No. 24-

IN THE

Supreme Court of the United States

COASTLINE COMMERCIAL CONTRACTING, INC.,

Petitioner,

v.

BALTIMORE GAS & ELECTRIC COMPANY, CANDICE M. BATEMAN, RAYMOND C. BOSTIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the navigational capacity test used by the Fourth Circuit constitute an overbroad expansion of federal admiralty jurisdiction and encroach on Maryland's right to enforce its chosen legal doctrine for negligence liability?

2. Is the navigability in fact test used by the Seventh, Eighth, and Ninth Circuits, rather than the navigational capacity test or the ebb and flow test, the proper test to determine the admiralty jurisdiction of federal courts over a body of water?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Coastline Commercial Contracting, Inc. represents that it has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Baltimore Gas & Electric Co. v. Coastline Commercial Contracting, Inc., et al.*, No. 1:22-cv-00696-LKG, U.S. District Court for the District of Maryland. Judgment entered July 12, 2023.

- *Baltimore Gas & Electric Co. v. Coastline Commercial Contracting, Inc., et al.*, No. 23-1937, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 9, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Coastline Commercial Contracting, Inc., respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is published at 107 F.4th 264 (4th Cir. 2024) and is reproduced as Appendix A at App. 1a-13a. The decision of the United States District Court for the District of Maryland is published at 681 F. Supp. 3d 454 (D. Md. 2023) and reproduced as Appendix B at App. 14a-29a.

JURISDICTION

The Fourth Circuit entered judgment on July 9, 2024. *See* App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides, in part:

> The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction[.]"

28 U.S.C. § 1333 provides, in part, that:

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

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

In 1986, Baltimore Gas and Electric Company ("Baltimore Gas"), Respondent, applied for and received from the Department of the Army a permit to lay a submerged electricity cable (the "Cable") through Eli Cove, a small tributary of the Chesapeake Bay in Pasadena, Maryland. App. 16a. The Cable was installed in November 1986. App. 17a. Eli Cove is surrounded on its eastern and western shores by residential homes and a small creek, Eli Cove Creek, flows into the cove from the south. App. 24a. On its north end, Eli Cove flows into Stoney Creek, which in turn flows into the Patapsco River and then the Chesapeake Bay. App. 16a.

On August 3, 2018, Candice Bateman and Raymond Bostic (the "Owners") purchased property adjoining Eli Cove at 7746 West Shore Road, Pasadena, Maryland, including the riparian rights to build into the waters of Eli Cove. App. 17a. In March of 2019, the Owners contracted with Coastline Commercial Contracting, Inc. ("Coastline") to extend an existing pier on their property further into Eli Cove. App. 17a. Such construction required Coastline to use a barge to excavate the floor of Eli Cove and install new pilings to support the extended pier. App. 17a. On March 25, 2019, Coastline allegedly struck the Cable with its barge while transporting pilings to the pier, causing a loss of electrical services in the area and ultimately resulting in damages to Baltimore Gas north of $1.3 million (the "Incident"). App. 17a-18a.

On March 22, 2022, Baltimore Gas filed the instant action in the United States District Court for the District of Maryland, alleging that both Coastline and the Owners were negligent. App. 18a. Coastline and the Owners filed separate motions to dismiss on the ground that Baltimore Gas lacked admiralty jurisdiction to bring this case in federal court. App. 18a-19a. Following additional briefing from each party, the District Court granted both motions and found that Baltimore Gas lacked admiralty jurisdiction. App. 29a. Specifically, the Court found that Eli Cove is not a navigable water for purposes of admiralty jurisdiction because Eli Cove is a distinct body of water from Stoney Creek, and the facts did not show that Eli Cove could be used as a highway for commerce. App. 24a-25a. The Court also found that, even if Eli Cove was a navigable water, the Incident did not have a sufficient nexus to maritime commerce. App. 27a-28a.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed and remanded for further proceedings, holding that Baltimore Gas had admiralty jurisdiction. *See Balt. Gas & Elec. Co. v. Coastline Commer. Contracting, Inc.*, 107 F.4th 264, 267 (4th Cir. 2024); App. 13a. The Court held that Eli Cove is a navigable water because it is "lined with commercially built piers, [and] Coastline itself was engaged in commercial activity when it allegedly struck the [Cable]." App. 7a. Further, the Court concluded that the "uninterrupted route" that could be taken on the water from Eli Cove into the Chesapeake Bay and Atlantic Ocean is "quintessential navigability." App. 7a-8a. The Court also held that the Incident had a sufficient nexus to maritime activity because "the general features of the [I]ncident here posed a sufficient risk of disruption to maritime commerce," and performing

repair or maintenance work from a vessel on a navigable waterway is "the epitome of" traditional maritime activity. App. 12a-13a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari for two reasons. First, the navigational capacity test used by the Fourth Circuit to determine whether a body of water is subject to admiralty jurisdiction is overbroad and encroaches on Maryland's right to enforce its chosen legal doctrine for negligence liability. Second, this Court should grant a writ of certiorari to resolve the circuit split regarding the definition of navigability in the admiralty context and hold that the navigability in fact test used by the Seventh, Eighth, and Ninth Circuits is the proper test to determine whether the federal courts have admiralty jurisdiction over a body of water.

I. This Court should grant the writ of certiorari because the navigational capacity test is overbroad and encroaches on Maryland's right to enforce its chosen legal doctrine for negligence liability

Article III, § 2 of the United States Constitution states: "The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction[.]" In its initial form, as developed by this Court, admiralty jurisdiction was restricted to "the sea, or upon waters within the ebb and flow of the tide." *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat) 428, 429 (1825). This jurisdiction, however, was soon after expanded such that "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters[.]" *The Plymouth*, 70 U.S.

(3 Wall.) 20, 35 (1865). In *The Daniel Ball*, this Court clarified the test for determining whether a body of water is navigable; in that case, the Grand River in Michigan:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall) 557, 563 (1871).

In *The Montello*, this Court further clarified the test to determine navigability:

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true

> criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

87 U.S. (20 Wall.) 430, 441-42 (1874). This Court, however, also included an important limitation to the navigability test:

> It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

Id. at 442 (footnote omitted).

Under the navigational capacity test, adopted by the Fourth Circuit in *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) and applied to the instant case, a body of water is considered navigable for admiralty purposes if it "is capable of being used for purposes of transportation and commerce by customary modes of trade and travel on water," even if it is "not currently used for commercial navigation[.]" *Id.* at 135. The Fourth Circuit stated in the instant case that waters are navigable if they are "susceptible" of being used as a highway of commerce. App. 6a-7a. In this context, "susceptible" and "capable" mean that a body of water is "physically capable of being

used as a highway of commerce[,]" rather than it being likely that a body of water would be used for commercial activity. *Duke v. United States*, 711 F. Supp. 332, 334 (E.D. Tex. 1989).

The navigational capacity test ignores whether a body of water is presently being used for commercial shipping and whether it has history of commercial use. *See Price*, 929 F.2d at 135; *Alford v. Appalachian Power Co.*, 951 F.2d 30, 33 (4th Cir. 1991). Further, the navigational capacity test extends admiralty jurisdiction to waters used solely for recreational purposes. *See Mullenix v. United States*, 984 F.2d 101, 104 (4th Cir. 1993). Under the navigational capacity test, therefore, a body of water with no history of or connection with commercial shipping or commerce, or present commercial use, would be considered navigable if it was physically possible for a commercial vessel to theoretically travel on the body of water. This test goes far beyond the precedent of this Court and extends admiralty jurisdiction to waters that should be left to the control of the states.

In *The Daniel Ball*, this Court stated that waters are navigable "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 77 U.S. at 563. Further, *The Montello* requires that a body of water "be generally and commonly useful to some purpose of trade or agriculture[]" in order to fall within the bounds of admiralty jurisdiction. 87 U.S. at 442. Contrary to this precedent, the Fourth Circuit, applying the navigational capacity test to the facts of the instant case, found that Eli Cove was navigable solely on

the basis that it is "lined with commercially built piers[]" and Coastline "was engaged in commercial activity when it allegedly struck the [Cable]." App. 7a.

The expansion of admiralty jurisdiction to a case involving no commercial shipping, transportation, trade, or commerce, but instead only a lone commercial vehicle on a body of water, is at odds with the fact that "[a]dmiralty law . . . is concerned almost exclusively with the special needs of the shipping industry." *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980); *see LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999) ("The primary purpose of federal admiralty jurisdiction is to 'protect[] commercial shipping' with 'uniform rules of conduct.'") (quoting *Sisson v. Ruby*, 497 U.S. 358, 362 (1990)) (alteration in original). Although Coastline was performing work on the Owners' pier allegedly as part of a commercial agreement, the work done by Coastline is not the type of work that admiralty jurisdiction is, and should, be concerned with.

As a result of this jurisdictional overreach, the navigational capacity test infringes upon Maryland's stated interest in applying its own common law negligence doctrine to the instant case. Maryland is one of four states, plus the District of Columbia, that applies the doctrine of pure contributory negligence when deciding tort cases, which states that "a plaintiff who fails to observe ordinary care for his own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence." *Harrison v. Montgomery Cnty. Bd. of Educ.*, 456 A.2d 894, 898 (Md. 1983). Maryland first adopted the doctrine in 1847 and has, despite several reviews of the doctrine

by the Maryland Supreme Court, steadfastly adhered to the doctrine since its adoption. *See id.* at 905; *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1150 (Md. 2013).

The contributory negligence doctrine "is a fundamental principle of Maryland negligence law, one deeply imbedded in the common law of this State, having been consistently applied by Maryland courts for 135 years." *Harrison*, 456 A.2d at 902. The doctrine has been "'unchanged by the legislature and thus [is] reflective of [Maryland's] public policy[.]'" *Coleman*, 69 A.3d at 1155 (quoting *Harrison*, 456 A.2d at 903)). Maryland thus has a vested interest in applying its common law contributory negligence doctrine to all cases that fall within its borders.

Federal courts in admiralty cases, on the other hand, apply the comparative negligence doctrine, under which damages are "allocated among the parties proportionately to the comparative degree of their fault[.]" *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). Indeed, this Court has stated that the "rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1952). Although Coastline does not question the use of comparative negligence in admiralty cases, the Fourth Circuit's navigational capacity test, an overbroad expansion of admiralty jurisdiction, is forcing comparative negligence to be applied to a case that should be left to Maryland state law, and is preventing Maryland from applying the "deeply imbedded" principle of contributory negligence to the instant case. *Harrison*, 456 A.2d at 902.

Eli Cove is entirely within the borders of Maryland, as is the Owners' property. App. 16a-17a. The Incident occurred in Maryland, and Baltimore Gas operates entirely within Maryland, as does Coastline. App. 15a-16a. There is only one entrance to Eli Cove, from Stoney Creek, and the physical characteristics of Eli Cove Creek make it physically impossible to act as a "highway of commerce." App. 16a. Finally, Eli Cove is a separate and distinct body of water from Stoney Creek and the rest of the Chesapeake Bay watershed. App. 24a. Maryland law should thus apply to all disputes and claims arising out of conduct on Eli Cove.

Accordingly, because of the Fourth Circuit's broad expansion of federal admiralty jurisdiction and ensuing infringement of Maryland's vested interest in applying the contributory negligence doctrine to the instant case, this Court's review is warranted.

II. This Court should grant the writ of certiorari to resolve the circuit split and hold that the navigability in fact test applies to admiralty jurisdiction nationwide

This Court should grant the writ of certiorari to resolve the circuit split regarding the test used to define navigable waters and decide whether present commercial activity is required for a body of water to be considered navigable in the admiralty context. "[T]he primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce[.]" *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). Further, "'[a]dmiralty jurisdiction in the federal courts was predicated upon the need for a uniform development of the law governing the maritime

industries.'" *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 786 (11th Cir. 1984) (quoting *Peytavin v. Gov't Employees. Ins. Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972)). Based on this explicit purpose, if there is no shipping or other commercial activity occurring in a body of water, now or in the past, then the federal government has no interest in having jurisdiction over that water.

Instead of the navigational capacity test used by the Fourth Circuit, the test that is more consistent with the stated purpose of admiralty jurisdiction and historical precedent is the navigability in fact test. As stated by the Eighth Circuit in *Livingston*, under this test, "navigability" is "properly limited to describing a present capability of waters to sustain commercial shipping." 627 F.2d at 170; *see* John F. Baughman, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 Mich. L. Rev. 1028 (1992). This test limits the outer bounds of admiralty jurisdiction to waters currently and actively being used for commercial activity. *Livingston*, 627 F.2d at 169.

The Seventh and Ninth Circuits also apply the navigability in fact test. In *Adams v. Montana Power Co.*, the Ninth Circuit held that "[i]n the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests." 528 F.2d 437, 439 (9th Cir. 1975). In that case, a portion of the Missouri River that "was traversed by small pleasure craft only, and [on which] no commercial shipping occurred or was likely to occur[]" was not navigable for purposes of admiralty jurisdiction. *Id.* at 440. The Court explained its reasoning as follows:

> The logic of requiring commercial activity is evident. The purpose behind the grant of admiralty jurisdiction was the protection and the promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law. The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders. It follows that admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft.

Id. at 439 (citation and footnotes omitted).

Similarly, in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), the Seventh Circuit held that "a recreational boating accident does not give rise to a claim within the admiralty jurisdiction when it occurs on waters that . . . are not in fact used for commercial navigation and are not susceptible of such use in their present state." *Id.* at 151. Even if waters were used for commercial transportation in the past, the Court held, waters that "are now used and likely to be used only for recreational activities[]" do not fall under the umbrella of admiralty jurisdiction. *Id.* at 147. The body of water at issue in *Chapman* was the Kankakee River, which connects with the Mississippi River by way of the Illinois River. *Id.* at 148. Unlike the term "capable" used by the Fourth Circuit in *Price*, the use of "susceptible" in this context means that commercial activity is likely to occur on a body of water.

See United States v. McKee, 68 F.4th 1100, 1109 (8th Cir. 2023) (holding that Table Rock Lake in Missouri is not navigable because "'there is no reasonable likelihood that Table Rock Lake will be [used for commercial shipping] in the near future.'") (quoting *Edwards v. Hurtel*, 717 F.2d 1204 (8th Cir. 1983)).

The navigability in fact test has also been cited positively by the First Circuit. *See Cunningham v. Dir., OWCP*, 377 F.3d 98, 108 (1st Cir. 2004) ("For admiralty purposes, the concept of 'navigability' is generally understood to describe 'a present capability of waters to sustain commercial shipping,' or 'contemporary navigability in fact'"). (quoting *Livingston*, 627 F.2d at 169-70). This test is both more consistent with the purpose of admiralty jurisdiction, as stated by this Court, and is significantly more consistent to apply because it does not require a court to delve into the specific characteristics of a body of water. Contrary to the Fourth Circuit's argument that this test would be "dependent on whether, on any given day, commercial maritime is being conducted on the waters[,]" *Price*, 929 F.2d at 134, the navigability in fact test requires only that it be likely that commercial activity is conducted on a particular body of water, not that there actually was commercial activity occurring at the time of a claim arising. The navigability in fact test is thus consistent with this Court's precedent, which requires that a body of water be "generally and commonly" used for commercial purposes to be considered navigable. *The Montello*, 87 U.S. at 442.

In the instant case, the Fourth Circuit explicitly acknowledged that "uniformity and predictability [is] integral to admiralty law[,]" and continuing to allow

different circuits to apply different definitions of navigable water leads to anything but uniformity. App. 8a. Under the navigability in fact test, Eli Cove would clearly not be considered a navigable water because there is no possibility of it acting as a highway of commerce. Only residential buildings surrounding Eli Cove, and Eli Cove Creek, which flows into Eli Cove from the south, is too small and shallow to support a vessel, let alone a commercial vessel. App. 24a-25a. Further, the closest commercial marina is on Stoney Creek, downstream of Eli Cove. App. 16a. There is no history of commercial shipping on Eli Cove or any evidence that Eli Cove has ever been used for anything but residential and recreational activities. App. 25a. Because there is no actual commercial shipping on Eli Cove, nor a likelihood of commercial shipping occurring, admiralty jurisdiction should not extend to Eli Cove.

The Fourth Circuit in the instant case also applied the "ebb and flow" test in its holding that Eli Cove was a navigable water and thus was subject to admiralty jurisdiction. App. 6a, 9a. Abandoned by this Court when it adopted the navigable water standard, the ebb and flow test is used by a few Circuits to determine whether tidal waters fall within admiralty jurisdiction. This test, however, has been applied inconsistently.

Under the definition used by the Ninth Circuit, all tidal waters within the ebb and flow of the tide are subject to admiralty jurisdiction. *See In re Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986). The Fourth Circuit applies the ebb and flow test after the navigability of a body of water is determined to establish the outer limits of the Court's jurisdiction, not as a separate basis for finding a body of water to be

within the bounds of admiralty jurisdiction. As explained in *Mullenix*:

> In *Hassinger* [*v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986)], we addressed the scope of the term "navigable," not the determination of navigability, holding that "'navigable water' and thus the boundary of admiralty jurisdiction in tidal areas does not ebb and flow with the tide but extends to the mean high water mark at all times." *Id.* at 1026 (emphasis added). We did not limit admiralty jurisdiction only to those bodies of water that ebb and flow with the tide; instead, we delineated the outer boundary of admiralty jurisdiction once navigability is found to exist.

984 F.2d at 104-05. The Fifth Circuit, on the other hand, simply applies the navigability in fact test to a determination of admiralty jurisdiction regardless of whether the water is tidal or inland. *See Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1377 (5th Cir. 1988) (stating that the navigability in fact test has "been held to apply to all bodies of water, not just rivers, natural as well as artificial."). In Circuits that contain no tidal waters within its jurisdiction, the Courts have not had the opportunity or need to determine the validity of the ebb and flow test in relation to tidal waters and continue to apply either the navigational capacity test or the navigability in fact test.

The numerous conflicting tests and applications used by different federal courts to determine whether a body of water is subject to admiralty jurisdiction create the very same "unworkable . . . patchwork" of laws that the

Fourth Circuit in the instant case states it is trying to avoid and emphasizes the pressing need for this Court to grant the writ of certiorari and establish a nationwide basis for determining whether a body of water is covered under admiralty jurisdiction. App. 9a. This Court has not ruled directly on the definition of navigable waters since the 1903 decision *The Robert W. Parsons*, 191 U.S. 17 (1903), and the instant case affords this Court the perfect opportunity to do so.

CONCLUSION

For the foregoing reasons, Petitioner, Coastline Commercial Contracting, Inc., respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1937

BALTIMORE GAS & ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

COASTLINE COMMERCIAL CONTRACTING, INC.; CANDICE M. BATEMAN; RAYMOND C. BOSTIC,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Lydia Kay Griggsby, District Judge.
(1:22-cv-00696-LKG)

Argued: May 10, 2024 Decided: July 9, 2024

Before WILKINSON, NIEMEYER, and QUATTLEBAUM, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion in which Judge Niemeyer and Judge Quattlebaum joined.

Appendix A

WILKINSON, Circuit Judge:

In 2019, a 13,000-volt electric cable lying at the bottom of Eli Cove in Pasadena, Maryland was damaged. According to Baltimore Gas & Electric Co.—the public utility which owned and maintained the cable—the cable was struck by a barge that Coastline Commercial Contracting owned. Coastline allegedly hit the cable while performing work for a couple who owned property on the cove and who had hired Coastline to extend their pier. Baltimore Gas & Electric sued Coastline and the owners for negligence. The issue before us is whether a court of the United States has admiralty jurisdiction to determine the existence and extent of Coastline's tort liability. The district court determined that it did not have such jurisdiction. For the reasons that follow, we hold that this case falls within federal admiralty jurisdiction. We thus reverse the district court and remand for further proceedings.

I.

The complaint alleged the following facts. Candice Bateman and Raymond Bostic (the "Owners") own property on Eli Cove, a tidal inlet off of Stoney Creek. Like other properties on the cove, the Owners' property includes a pier and riparian rights to build out into the waters. And this they sought to do.

In March 2019, the Owners hired Coastline to extend their existing pier further into the cove. The project required Coastline to send a barge from its headquarters

on Stoney Creek to excavate the cove's floor and to install new pilings which would support the additions.

Resting at the bottom of the cove was a high-voltage electric cable owned and maintained by Baltimore Gas & Electric. Baltimore Gas & Electric laid the submerged cable in 1986, where it rested undisturbed for over thirty years. As Coastline was transporting the barge to carry out the work on the Owners' pier, it allegedly struck the cable, causing immediate loss of electricity to the area and damaging the cable to the tune of $1.3 million in repairs.

Baltimore Gas & Electric filed suit in federal district court against Coastline and the Owners. It alleged that Coastline failed to exercise reasonable care in performing the work for the Owners and that the Owners negligently failed to notify Coastline of the location and existence of the cable. Baltimore Gas & Electric invoked federal admiralty jurisdiction over the claim against Coastline and supplemental jurisdiction over the claim against the Owners.

Coastline and the Owners filed motions to dismiss for lack of admiralty jurisdiction. The district court granted the motions. *See Balt. Gas & Elec. Co. v. Coastline Comm. Contracting, Inc.*, 681 F. Supp. 3d 454, 461 (D. Md. 2023).

For background, admiralty jurisdiction over maritime torts depends on the location of the tort—whether it occurs on navigable waters—and its relation to traditional maritime activity. *See Price v. Price*, 929 F.2d 131, 133 (4th Cir. 1991). In dismissing the case, the district court

found that Eli Cove was not part of the navigable waters because it could not accommodate commercial navigation and was not susceptible of being used as a highway for commerce. *Balt. Gas & Elec.*, 681 F. Supp. 3d at 459-61. The district court also found that the incident did not bear a significant relationship to traditional maritime activity because "Coastline's barge was present on Eli Cove solely to extend an existing pier at a private residence." *Id.* at 461.

After de novo review, *see White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995), we hold that the district court applied the incorrect standard when making each determination and that it indeed has admiralty jurisdiction over the suit. We therefore reverse.

II.

The Constitution permits—and Congress has conferred—jurisdiction to the federal courts over "admiralty and maritime" cases. U.S. Const. art. III § 2; 28 U.S.C. § 1333. The primary justification for entrusting admiralty cases to the federal courts is to protect "the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation." 1 Admiralty & Mar. Law § 3:3 (6th ed.); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 544, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) ("[T]he basic rationale for federal admiralty jurisdiction is 'protection of maritime commerce through

uniform rules of decision[.]'"). Thus, a case subject to federal admiralty jurisdiction will be governed by the uniform body of common law precepts and statutes comprising federal maritime law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996). "This body of law serves to protect commercial activity by ensuring that uniform rules of conduct are in place." *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Raft of Logs*, 709 F.3d 1055, 1061 (11th Cir. 2013); *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972).

A party seeking to invoke federal admiralty jurisdiction over a tort claim must satisfy conditions both of location and of connection with traditional maritime activity. The test is twofold: "The alleged wrong must occur or be located over a navigable waterway, and the wrong must bear a significant relationship to traditional maritime activity." *Mullenix v. United States*, 984 F.2d 101, 104 (4th Cir. 1993); *see also Grubart*, 513 U.S. at 534-35. We address each condition in turn.

A.

As discussed, federal admiralty jurisdiction depends in part on where the tort occurred. "A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513

U.S. at 534. Here the tort certainly occurred on water. But is Eli Cove "navigable" for purposes of admiralty jurisdiction?

Tidal waters like Eli Cove have long been recognized as navigable for purposes of admiralty jurisdiction. *See Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022, 1026 (4th Cir. 1986). Indeed, until the mid-nineteenth century, admiralty jurisdiction was limited to tidal waters. *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429, 6 L. Ed. 358 (1825); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451, 13 L. Ed. 1058 (1851). Though admiralty jurisdiction can now extend to all navigable waters, including lakes and rivers, tidal waters remain the prototypical navigable waters and firmly fall within the ambit of federal admiralty jurisdiction. *See Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975) (mem.); 1 Admiralty & Mar. Law § 3:3 ("The traditional domain of admiralty jurisdiction is, of course, the sea, including waters within the ebb and flow of the tide.").

The district court recognized that Eli Cove is part of the tidal waters of the Chesapeake Bay yet held that Eli Cove was not navigable because it was not "susceptible of being used as a highway for commerce." *Balt. Gas & Elec.*, 681 F. Supp. 3d at 460. The susceptibility prong is

important because it focuses the inquiry on potential as well as actual use. *See Price*, 929 F.2d at 134; *Mullenix*, 984 F.2d at 104. Thus "[w]e have judged navigability based on a waterway's capability to bear commercial navigation." *Mullenix*, 984 F.2d at 104. Waters are navigable when they "are currently being used as a highway of commerce *or* if they are susceptible of being so used." *Price*, 929 F.2d at 134. And "[w]aters are susceptible of such use when they are, in their current configuration, capable of commercial navigation." *Id.*

The district court found that Eli Cove was neither being used as a highway of commerce nor susceptible of such use because it was a residential inlet whose purpose was "to provide access to the water from these residences" and because it was too shallow to support commercial navigation. *Balt. Gas & Elec.*, 681 F. Supp. 3d at 460. But this determination is belied by the undisputed facts in this case: not only is the cove lined with commercially built piers, but Coastline itself was engaged in commercial activity when it allegedly struck the underwater cable.

Moreover, the district court's determination overlooked the nature of the Chesapeake Bay and its tributaries. The district court recognized that "Eli Cove flows into Stoney Creek, which . . . in turn, flows into the Patapsco River and Chesapeake Bay." *Id.* One could push off from the cove and travel along an uninterrupted route to the Bay to reach Virginia and on to the Atlantic Ocean. This

is quintessential navigability. Indeed, though not an assessment of navigability through the lens of admiralty law, Baltimore Gas & Electric's 1986 permit from the Department of the Army to lay the submerged cable noted it was a "structure in or affecting navigable waters of the United States." J.A. 54.

The fact that many of the properties abutting the cove are residential homes is not relevant. Courts have repeatedly held that current use does not determine navigability. To hold that navigability depends on current commercial use would preclude the uniformity and predictability so integral to admiralty law because its application would be "dependent on whether, on any given day, commercial maritime activity is being conducted on the waters." *Price*, 929 F.2d at 134; *see also Aqua* Log, 709 F.3d 1055, 1061 (11th Cir. 2013) ("A test that requires evidence of actual or likely commercial activity fails to provide the predictability that encourages maritime commerce."). For this reason, we have found admiralty jurisdiction even over waters used exclusively for recreational navigation when they were capable of commercial navigation. *E.g.*, *Price*, 929 F.2d at 134-35; *Mullenix*, 984 F.2d at 104.

These same principles of uniformity and predictability apply to assessing the depth of navigable waters as well.[1]

1. We note that the district court's determination that Eli Cove was no more than five feet deep is at odds with the charts

We have thus held that "the boundary of admiralty jurisdiction in tidal areas does not ebb and flow with the tide but extends to the mean high water mark at all times" because it should not matter whether an injury occurred one step into or one step out of the water's edge at a given moment. *Hassinger*, 781 F.2d at 1026-27. Indeed, we have found admiralty jurisdiction over torts taking place on land when they fell within the mean high-water mark of the tide. *E.g.*, *id.*

A jurisdictional rule that required courts to assess the residential-ness versus commercial-ness—or the depth at each point along a continuous water route—would be unworkable and generate a patchwork of state law jurisdiction and admiralty law jurisdiction along the same body of water. That cannot be, and fortunately is not, our rule.

B.

In addition to satisfying conditions of location, a claimant invoking the court's admiralty jurisdiction must show that the incident had some connection to maritime activity. *Price*, 929 F.2d at 135; *Grubart*, 513 U.S. at 534. The purpose of this so-called "connection test" is to weed

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in the record. Upon closer inspection of the National Oceanic and Atmospheric Administration chart, the parties agreed at oral argument that the chart seems to state that the depth of the cove is *at least* five feet. *See* J.A. 46.

out cases "occurring on navigable waters, but lacking maritime flavor." 1 Admiralty & Mar. Law § 3:5. The connection test has two requirements: (1) the incident must have a potentially disruptive impact on maritime commerce and (2) the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity. *Grubart*, 513 U.S. at 534. We find both conditions met here.

1.

The incident underlying this action was plainly "of a sort with the potential to disrupt maritime commerce." *Grubart*, 513 U.S. at 538. "The jurisdictional inquiry does not turn on the [incident's] *actual* effects on maritime commerce" or "the particular facts" of the case. *Sisson v. Ruby*, 497 U.S. 358, 363, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990). Instead, the court has looked to its "general features" to determine whether it falls "within a class of incidents that pose[ ] more than a fanciful risk to commercial shipping." *Grubart*, 513 U.S. at 538-39.

In *Sisson v. Ruby*, for example, the Supreme Court held that "a fire on a vessel docked at a marina on navigable waters" "[c]ertainly" had a "potentially disruptive impact on maritime commerce" because the fire could have "spread to nearby commercial vessels or ma[d]e the marina inaccessible to such vessels," even though there were no commercial vessels in the marina

at that time. 497 U.S. at 362-63. "To speak of the incident as 'fire' would have been too general," yet to describe it as a fire "damaging nothing but pleasure boats and their tie-up facilities would have ignored, among other things, the capacity of pleasure boats to endanger commercial shipping that happened to be nearby." *Grubart*, 513 U.S. at 538-39. Thus the Court used an "intermediate level" of generality, *id.* at 538, and described the incident as "a fire on a vessel docked at a marina on navigable waters," *Sisson*, 497 U.S. at 363.

Turning to the present case, the incident may be fairly characterized as damage to an underwater cable by a barge. The question thus becomes whether the incident described "could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." *Grubart*, 513 U.S. at 539.

To ask the question is to answer it. Electricity and water are a dangerous combination. The striking of an underwater electric cable could plausibly lead to an electrical fire, an explosion, or electrocution of those on board a vessel or in the waters around. And in response to such exigencies on navigable waters, the Coast Guard and other commercial rescue vehicles would be called upon to render aid. Supreme Court precedent confirms that "damage by a vessel in navigable water to an underwater structure . . . is the kind of incident that has a 'potentially disruptive impact on maritime commerce.'" *Grubart*,

513 U.S. at 539; *see also*, *e.g.*, *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465 (5th Cir. 1991) (admiralty case where a vessel struck an underwater pipeline); *Orange Beach Water, Sewer, & Fire Prot. Auth. v. M/V Alva*, 680 F.2d 1374 (11th Cir. 1982) (same).

At oral argument, Coastline stressed the lack of disruption to maritime commerce arising from this particular incident. Coastline argued that the lack of any adverse consequences to anything but the cable itself meant that the risks put forth above were "fanciful" and "speculative." But our test is not one of actual disruption, but rather one of potential disruption. And Coastline's proposed application would read the word "potential" right out of it.

For the reasons discussed, we find that the general features of the incident here posed a sufficient risk of disruption to maritime commerce, though fortunately none occurred.

2.

We turn finally to "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 539. The complaint alleged that Coastline struck the cable while transporting a barge full of tools and materials to begin construction on the Owners'

pier. *See id.* at 540 (describing the "activity giving rise to the incident" as "repair or maintenance work on a navigable waterway performed from a vessel"). So described, Coastline's activity not only bears a substantial relationship to traditional maritime activity. It is the epitome of it.

Indeed, the Supreme Court has held that the navigation of vessels in navigable waters is substantially related to maritime activity. *See Foremost*, 457 U.S. at 674-75 ("Because the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court."); *see also Grubart*, 513 U.S. at 540 (finding there was "no question that the activity" of "repair or maintenance work on a navigable waterway performed from a vessel" was "substantially related to traditional maritime activity").

Traditional maritime activity cannot be narrowed to particular classes of vessels or specific kinds of repairs. Finding no meaningful distinction from *Foremost* and *Grubart*, or from our own line of precedent, we hold that admiralty jurisdiction plainly lies. We thus reverse the judgment of the district court and remand the case for further proceedings.

REVERSED AND REMANDED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED JULY 12, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 22-cv-00696-LKG

BALTIMORE GAS AND ELECTRIC COMPANY,

Plaintiff,

v.

COASTLINE COMMERCIAL CONTRACTING, INC., *et al.*,

Defendants.

Decided: July 11, 2023 Filed: July 12, 2023

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiff, Baltimore Gas and Electric Company's ("BGE"), brings this admiralty tort action against Defendants, Coastline Commercial Contracting, Inc. ("Coastline"), Candice M. Bateman and Raymond C. Bostic (collectively, the "Owners"), alleging that Defendants breached their duty of care in connection with certain

damage to an electrical cable that BGE submerged and buried in Eli Cove. *See generally* ECF No. 1. Defendants have moved to dismiss this matter for lack of subject-matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). ECF No. 12. The motions are fully briefed. ECF Nos. 1; 12; 22; 26; 28; 31; 36; 37. No hearing is necessary to resolve the motions. *See* L.R. 105.6 (D. Md. 2021). For the reasons that follow, the Court (1) **GRANTS** the Owners' motion to dismiss; (2) **GRANTS** Coastline's motion to dismiss; and (2) **DISMISSES** the complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Factual Background

This admiralty tort dispute arises from an incident involving damage to an electrical cable that BGE submerged and buried under the waters of Eli Cove, resulting in the loss of electrical service. ECF No. 1 at ¶ 14. In the complaint, BGE asserts negligence claims against Coastline and the Owners in connection with this incident. *Id.* at ¶ 19.

Plaintiff, BGE, is a public utility company that is a corporation organized under Maryland law and has its principal place of business in Anne Arundel County, Maryland. *Id.* at ¶ 1.

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1. The facts recited in this memorandum opinion and order are taken from the complaint, Defendants' motion to dismiss and the memorandum in support thereof, Plaintiff's response in opposition thereto, and Defendants' reply brief. *See generally* ECF Nos. 1; 12; 22; 26; 28; 31; 36; 37.

Appendix B

Defendant Coastline is a Maryland corporation with its principal place of business in Anne Arundel County, Maryland. *Id.* at ¶ 2. Defendants Candice M. Bateman and Raymond C. Bostic are citizens of Maryland who own property located at 7746 West Shore Road, Pasadena, Maryland and hold riparian rights to build out into the adjacent waters of Eli Cove. *Id.* at ¶¶ 3-4.

Eli Cove

As background, Eli Cove is a part of the tidal waters of the Chesapeake Bay. ECF No. 22-2 at 1-2. Eli Cove flows into Stoney Creek, which is located in Pasadena, Maryland. ECF No. 22 at 3. Stoney Creek in turn flows into the Patapsco River and Chesapeake Bay. *Id.*

The Stoney Creek Drawbridge and Stoney Creek Bridge Marina lay at the entrance to Stoney Creek. *Id.* at 3. Dena Marina is located where Stoney Creek meets Eli Cove, and this marina includes boat slips and a large concrete boat ramp that leads into Stoney Creek. *Id.* at 4.

BGE's Submerged Electrical Cable

In July 1986, BGE sought to lay a submerged and buried cable in Eli Cove and the company applied for a Department of the Army permit to do so. *Id.* In September 1986, the Department of the Army granted and issued a Department of the Army permit to BGE to perform work in Eli Cove. *Id.* at 5. The Army's permit provides, in relevant part, that:

> The Department of the Army permit program is authorized by Section 10 of the River and Harbor Act of 1899, Section 404 of the Clean Water Act and Section 13 of the Marine, Protection, Research and Sanctuaries Act. These laws require permits authorizing activities in or affecting navigable waters of the United States and the transportation of dredged material for the purpose of dumping into ocean waters.

Id.

In November 1986, BGE installed a submerged and buried electrical cable under the waters of Eli Cove. ECF No. 1 at ¶ 7. This feeder cable extended through BGE's easement and under the waters of Eli Cove. *Id.*

On August 3, 2018, Candice Bateman and Raymond Bostic purchased the property located at 7746 West Shore Road, Pasadena, Maryland (the "Property"), including the riparian rights to build into the waters of Eli Cove. *Id.* at ¶ 9. In March 2019, the Owners contracted with Coastline to extend an existing pier at the Property into Eli Cove. *Id.* at ¶ 10. This project required that Coastline excavate portions of the bottom of Eli Cove and install new pilings to extend the existing pier. *Id.*

BGE alleges that, on March 25, 2019, Coastline struck its submerged and buried cable in Eli Cove during a transport of the barge and pilings for this project, causing damage to the cable and immediate loss to electrical

services in the area. *Id.* at 4. BGE also alleges that, prior to this incident, the Owners failed to, among other things: (1) notify BGE of the project and (2) notify Coastline of BGE's easement, BGE's cable running under the Property, or the submerged cable under the waters of Eli Cove in the vicinity of the pier. *Id.* at ¶ 11. In addition, BGE alleges that Coastline failed to notify Miss Utility of its intended excavation or dredging in the vicinity of the pier and the submerged cable, or to obtain the proper ticketing from Miss Utility prior to, or during, the project. *Id.* at 4-5.

BGE contends that it was required to repair its electrical cable at a cost of $1,388,729.00. *Id.* at ¶ 15. And so, BGE seeks, among other things, to recover monetary damages from Defendants to cover the losses that it incurred in repairing the electrical cable. *Id.* at Prayer for Relief.

B. Procedural Background

BGE commenced this admiralty tort action on March 22, 2022. ECF No. 1. On April 25, 2022, the Owners filed a motion to dismiss, pursuant to Fed. R. Civ P. 12(b)(1). ECF No. 12.

On May 24, 2022, BGE filed a response in opposition to the Owners' motion to dismiss. ECF No. 22. On June 7, 2022, the Owners filed a reply brief. ECF No. 26.

On June 20, 2022, Coastline filed a motion to dismiss pursuant, to Fed. R. Civ P. 12(b)(1). ECF No. 28. On July 15, 2022, BGE filed a response in opposition to Coastline's

motion to dismiss. ECF No. 31. On July 28, 2022, Coastline filed a reply brief. ECF No. 32.

On February 3, 2023, BGE filed a supplemental response in opposition to Coastline's motion to dismiss. ECF No. 36. On February 13, 2023, Coastline filed a supplemental reply brief. ECF No. 37.

These matters having been fully briefed, the Court resolves the pending motions to dismiss.

III. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(1) And Admiralty Jurisdiction

A motion to dismiss for lack of subject-matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), is a challenge to the Court's "competence or authority to hear the case." *Davis v. Thompson*, 367 F. Supp. 2d 792, 799 (D. Md. 2005). The United States Supreme Court has explained that subject-matter jurisdiction is a "threshold matter" that is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1995) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)). And so, an objection that the Court lacks subject-matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 1240, 163 L. Ed. 2d 1097 (2006).

Appendix B

The United States Court of Appeals for the Fourth Circuit has also explained that a plaintiff bears the burden of establishing that subject-matter jurisdiction exists. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Given this, the Court "regard[s] the pleadings as mere evidence on the issue[ ] and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment," when deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). *Id.* (citation omitted). And so, if the Plaintiff "fails to allege facts upon which the court may base jurisdiction," then the Court should grant a motion to dismiss for lack of subject-matter jurisdiction. *Davis*, 367 F. Supp. 2d at 799.

Relevant to the pending motions to dismiss, Article III, § 2 of the Constitution extends "judicial power[s] . . . to all [c]ases of admiralty and maritime Jurisdiction. . . . " U.S. Const. art. III, § 2, cl. 1; *see Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 225 (4th Cir. 2022). Congress has also vested power in district courts to have "original jurisdiction" in "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333; *see Mayor & City Council of Baltimore*, 31 F. 4th at 225. In this regard, the Fourth Circuit has held that admiralty jurisdiction over maritime torts depends upon the locus of the tort on navigable waters and the tort's nexus with traditional maritime activity. *Price v. Price*, 929 F.2d 131, 133 (4th Cir. 1991). And so, to successfully invoke admiralty jurisdiction over a tort claim, a plaintiff must satisfy two conditions: (1) a location test and (2) a connection test. *Jerome B.*

Appendix B

Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 1045, 130 L. Ed. 2d 1024 (1995); *see also Id.* at 226.

"To satisfy the location test, a tort must either occur on navigable waters, or, if suffered on land, at least be caused by a vessel on navigable water." *Mayor & City Council of Baltimore*, 31 F.4th at 226 (internal quotation marks omitted). In this regard, the Fourth Circuit has held that:

> We have judged navigability based on a waterway's capability to bear commercial navigation. Waters are navigable "when they are used to, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

Mullenix v. United States, 984 F.2d 101, 104 (4th Cir. 1993) (quoting *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563, 19 L.Ed. 999 (1970); *see Price v. Price*, 929 F.2d 131, 134 (4th Cir. 1991). The Fourth Circuit has also held that:

> [T]o come within the regulatory power of Congress, [a] stream must be susceptible in its natural condition of becoming a highway of interstate or foreign commerce, *i.e.*, it must be of such a nature and so situated that there is at least a practical possibility of it being used as a highway for such commerce . . .

United States v. Doughton, 62 F.2d. 936, 939 (4th Cir. 1933).

Lastly, when determining whether the connection test for admiralty jurisdiction is satisfied, the Court must decide whether the general features of the type of incident involved have a potentially disruptive impact on maritime commerce. *Grubart*, 513 U.S. at 534. If so, the Court must also determine "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.*

IV. LEGAL ANALYSIS

In their motions to dismiss, Defendants argue that the Court does not possess subjectmatter jurisdiction to entertain this admiralty tort matter, because BGE cannot establish that Eli Cove is a navigable water of the United States, or that the incident at issue in this case has a nexus with traditional maritime activity. *See generally*, ECF Nos. 12; 28; 37. In this regard, Defendants argue that Eli Cove is not a navigable water of the United States, because the cove is not capable of conducting trade and travel on water in a customary manner. *Id.* Defendants also argue that the incident at issue in this case has no connection with maritime activity, because the only damage that occurred when Coastline's barge allegedly struck BGE's cable was damage to the cable. ECF No. 12 at 3; ECF No. 28 at 5-6. And so, the Defendants argue that the Court does not possess jurisdiction to consider this admiralty dispute. *Id.*

BGE counters that dismissal of this matter is not warranted, because: (1) Eli Cove is a navigable water of the United States and (2) the incident at issue in this case has a connection with maritime activity, because it involved Coastline's vessel pushing a barge in Eli Cove. ECF Nos. 22; 31. And so, BGE requests that the Court deny Defendants' motions to dismiss.

For the reasons set forth below, the factual record before the Court neither establishes that Eli Cove is a navigable water of the United States, nor that the incident that resulted in the damage to BGE's cable has a connection to maritime activity. And so, the Court (1) **GRANTS** the Owners' motion to dismiss; (2) **GRANTS** Coastline's motion to dismiss and (3) **DISMISSES** the complaint for lack of subject-matter jurisdiction.

A. BGE Has Not Shown That Eli Cove Is A Navigable Water Of The United States

As an initial matter, the factual record before the Court does not establish that Eli Cove is a navigable water of the United States to establish subject-matter jurisdiction in this case. To establish admiralty jurisdiction over its tort claims, BGE must satisfy two conditions: (1) a location test and (2) a connection test. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 1045, 130 L. Ed. 2d 1024 (1995).

To satisfy the location test, BGE must show that the alleged tort at issue in this case occurred either on navigable waters, or, if suffered on land, at least be caused

by a vessel on navigable water. *Mayor & City Council of Baltimore*, 31 F.4th at 226 (internal quotation marks omitted). In this regard, the Fourth Circuit has explained that navigability is:

> [B]ased on a waterway's capability to bear commercial navigation. [And so,] [w]aters are navigable when they are used to, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Mullenix v. United States, 984 F.2d 101, 104 (4th Cir. 1993) (quoting *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563, 19 L.Ed. 999 (1970); *see also Price v. Price*, 929 F.2d 131, 134 (4th Cir. 1991).

In this case, the undisputed evidence shows that Eli Cove is not a navigable water of the United States for several reasons. First, the facts before the Court show that Eli Cove is a separate body of water that is distinct from Stoney Creek. It is undisputed that Eli Cove is a part of the tidal waters of the Chesapeake Bay and that Eli Cove flows into Stoney Creek, which is located in Pasadena, Maryland. ECF No. 22 at 3. It is also undisputed that Stoney Creek, in turn, flows into the Patapsco River and Chesapeake Bay. *Id.* But, as the map of Eli Cove makes clear, Eli Cove is a distinct body of water that abuts several residential properties located in Pasadena, Maryland. ECF No. 22-5 at 1. And so, the cove allows for water access

from these residential properties to Stoney Creek, but it is not part of Stoney Creek. *Id.*

Second, BGE has not identified any facts to show that Eli Cove is used, or susceptible of being used, as a highway for commerce. In this regard, BGE argues that Eli Cove can be used for commercial navigation, because the cove is located in close proximity to the Stoney Creek Drawbridge, the Stoney Creek Bridge Marina, the Lombardee Community Beach/Boat Launch and the Dena Marina. ECF No. 22 at 6. But, the facts before the Court make clear that the Stoney Creek Drawbridge and Stoney Creek Bridge Marina are located on Stoney Creek, rather than Eli Cove. ECF No. 26 at 1. The facts before the Court also make clear that the Dena Marina—which has boat slips and a large concrete boat ramp that leads into Stoney Creek—and Lombardee Community Beach/ Boat Launch, are similarly located on Stoney Creek. *Id.* And so, while these facts show that Stoney Creek can be, and is in fact, used for commercial purposes, this evidence does not show that Eli Cove can be used as a highway for commerce.

Again, as discussed above, the facts before the Court make clear that Eli Cove is a body of water that abuts several residential properties located in Pasadena, Maryland and that the primary purpose of the cove is to provide access to the water from these residences.

In addition, Defendants represent, and BGE does not dispute, that the depth of Eli Cove is not more than five feet. ECF Nos. 12; 28. And so, the facts before the

Court indicate that Eli Cove is not of a sufficient depth to accommodate commercial navigation.

Given these facts, the evidence before the Court simply does not show that Eli Cove can accommodate commercial navigation, or is susceptible of being used as a highway for commerce. ECF Nos. 12; 28. *See United States v. Doughton*, 62 F.2d 938 (4th Cir. 1933) (noting that "navigable waters of the United States . . . has reference to commerce of a substantial and permanent character to be conducted thereon").[2]

BGE's argument that Eli Cove is a navigable water of the United States, because the Army's permit for its cable states that the permit has been issued pursuant to certain federal laws "authorizing activities in or affecting navigable waters of the United States," is also unpersuasive. The Court agrees with BGE that the Court may consider the language in the Army's permit when assessing whether Eli Cove is a navigable water of the United States. But, the language in this permit is not dispositive of this question. *See Rapanos v. United States*, 547 U.S. 715, 737, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (holding that governmental agencies, including the Army Corps of Engineers, may provide guidance into interpreting whether various bodies of water are

2. The United States Court of Appeals for the Fourth Circuit further held that if Plaintiff's proposition was correct that a water is navigable due to its association with other waters that are regarded as navigable, "then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. *Id.*

navigable, but ultimately, that determination is reserved by the Court).

BGE's reliance upon NOAA's map of Eli Cove is similarly not dispositive of the question of whether Eli Cove is a navigable water of the United States for purposes of this Court's admiralty jurisdiction. As discussed above, the Fourth Circuit has explained that navigability for the purposes of the Court's admiralty jurisdiction is:

> [B]ased on a waterway's capability to bear commercial navigation. [And so,] [w]aters are navigable when they are used to, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Mullenix, 984 F.2d 1 at 104. Because BGE advances no facts show that Eli Cove, as opposed to Stoney Creek, is used to, or susceptible of being used, in their ordinary condition as highways for commerce, the Court must conclude that Eli Cove is not a navigable water of the United States. For this reason, the Court DISMISSES this admiralty matter for lack of subject-matter jurisdiction.

B. BGE Has Not Shown That The Alleged Tort Has A Nexus To Maritime Commerce

The Court also observes that, even if BGE could establish that Eli Cove satisfies the location test for establishing admiralty jurisdiction, BGE also fails to show

that the incident at issue in this case had the potential to disrupt maritime commerce and had a substantial relationship to traditional maritime activity. *See Grubart*, 513 U.S. at 534 (holding that in determining whether this connection test is satisfied, this Court must decide "whether the general features of the type of incident involved have a potentially disruptive impact on maritime commerce.").

BGE argues that the connection test is met here, because the alleged tort in this case involves a barge damaging a submerged cable and the potential maritime disruptions arising from damaged submerged cables caused by a commercial vessel pushing a barge are well recognized. ECF No. 31 at 6. In this regard, BGE hypothesizes that, if Coastline's barge had experienced an emergency, the United States Coastguard and other commercial rescue vehicles would have had to go to Eli Cove *via* the Patapsco River and Stoney Creek to render aid, thereby, creating a potentially disruptive impact on maritime activity. ECF No. 31 at 6.

But, BGE points to no case law to show that the mere presence of a barge on a body of water constitutes traditional maritime activity. *See generally*, ECF Nos. 1; 22; 31. The facts of this case also make clear that Coastline's barge was present on Eli Cove solely to extend an existing pier at a private residence. *Id.* at ¶ 10. Given these facts, BGE has not met its burden to show that the incident resulting in the damage to its cable had a potentially disruptive impact on maritime commerce, or that this incident had a substantial relationship to

maritime activity. And so, for this independent reason, the Court must also DISMISS the complaint for lack of subjectmatter jurisdiction.

V. CONCLUSION

In sum, the factual record before the Court neither establishes that Eli Cove is a navigable water of the United States, nor that the incident that resulted in the damage to BGE's cable has a connection to maritime activity.

And so, for the foregoing reasons, the Court:

(1) **GRANTS** the Owners' motion to dismiss (ECF No. 12);

(2) **GRANTS** Coastline's motion to dismiss (ECF No. 28); and

(3) **DISMISSES** the complaint.

A separate Order shall issue

IT IS SO ORDERED.

/s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
United States District Judge