

On or about August 11, 2017, plaintiff was employed by a third party, Helix Resources, LLC., as a blaster/painter. On that date, the plaintiff was performing his assigned duties aboard a barge owned and/or operated by and/or chartered to the defendants, Cashman Equipment Corp. and/or Osprey Line, LLC, which vessel was in the navigable waters of the United States and within the jurisdiction of this Court in a shipyard owned and operated by the defendant, A&M Dockside Repair, Inc. In the course of performing those duties, suddenly and without warning and due to the negligence of the defendants and/or the vessel, plaintiff was caused to sustain severe and disabling injuries when fell in an open manhole cover on the barge.

6.

Plaintiff was in no manner negligent. On information and belief, plaintiff alleges that the sole and proximate cause of the accident and his injuries, as described herein, was the negligence and/or failure of the defendants, and their employees, servants and/or agents and/or the vessel, in carrying out their obligations and duties, individually and concurrently, in the following respects:

1. Failure to provide plaintiff with a safe place in which to work;

2. Failure to warn the plaintiff;

3. Failure to warn plaintiff of the dangerous and unsafe conditions of the vessel;

4. Failure to exercise reasonable care in discovering and correcting any and all unsafe conditions existing on the vessel;

5. Failure to have the vessel in such condition that the plaintiff could work with reasonable safety;

6. Failure to provide plaintiff with the proper equipment and/or personnel to accomplish his job in a reasonably safe manner;

7. Failure to provide competent and adequate supervisory authority;

8. Hiring untrained and unskilled employees;

9. Retaining employees found to be careless and/or unskilled;

10. Breach of legally imposed duties of reasonable care owed by the defendant(s) to the plaintiff;

11. Other acts of negligence and conditions of unseaworthiness to be proven at the trial of this case.

7.

Solely by reason of the negligence of the defendants and of the vessel, and other acts and inactions described herein, plaintiff sustained serious injuries including but not limited to the following: possible ruptured disks and nerve damage, as well as possible injuries to his bones, muscles and joints, organs and tissues among other component parts of his head, back, ribs, legs,

feet, and hands. As a result thereof, plaintiff has in the past and will in the future: require medicines, medical care, medical treatment, have to expend moneys and incur obligations for treatment and care, suffer agonizing aches, pains, and mental anguish, and be disabled from performing his usual duties, occupations and avocations.

8.

As a result of the aforesaid negligence, breach of duties, and other actions and inactions on the part of the defendants herein, plaintiff has suffered injuries and damages for which defendants are liable unto him, plus legal interest from the date of occurrence, a reasonable attorney's fee, and all costs of these proceedings.

WHEREFORE, plaintiff prays that this Amended Complaint be deemed good and sufficient and, after service hereof and after due proceedings had and the expiration of all legal delays herein, there be a judgment rendered in favor of the plaintiff, WALTER SKIPPER, and against defendants, A&M DOCKSIDE REPAIR, INC., CASHMAN EQUIPMENT, CORPORATION, and OSPREY LINE, LLC., as prayed for herein and in plaintiff's original Complaint, in damages in an amount to be determined at trial, together with interest from the date of occurrence until paid, attorney's fees, and all costs; and for any and all other relief which the law and justice may provide.

RESPECTFULLY SUBMITTED:

__s/ David C. Whitmore_____
LAWRENCE BLAKE JONES (7495)
DAVID C. WHITMORE (17864)
BLAKE JONES LAW FIRM, LLC
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Attorneys for Plaintiff, Walter Skipper

CERTIFICATE OF SERVICE

I do hereby certify that on the 12th day of October, 2018, a copy of the above and foregoing pleading was electronically filed with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record that have elected e-notification by operation of the court's electronic filing system. I further certify that, on the aforementioned date, I also served a copy of the foregoing pleading upon all counsel of record who are non-CM/ECF participants via facsimile transmission and/or via hand delivery and/or via the United States mail, postage prepaid and properly addressed.

_____s/ David C. Whitmore_____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	**NO. 18-6164**
VERSUS	**SECTION: "R" (4)**
A&M DOCKSIDE REPAIR, INC. AND CASHMAN EQUIPMENT CORP.	**HON. SARAH S. VANCE**
	MAG. KAREN WELLS ROBY

ANSWER TO AMENDED COMPLAINT

NOW INTO COURT, through undersigned counsel, comes Defendant, A&M Dockside Repair, Inc. ("A&M"), and for answer to the Amended Complaint of plaintiff, Walter Skipper, alleges and avers upon information and belief as follows:

FIRST DEFENSE

A&M re-alleges and re-avers all answers and all defenses asserted in response to Plaintiff's original Complaint.

SECOND DEFENSE

1.

The allegations contained in Paragraph 1 of the Amended Complaint require no response from A&M.

2.

The allegations contained in Paragraph 2 of the Amended Complaint are legal conclusions that require no response from A&M.

3.

Except to admit the allegations contained in Paragraph 3 of the Amended Complaint as regards A&M, the remaining allegations contained in Paragraph 2 are denied for lack of information or knowledge sufficient to justify a belief therein.

4.

Except to admit that Plaintiff was an employee of Helix Resources, LLC, the remaining allegations contained in Paragraph 4 of the Amended Complaint are denied.

5.

Except to admit that Plaintiff was employed by Helix Resources, LLC as a blaster/painter on August 11, 2017, the remaining allegations contained in Paragraph 5 of the Amended Complaint are denied.

6.

The allegations contained in sections (1) through (11) of Paragraph 6 of the Amended Complaint are denied.

7.

The allegations contained in Paragraph 7 of the Amended Complaint are denied.

8.

The allegations contained in Paragraph 8 of the Amended Complaint are denied.

WHEREFORE, the premises considered, A&M prays that this, its Answer, be deemed good and sufficient and that after due proceedings had, there be a judgment in its favor and against Plaintiff, dismissing the Amended Complaint at Plaintiff's costs, and for all general and equitable relief.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/ Rachael F. Gaudet
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ATTORNEYS FOR A&M DOCKSIDE REPAIR, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Rachael F. Gaudet

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	*	
	*	NO. 18-6164, SECTION: "R" (4)
VERSUS	*	
	*	JUDGE SARAH S. VANCE.
A&M DOCKSIDE REPAIR, INC. AND	*	
CASHMAN EQUIPMENT CORP.	*	MAG. KAREN WELLS ROBY
	*	

* *

ANSWER TO ORIGINAL AND AMENDED COMPLAINTS

NOW INTO COURT, through undersigned counsel, comes defendant, Helix Resources, LLC ("Helix"), who in answer to the allegations of plaintiff's original and amended complaints, respectfully states:

FIRST DEFENSE

The complaints fail to state a claim upon which relief can be granted.

SECOND DEFENSE

AND NOW, without waiving any defenses, denials, claims, assertions, answers or allegations, Helix responds to the complaint of Walter Skipper as follows:

1.

The allegations of paragraph 1 do not require a response from this defendant.

2.

The allegations of paragraph 2 do not require a response from this defendant.

3.

The allegations of paragraph 3 do not require a response from this defendant.

4.

The allegations of paragraph 4 are denied.

5.

The allegations of paragraph 5 are denied.

6.

The allegations of paragraph 6 do not require a response from this defendant, but if one is needed, then the allegations are denied.

7.

The allegations of paragraph 7 are denied.

8.

The allegations of the prayer are denied.

9.

Helix Resources, LLC, adopts, affirms, pleads and incorporates herein by reference all contents of the third party complaint filed by A&M Dockside Repair, Inc., along with all of the affirmative defenses pled therein as if copied herein *in extenso*.

THIRD DEFENSE

AND NOW, without waiving any defenses, denials, claims, assertions, answers or allegations, Helix responds to the amended complaint of Walter Skipper as follows:

1.

The allegations of paragraph 1 are denied.

2.

The allegations of paragraph 2 do not require a response from this defendant.

3.

The allegations of paragraph 3 do not require a response from this defendant.

4.

The allegations of paragraph 4 are denied.

5.

The allegations of paragraph 5 are denied as written.

6.

The allegations of paragraph 6 are denied.

7.

The allegations of paragraph 7 are denied.

8.

The allegations of paragraph 8 are denied.

9.

The allegations of the prayer are denied.

10.

Helix Resources, LLC, adopts, affirms, pleads and incorporates herein by reference all contents of the third party complaint filed by A&M Dockside Repair, Inc., along with all of the affirmative defenses pled therein as if copied herein *in extenso*.

WHEREFORE, defendant, Helix Resources, LLC prays that its Answer be deemed good and sufficient and that after all legal delays are had there be judgment herein in favor of Helix

and against plaintiff, dismissing plaintiff's claims with prejudice and at his costs, and for all general and equitable relief.

Respectfully submitted,

/s/John E. Unsworth, III
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Facsimile: 866-649-3893
Email: John.Unsworth@cna.com
Attorneys for Helix Resources, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 2019, I electronically filed the foregoing with the Clerk of Court by using CM/ECF system which will send a notice of electronic filing to all known counsel of record.

/s/John E. Unsworth, III
JOHN E. UNSWORTH, III

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WALTER SKIPPER	*	
	*	NO. 18-6164, SECTION: "R" (4)
VERSUS	*	
	*	JUDGE SARAH S. VANCE.
A&M DOCKSIDE REPAIR, INC. AND	*	
CASHMAN EQUIPMENT CORP.	*	MAG. KAREN WELLS ROBY
	*	

* *

ANSWER TO THIRD PARTY COMPLAINT

NOW INTO COURT, through undersigned counsel, comes Helix Resources, LLC (Helix), who in answer to the allegations of A&M Dockside Repair, Inc.'s ("A&M") Third Party Complaint, respectfully states:

FIRST DEFENSE

The third party complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

AND NOW, without waiving any defenses, denials, claims, assertions, answers or allegations, Helix responds to the third party complaint of A&M as follows:

1.

The allegations of paragraph 1 are admitted as to the status of Helix and denied as to liability.

2.

The allegations of paragraph 2 are denied for lack of sufficient information to justify a belief therein.

3.

The allegations of paragraph 3 are denied for lack of sufficient information to justify a belief therein.

4.

The allegations of paragraph 4 do not require a response from this defendant, but if one is needed, then the allegations are denied.

5.

The allegations of paragraph 5 are denied for lack of sufficient information to justify a belief therein.

6.

The allegations of paragraph 6 are denied as written as the complete indemnity provision **is not quoted** and therefore inaccurate.

7.

The allegations of paragraph 7 are denied.

8.

The allegations of paragraph 8 are admitted as Walter Skipper was an employee of Helix. Any allegations as to implication of liability are denied.

9.

The allegations of paragraph 9 are denied as written.

10.

The allegations of paragraph 10 are denied.

11.

The allegations of paragraph 11 are denied as written.

12.

The allegations of the prayer are denied.

AND NOW, IN FURTHER ANSWERING, Helix hereby offers the following affirmative defenses in response to all allegations of A&M's third party complaint:

THIRD DEFENSE

Helix and A&M entered into a Service Agreement on September 6, 2016 (the "Agreement").

FOURTH DEFENSE

The Agreement defines "Contractor" as Helix and "Client" as A&M. The Agreement contains the following indemnity provision:

> **6 (Second paragraph)** Client shall indemnify, hold harmless and defend at its own expense Contractor, Contractor's parent, subsidiary and affiliated companies, Contractor's purchasers, and 2 officers, directors, employees, agents, contractors, insurers and subcontractors of each (hereinafter collectively "Contractor Group") from against all suits demands claims, fines, penalties, attorney's fees and actions of every type and character by whomever brought, whenever occurring, suffered or incurred by Client, Client's parent subsidiary, and affiliated companies and the officers, directors, employees, agents, contractors, insurers, and subcontractors of each (hereinafter collectively "Client Group") without regard to the cause there of for any bodily injury death or property damage or loss arising out of or resulting in any way from any conditions or defects in the work, or from performance of the work even if same should arise due to the concurrent negligence, strict liability or other legal fault of Contractor Group or the unseaworthiness of any contractor owned or leased vessel excepting only injury death or property damage or loss resulting solely from contractor's negligence and without negligence or fault on the part of Client Group or any other party whomsoever.

FIFTH DEFENSE

Accordingly the Agreement requires A&M to "indemnify, hold harmless and defend" Helix and its insurers for "all suits, demands, claims" that were "suffered or incurred" by Helix employees.

SIXTH DEFENSE

The contract calls for A&M to defend Helix under the facts and circumstances of the case.

SEVENTH DEFENSE

Helix is not the owner of the barge plaintiff was aboard when he was allegedly injured. The owner of the barge is Cashman.

EIGHTH DEFENSE

In the event, and solely in the event, that liability is found to exist on the part of a person, firm, or corporation for whom Helix is or may be responsible, all of which is at all times specifically denied, Helix avers that Plaintiff was guilty of comparative fault constituting a proximate cause of the alleged accident in question, which acts of comparative fault consist of the following non-exclusive particulars:

a. Failing to keep a proper lookout for his own safety;

b. Failing to exercise reasonable and prudent care under the circumstances then existing;

c. Being inattentive to this physical surroundings;

d. Acting carelessly or recklessly under the circumstances;

e. Placing himself in a zone of danger;

f. Failing to take proper precautions for his own safety and/or well-being;

g. Failing to abide by safety rules, regulations and policies and/or procedures;

h. In general, in failing to do what he could have done and should have done to avoid the incident; and

i. Other acts of negligence or fault that will be more fully shown at the trial of this matter.

NINTH DEFENSE

Helix avers that the negligence of Plaintiff was a contributing or sole cause of the alleged injuries, thus diminishing or barring Plaintiff's recovery. Such negligence includes, but is not limited to, failure to keep a proper watch, failure to exercise due care under the circumstances, and all other negligent or wrongful acts or omissions that may be discovered or proven at trial in this matter.

TENTH DEFENSE

Helix avers that if Plaintiff is entitled to recover from Helix, which right is expressly denied, Plaintiff's recovery is barred and/or reduced in proportion to the degrees or percentages of fault attributable to Plaintiff and/or any other person or entity to whom or to which a percentage of fault is attributed.

ELEVENTH DEFENSE

Helix avers that the alleged injuries, if any, were caused by acts or omissions or conditions that are responsibilities of persons other than Helix and for whom Helix had no legal responsibility or control and whose comparative fault is plead in bar, diminution, or mitigation of any recovery by Plaintiff.

TWELFTH DEFENSE

Helix avers that the alleged injuries and damages, if any, were caused by superseding and intervening acts and/or negligence and/or strict liability of parties over whom Helix had no control and/or for whose actions Helix is not liable.

THIRTEENTH DEFENSE

Plaintiff's demands are barred by failure to mitigate, minimize, or abate damages or by his failure to provide Helix with adequate information about pre-existing medical conditions

FOURTEENTH DEFENSE

Helix avers that Plaintiff has not suffered any personal injuries as a result of the alleged accident. Helix avers that, in the alternative, if Plaintiff has suffered personal injury damages from the alleged accident, which Helix expressly denies, Plaintiff has fully recovered and is not suffering ongoing damages.

FIFTEENTH DEFENSE

Helix avers that the injuries allegedly sustained by Plaintiff occurred as a result of pre-existing or other medical conditions, causes, or injuries that are completely unrelated to Helix and/or the alleged accident, and the existence of these pre-existing or other medical conditions, causes, or injuries bars or diminishes the Plaintiff's recovery sought.

SIXTEENTH DEFENSE

Helix avers that at all times relevant, Helix complied with all applicable laws, regulations and standards.

SEVENTEENTH DEFENSE

Helix denies that it is liable to any extent as alleged in the First Amended Complaint, and claim exoneration form all liability for all losses, damages and injuries incurred by Plaintiff as a result of the allegations contained in the First Amended Complaint and for any other damages or claims that exist or may arise, but have not been specifically pled.

EIGHTEENTH DEFENSE

Helix avers that Plaintiff has or may have received payment of medical expenses and/or other benefits, including, but not limited to, under a policy or policies of health, accident and/or hospitalization insurance, Medicare or Medicaid benefits and/or at a charity hospital or other government hospital and/or Workers' Compensation insurance, and has subrogated his rights and

claims to payment of said benefits and expenses to the person, form, corporation or entity issuing said policy or benefits and therefore have no right of action against Helix for any of the amounts so paid.

NINETEENTH DEFENSE

Helix specifically denies that the Plaintiff has a claim for punitive damages. Said damages are unconstitutional and are prohibited under and violate the United States Constitution, including but not limited to the provisions of the Eighth Amendment and Fourteenth Amendment to and/or Article 1, Section 10 of the United States Constitution.

TWENTIETH DEFENSE

Helix claims a credit or set-off for all amounts previously paid to Plaintiff arising from in any way the incident described in the Petition.

TWENTY-FIRST DEFENSE

Helix denies that Plaintiff is a Jones Act seaman. Plaintiff cannot satisfy the second prong of the *Chandris v. Latsis*, 515 U.S. 347, test as Plaintiff cannot show that he has 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 nature. The evidence does not support a finding of Jones Act seaman status.

TWENTY-SECOND DEFENSE

At all pertinent times hereto, upon information and belief, Helix did not have supervising personnel on board at the time of the incident and relinquished control of Helix personnel to others to supervise.

TWENTY-THIRD DEFENSE

Further in the alternative, defendants aver upon information and belief that there was no condition or risk of unreasonable harm, that there was no risk that was reasonably foreseeable, that defendants did not have actual or constructive notice of any risk or unreasonable condition prior to the alleged occurrence, and that defendants exercised appropriate and reasonable care at all times material and relevant.

TWENTY-FOURTH DEFENSE

There is an absence of evidence to suggest that the defendants owed or breached any duty to plaintiff, or that this condition presented an unreasonable risk of harm to this repairman plaintiff.

TWENTY-FIFTH DEFENSE

In this matter, the *Celestine v. Union Oil Company of California*, 94-C-1868 (La. 4/10/95) 652 So.2d 1299, 1300 factors that the court had to consider included, but were not limited to "the social, moral, economic considerations, the degree of knowledge of the repairman, the incentives or disincentives to the owner to repair the vice or defect, the reasonableness of presuming that a particular repairman is cognizant of the particular risks, and the ability of the repairman to minimize such risks..." 652 So.2d at 1304.26. This Honorable Court should followed the *Celestine* analysis by considering (1) the plaintiff's status as a construction worker, and (2) whether the plaintiff knew or should have known of a particular condition at a job site.

TWENTY-SIXTH DEFENSE

At all pertinent times, other defendants failed to supply the proper safety equipment to plaintiff to start with on the job and other defendants were fully aware of putting their employees in potentially unsafe conditions. As such, other defendants bear all responsibility.

TWENTY-SEVENTH DEFENSE

At all pertinent times hereto as a result of Mr. Skipper was on a mission for his employer and performing employment related activities his exclusive remedy is pursuant to La.R.S. 23:1032, et. seq., i.e. worker's compensation.

TWENTY-EIGHTH DEFENSE

At all pertinent times hereto, Helix was the employer of plaintiff, Skipper, who was performing manual labor, pursuant to the La. Revised Statute 23:1061 and as such, plaintiff's exclusive remedy under the La. Revised Statute 23:1032 under the Workers' Compensation Act has no right to seek tort remedies from Helix, nor any other party to attempt to pass through alleged fault to Helix as no Helix employees or supervisors were present at the time of the incident and Helix relinquished control, supervision, and direction to A & M.

TWENTY-NINTH DEFENSE

Helix avers that complainant's sole remedy against it is for compensation benefits under Louisiana workers' Compensation Act or, alternatively, under the Longshoremen's and Harbor Workers' Compensation Act.

THIRTIETH DEFENSE

Helix avers that any injuries, damages or disabilities of complainant as alleged herein are a result of physical or mental conditions that pre-existed the incident made the basis of this

lawsuit and were incurred in the normal progressive of those pre-existing conditions, or were due to causes or conditions not related to the accident made the basis of this lawsuit.

THIRTY-FIRST DEFENSE

Third party defendant Helix would show that if complainant was injured, which is specifically denied, such injury was caused by equipment and/or occurred in an area over which this defendant had no control or authority.

THIRTY-SECOND DEFENSE

That this Honorable Court lacks subject matter jurisdiction as an exclusive remedy is in workers' compensation.

THIRTY-THIRD DEFENSE

Helix reserves the right to raise all affirmative defenses that may be revealed as a result of discovery.

THIRTY-FOURTH DEFENSE

Answering Defendant had neither actual nor constructive notice of any alleged defect in the premises.

THIRTY-FIFTH DEFENSE

Answering Defendant specifically contends that it had no duty to provide plaintiff with a seaworthy vessel, and/or that such vessel was seaworthy in all manners and/or that Answering Defendant provided plaintiff with an unseaworthy vessel.

THIRTY-SIXTH DEFENSE

In the further alternative, Answering Defendant specifically alleges and avers that any damages allegedly sustained by the plaintiff were due to a fortuitous event, an Act of God, or force majeure or other circumstances beyond Answering Defendant's control or the responsibility of Answering Defendant and were not proximately caused by any acts or

omissions on the part of Answering Defendant or any other person, party or entity for whom it would be responsible.

WHEREFORE, Helix Resources, LLC, prays that this answer be deemed good and sufficient, and that all delays and due proceedings had there be judgment rendered herein in favor of Helix Resources, LLC, and against plaintiff in cross-claim, A&M Dockside Repair, Inc., dismissing its suit at its cost, and for all general and equitable relief.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 2019, I electronically filed the foregoing with the Clerk of Court by using CM/ECF system which will send a notice of electronic filing to all known counsel of record.

/s/John E. Unsworth, III
JOHN E. UNSWORTH, III

/s/John E. Unsworth, III
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