

IN THE
Supreme Court of the United States

WAYNE VOLK AND KAREN VOLK,

Petitioners,

v.

A.J. FRANZ, JR., TRUSTEE, AS OWNER AND
BUCHANAN MARINE, L.P., AS BAREBOAT
CHARTERER OF THE BARGE B-252,

Respondents.

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

**REPLY BRIEF OF PETITIONERS IN
SUPPORT OF A WRIT OF CERTIORARI**

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INTRODUCTION

For the convenience of this Court and others, the website www.VolkWritResource.com provides the entire record on appeal and much more in digital format.

Inasmuch as the Respondents contend that “this matter is a poor vehicle for review because the Petitioners seek a factual review of a cloudy record”¹ and that “This matter is a poor vehicle for review because the record is problematic,”² the availability to this Court of the entire record in the court of appeals³ is important and helpful. The internal hyperlinks within the record on appeal and the hyperlinks to the citations to the record in Appendix C⁴ demonstrate the lack of merit of the contention of the Respondents (note 4, page 15) that “the number of misstatements of facts and argument raised for the first time in the petition are simply too numerous to address without a proper underlying record.” Respondents’ contentions, of which **no** examples are given, are specious and are an unworthy attempt to discourage review of a clearly erroneous decision.

1. Opposition, page 9.

2. Opposition, page 15 and particularly note 4.

3. <http://www.volkwritresource.com/record.html>.

4. Note 10, A90: A1033/18-18 should read: A1033/17-18; note 43, A108: A1240/41242/7 should read: A1240/4-1242/7.

I. VOLK'S SEAMAN STATUS AS A MATTER OF LAW ON THE FACTS RECITED BY THE COURT OF APPEALS

The court of appeals recites that Wayne Volk worked for twelve years as a ship repairer on 150-200 dumb material barges and on and from a small, motor-powered pontoon barge, all afloat and all owned and/or operated by Buchanan Marine, his employer. It further states that Mr. Volk was injured on the B-252, one of the barges on which he served as a seaman, after it had been loaded. Volk worked daily on this fleet of vessels, none of which had sleeping accommodations, from 5:30 A.M. to as late as 9:00 P.M., from March of each year when the Hudson, an important navigable tidal estuary, thawed, until December when it froze. As clearly set forth in his petition, Mr. Volk is a seaman as a matter of law on the facts stated by the court of appeals.⁵

In no other reported circuit case, including *Endeavor Marine*⁶ (which involved the Mississippi River), did the injured seaman face equal peril from either work location or employer fault.

5. As is illustrated by "Buchanan Barges at Tilcon Facility 11/20/11," <http://www.volkwritresource.com/photos.html>, empty barges were fleetied at the south end of the Tilcon facility and sometimes moored (overnight at most and regularly into the Hudson), then moved to be loaded, and finally, as in the case of the B-252, fleetied at the north end of the Tilcon facility, ready to be pushed south to New York by Buchanan tugs. Volk, daily, worked equally aboard vessels which were moored and which were NOT moored.

6. *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000).

Despite efforts to obscure this fundamental reality and a facile but ineffective attempt to distinguish contrary circuit authority and to denigrate Petitioner's citation to this Court's precedent, Respondents' opposition, as will be detailed hereinafter, provides no effective rebuttal to Petitioners' contentions that the decision below creates a circuit conflict and deviates from the established precedent of this Court.

II. AN IMPORTANT MISSTATEMENT IN THE OPPOSITION IS CONTRADICTED BY THE RECORD ON APPEAL

Apparently secure in their belief that Petitioners had not and could not make the record on appeal available to this Court, Respondents boldly misrepresent the facts by stating that "Wayne Volk . . . was injured on May 19, 2011, while aboard a barge that was moored to a dock on the Hudson River." To the contrary and as may be seen from the cell phone photographs taken by Mr. Volk immediately after the accident, the B-252 was not moored to a dock but was tied to another barge, the B-298, while both were afloat in the Hudson River. Please see photos (A141 and A142)⁷ showing the loaded rack with B-252 nested to B-298.

III. STANDARD OF REVIEW

The facts found by the district court and those recited by the court of appeals, although sufficient to establish seaman status *ipso facto* and as a matter of law, constituted impermissible fact-finding in the context of a motion for summary judgment, *Tolan v. Cotton*, 134 S.Ct. 1861, 1867, 188 L.Ed. 2d 895 (2014).

7. <http://www.volkwritresource.com/photos.html>.

IV. REVIEW OF THE CONFLICTING CIRCUIT AUTHORITY AND THIS COURT'S PRECEDENT AND DETAILED EXPLANATION OF WHY THE ATTEMPT TO DISTINGUISH THESE AUTHORITIES FALLS SHORT

A. Introduction

Inasmuch as the court of appeals made five references to “perils of the sea”⁸ and it appears that, according to the Second Circuit, the *sine qua non* and defining characteristic of seaman status, *vel non*, is exposure to the “perils of the sea” (which it found that Wayne Volk did not have), petitioners, on www.VolkWritResource.com, have hyperlinked the citation to each cited case (when meaningful and available) to the geographic location at which the accident is stated to have occurred. Using this measure, Volk’s work situs was more perilous than that of any other cited case.

B. This Court’s Precedent

1. *McDermott Int’l Inc. v. Wilander*, 498 U.S. 337 (1991):⁹

Respondents contend:¹⁰

Yet the Volks offer no explanation as to how the Second Circuit deviated from this Court’s precedent, except to say that “this Court

8. A-18, A-22, A-27, and A-28 (twice).

9. Wilander was injured in the Persian Gulf, a location not relevant.

10. Respondents’ Brief, pages 10-11.

rejected the narrow interpretation of the ‘perils of the sea’ in *McDermott*.” Pet. Brief, p. 14.

However, *McDermott* does not address “perils of the sea.” That case involved the “narrow” question of whether “Wilander should be precluded from seaman status because he did not perform transportation-related functions on board [the vessel].” 498 U.S. at 356-57.

McDermott does not mention “perils of the sea”; the word “perils” appears only once in *McDermott*: “All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. It is not the employee’s particular job that is determinative but the employee’s connection to a vessel.” *Id.* at 354 (internal citation omitted). Thus, Petitioners analysis of *McDermott* is clearly incorrect.

However, the defining issue in *Wilander*, 498 U.S. at 354 (who was found to be a seaman) was whether seaman status was limited to those who were engaged in “navigation.” This issue was resolved in language cited to the Second Circuit and neither addressed nor applied by that court:

We believe the better rule is to define “master or member of a crew” under the LHWCA, and therefore “seaman” under the Jones Act, solely in terms of the employee’s connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of “seaman” and Congress’ land-based/sea-based distinction. **All who**

work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985). It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

As this language is guidance and not dicta, *Wilander* should have been addressed by Respondents and not merely ignored as not relevant.

2. *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991):

Respondents contend:¹¹

Southwest Marine held that a ship repairman was not excluded from being a Jones Act seaman solely because his job title was “ship repairman”—a title specifically identified as a covered employee in the LHWCA. In the present matter, the lower courts made no such mistake. They specifically analyzed all the facts relevant to Wayne Volk's employment status under both the *Chandris* and *Harbor Tug* precedents.

However, **location matters**. Gizoni's work, his accident, and the Southwest Marine repair facility were located on the quiet waters of San Diego Bay and not on the dangerous Hudson River.¹²

11. Respondents' Brief, page 11.

12. <http://volkwritresource.com/maps.html> and <http://volkwritresource.com/photos.html>.

3. *Stewart v. Dutra Const. Co.*, 543 U.S. 481 (2005):

While Respondents contend that *Stewart* is not relevant,¹³ Petitioner’s citation to *Stewart*, taken directly from the opinion of the Fifth Circuit in *Naquin v. Elevating Boats, LLC*, 744 F.3d 927, 934 (5th Cir. 2014), *cert. denied* — U.S. —, 135 S.Ct. 1397, 191 L.Ed.2d 359 (2015), more than arguably makes *Stewart* relevant.

Once again in *Stewart*, location matters. The “Big Dig” was dredged by the *Super Scoop* from the middle of Boston/Boston Harbor,¹⁴ a placid location far away from the “perils of the sea” as defined by the court of appeals. While *Stewart* had to be assigned to a vessel to be a seaman, *Stewart* could not be a seaman according to the test and rational of the court below because he did not face the “perils of the sea” in Boston Harbor.

4. *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997):

While Respondents contend that the court below clearly and correctly applied *Harbor Tug* in its analysis,¹⁵ the issue in *Harbor Tug* was not whether Mr. Papai was exposed to perils of the sea from work which was apparently conducted solely on harbor tug boats in San Francisco Bay and environs, but whether Mr. Papai was assigned to a vessel or fleet of vessels under common

13. Respondents’ Brief, page 11.

14. <https://boston.curbed.com/2016/1/5/10850028/boston-big-dig>.

15. Respondents’ Brief, page 11.

control. Justice Stevens in dissent gave directions to the courts of appeal¹⁶ which were ignored by the court below.

Respondents' *ipse dixit* that "Accordingly, the Second Circuit's decision does not conflict with this Court's precedent" is totally unfounded.

C. The Circuit Split

Respondents contend¹⁷ that the putative circuit split is simply courts reaching different results based on different facts because each such decision relies on the "same standard articulated by this Court." Respondents then try to distinguish each such case by a selected factual quote or reference taken out of context that is contradicted by the images of the locations of each accident that have been placed on the www.VolkWritResource.com website under the "Maps" and "Photos" tab. These images demonstrate that the location of the Buchanan fleeing and loading operations at Tilcon's Hudson River location was far more perilous than the Elevating Boats location in the middle of Houma, Louisiana was for Naquin,¹⁸ than the Boh Brothers location on Lake Pontchartrain was to Grab, the Endeavor Marine location was to Bayle, the Long Beach ship terminal was to Scheuring, or the pile-driving barge working on a navigation aid in Hawaii was to *Delarge*.¹⁹

16. Quoted, Petitioners' Brief, at pages 44-45.

17. Respondents' Brief, page 12 and 15

18. Some 50 miles from the EBI slip to the Houma Navigational Canal and then to the Gulf of Mexico.

19. In *Delange v. Dutra Const. Co.*, 183 F.3d 916, 919, n. 2 (9th Cir. 1999), the court affirmed the rejection by the district court of an attempt by the moving party to deem facts uncontested:

Moreover, such factual issues are for the trier of fact and not appropriate for summary determination.

Furthermore, Respondents have not addressed the concerns expressed by the learned, interested, and persuasive commentators cited by Petitioners. At least one of these commentators, Kristen Hayes, carefully examined the opinion of the court below and concluded that the conflict among the circuits should be addressed by this Court.²⁰

Dutra challenges the district court's implicit finding that Delange did not violate District Court of Hawaii Local Rule 56.1, which requires a party opposing summary judgment to file a separate, concise statement of triable issues of fact. *See* D. Haw. R. 56.1(b)(2). District courts "have broad discretion in interpreting and applying their local rules." *Miranda v. Southern Pac. Transp.*, 710 F.2d 516, 521 (9th Cir.1983). We find no error in the district court's ruling. Although Delange did not include a separate, concise statement of facts with his brief opposing summary judgment, his brief itself was sufficiently short and clear to enable the district court to decide Dutra's summary judgment motion efficiently. Accordingly, Delange's brief was consistent with the principal policy underlying Rule 56.1: to obviate the need for the court to scour the record for facts in support of or against summary judgment. *See* D. Haw. R. 56.1(f).

20. <https://www.stridingthequarterdeck.com/naquin-door-circuit-split-second-circuit-suggests-emerging-split-fifth-circuit-regarding-jones-act-seaman-status-essentially-land-based-employees/#more-305>.

CONCLUSION

Nothing in Respondents' Opposition diminishes the force of Petitioners' authority and argument. Rather, as expressed by Kristen Hayes:

The Second Circuit's distinction between the *Buchanan Marine* plaintiff and the *Naquin* plaintiff seems fairly strained, and thus a circuit split appears to be emerging as to Jones Act seaman status for certain essentially land-based employees. Further, it is noteworthy that the Fifth Circuit's *Naquin* decision affirmed **a jury's seaman status determination after trial**, on the basis that the evidence "supported the jury's implicit finding" of seaman status; whereas the Second Circuit's *Buchanan* decision affirmed a district court's grant of summary judgment on seaman status. Thus, the Second Circuit effectively treated the seaman status question as a purely legal concern for the district court *that should not even have been presented* to a jury. Given the practical irreconcilability of (or at the very least tension between) *Naquin* and *Buchanan Marine*, it is possible that the Supreme Court may grant a writ of certiorari should the *Buchanan Marine* plaintiff seek review, . . .

The petition should be granted.

Respectfully submitted,

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