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Court of Appeals No. 73127-1
King County Superior Court No. 14-2-21305-1 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

WILLARD E. BARTEL and DAVID C. PEEBLES, Administrators for
the Estate of PAUL S. MCCABE,

APPELLANTS,

v.

MATSON NAVIGATION COMPANY, INC., on its own behalf and as
Successor-In-Interest to THE OCEANIC STEAMSHIP COMPANY, and
OLYMPIC STEAMSHIP COMPANY, INC.

RESPONDENTS.

BRIEF OF APPELLANTS

BRIAN D. WEINSTEIN
BENJAMIN R. COUTURE
MARISSA C. LANGHOFF
ALEXANDRA B. CAGGIANO
Attorneys for Appellant

WEINSTEIN COUTURE PLLC
818 Stewart Street, Suite 930
Seattle, Washington 98101
(206) 389-1734

JOHN E. HERRICK *pro hac vice*

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INTRODUCTION

For many years, a large group of ship owners, including Defendants Matson and Olympic, engaged in conduct and made representations such that Plaintiffs' counsel reasonably concluded that the ship owners desired to litigate maritime asbestos cases in Ohio. Defendants' conduct included their counsel forming an agreement with counsel for Plaintiffs whereby the Defendants agreed *not* to raise their defense of a lack of personal jurisdiction for the cases filed in the United States District Court in the Northern District of Ohio. Other conduct engaged in by ship owners, and Matson, included actually litigating numerous maritime asbestos personal injury cases in the Northern District of Ohio. Plaintiffs reasonably believed, based upon Defendants' past conduct, the agreement between counsel, and representations, that it would be acceptable to litigate this case in the Northern District of Ohio. Therefore, Plaintiffs timely filed, as they had on thousands of other occasions, McCabe's case in the Northern District of Ohio. The case was transferred to MDL 875 for consolidated proceedings and there it remained, inactive for over a decade.

The trial court, no doubt due in part to the complex procedural history of these cases together with an intermingling of competing legal principles, mistakenly concluded that another court's finding that certain

ship owner defendants had not waived their personal jurisdiction defense in Ohio necessitated a finding that Plaintiffs were not entitled to the equitable tolling of their statutes of limitations. This incorrect conclusion necessarily precluded the trial court from fully considering whether Plaintiffs could be entitled to equitable tolling and constitutes reversible error. The trial court also erred in ruling that Plaintiffs were not entitled to equitable tolling under the facts and circumstances of this case. Therefore, the trial court's grant of summary judgment to Matson Navigation Company, Inc., on its own behalf and as Successor-In-Interest to The Oceanic Steamship Company and Olympic Steamship Company, Inc. based on the statute of limitations was erroneous and this Court should reverse those rulings and remand this case for further proceedings.

ASSIGNMENTS OF ERROR

Willard E. Bartel and David C. Peebles filed this appeal raising the following:

Assignments of Error

1. The trial court erred in granting Matson Navigation Company, Inc., on its own behalf and as Successor-In-Interest to The Oceanic Steamship Company's Motion for Summary Judgment dismissing Plaintiffs' complaint for negligence and unseaworthiness under the Jones

Act and general admiralty and maritime law as barred by the Statute of Limitations.

2. The trial court erred in dismissing Plaintiffs' complaint for negligence and unseaworthiness under the Jones Act and general admiralty and maritime law as barred by the Statute of Limitations by granting Olympic Steamship Company, Inc.'s Motion to Dismiss.

Issues Pertaining to Assignments of Error

1. Equitable tolling is a remedy to which Plaintiffs are entitled regardless of the earlier ruling concerning waiver. (*Assignments of Error Nos. 1 and 2*)

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Paul S. McCabe served as a merchant mariner aboard vessels owned and operated by various entities from 1946 until 1967. CP 14. During this time, McCabe was employed by several ship owners, including Matson Navigation Company, Inc., Olympic Steamship Company, Inc., and The Oceanic Steamship Company (collectively "ship owner defendants"). CP 14. While performing his duties as a merchant mariner assigned to the ship owner defendants' vessels, McCabe was exposed to asbestos and asbestos-containing products. CP 5.

McCabe was diagnosed with mesothelioma and this disease took his life on June 16, 2006. CP 597. Plaintiffs Willard E. Bartel and David C. Peebles became the administrators of the Estate of Paul S. McCabe after obtaining Letters of Authority from the Probate Court of Cuyahoga County, Ohio and the King County Superior Court, Seattle, Washington. CP 3.

McCabe initially filed suit against several ship owners including Defendants, Matson Navigation Company, Inc. and Olympic Steamship Company, Inc., on or about January 27th, 1998 in the Northern District of Ohio for his non-malignant asbestos-related disease. CP 582-88. McCabe's suit was immediately transferred to MDL 875. The Honorable Charles Weiner was the judge then assigned to preside over MDL 875. Previously, on May 2, 1996, Judge Weiner dismissed hundreds of plaintiffs' claims administratively. CP 590-92. On March 17, 1997, Judge Weiner entered another Order that expanded the scope of the Order of May 2, 1996. CP 594-95. The result of this second order was that McCabe's case and other MARDOC¹ cases filed after May 2, 1996, were, upon transfer to MDL 875, also administratively dismissed and were "transferred to the Court's inactive docket of cases...." CP 595.

¹ Throughout this Response, Plaintiffs may use the term "MARDOC" frequently. "MARDOC" is simply a shorthand designation for the Maritime Asbestos Docket employed both by the Court and parties in the Northern District of Ohio and by the Court and parties in MDL 875.

Later, following McCabe's diagnosis and death from mesothelioma, Plaintiffs Bartel and Peebles filed an amended complaint on behalf of McCabe in the Northern District of Ohio on November 14th, 2008. CP 599-606. Neither Matson, Olympic, nor any other defendant has alleged that the initial complaint or the amended complaint was filed untimely. CP 400-24, 464-75. These claims, like those earlier asserted by McCabe, remained stayed by the MDL court until they were re-instated on January 24th, 2011. CP 608, 645.

To understand the reason McCabe filed his initial complaint and his amended complaint in the Northern District of Ohio, Plaintiffs must provide this Court with an extensive history of the maritime asbestos litigation in that venue.

A. History of Maritime Asbestos Litigation in the Northern District of Ohio.

1. Initial Proceedings in the Northern District of Ohio.

A large number of maritime asbestos cases began to be filed in the Northern District of Ohio in the mid to late 1980s and in the autumn of 1989, many ship owner defendants filed motions to dismiss for lack of personal jurisdiction in many of those cases. CP 731. On October 31st, Judge Thomas Lambros found personal jurisdiction did not exist and ruled transfer was the appropriate remedy. CP 731, 760. He held "the sound judgment and decision with respect to those cases against those defendants

[over whom the court lacked personal jurisdiction] is to order those cases transferred.” CP 731, 760.

During the hearing, Thomas Murphy of Thompson Hine, representing many ship owner defendants including Matson, stated that it was “conceivable ... in view of the fact that such motions to dismiss have been denied that some of those defendants who filed motions will not care to be transferred and they [may] wish to stay here....” CP 764. Defense counsel was given time to consult with their clients to determine whether to accept the transfer or waive personal jurisdiction. CP 764.

During a later conference in November, The court made clear that if a defendant elected to file an answer, it was agreeing to remain in the jurisdiction and not to be transferred. CP 799-800. To clarify, Special Master Martyn inquired, “Just for my understanding, so they [defendants] will answer if they want to stay.” CP 803. Judge Lambros responded, “That’s right.” CP 803. Accordingly, on November 22nd, 1989, Judge Lambros entered MARDOC Order No. 40 and ordered that those Defendants who “wish to remain in this jurisdiction need only file answers to the complaints in accordance with the deadlines established below.” CP 896.

The actual transfer order, MARDOC Order No. 41, was entered on December 29th, 1989 and ordered that the cases subject to the transfer

ruling “are transferred to jurisdictions which plaintiffs represent have sufficient contact to sustain the choice of that in personam jurisdictional forum.” CP 901-04. Defendant, Matson was among the ship owner defendants subject to the transfer Order which were listed in Exhibit A. CP 905. No cases were transferred to other jurisdictions, however. Instead, as the attached docket sheets reveal, a majority of ship owner defendants answered Plaintiffs’ complaints and remained in the Northern District of Ohio, including Olympic Steamship Co., Inc. and Matson Navigation Company, Inc. CP 949-75; *see also* CP 978-1000.

The entry of MARDOC Order 41 would have required a single plaintiff to prosecute his claims in several different jurisdictions. In response to this situation, the plaintiffs filed a Motion to Transfer in Toto. In Thompson Hine Defendants’² Response in Opposition to Plaintiffs’ Motion to Transfer in Toto, the defendants stated in pertinent part as follows:

Several nonresident defendants, although not subject to the personal jurisdiction of this Court, nevertheless **agreed to waive their personal jurisdiction defense** as the quid pro quo to avoid the expense of litigating these cases in as many as 13 different jurisdictions simultaneously, and to take advantage of the consolidated handling available in [the Northern District of Ohio].

² Plaintiffs may refer to “Thompson Hine Defendants” elsewhere in this Response because dozens of shipowners were represented by the law firm Thompson Hine & Flory and that firm routinely filed single documents on behalf of all of its shipowner clients which included Defendant, Matson and Olympic. *See, e.g.*, CP 1081-82.

CP 1028-29 (emphasis supplied). Defendants later reiterated their position and stated:

Furthermore, some nonresident defendants who are not subject to the personal jurisdiction of this Court **elected to waive that valuable due process right and submit themselves to the Court's jurisdiction** to take advantage of this Court's experience in the handling of mass tort litigation, the consolidated handling of cases available in this Court, and to avoid the inconvenience of litigating these cases simultaneously in 13 scattered jurisdictions.

CP 1035-36 (emphasis supplied). The defendants wished to "keep all cases against them in this district court." CP 1029. Nowhere in the response did the Thompson Hine defendant group specifically delineate which defendants had agreed to remain in Ohio and instead, the defendant group, as it had in other filings, continued to present a unified front. CP 1027-38. Plaintiffs' Motion to Transfer in Toto was ultimately denied in April of 1990 and the cases stayed in Cleveland, Ohio for consolidated proceedings. *In re Asbestos Products Liab. Litig. (No. VI)*, 965 F.Supp.2d 612, 617 (E.D. Pa. 2013).

2. Defendants Insisted that Cases be Litigated and Tried in the Northern District of Ohio.

The administration of the MARDOC in the Northern District of Ohio continued throughout the summer of 1990, with several clusters of cases proceeding through the pre-trial stage despite the earlier finding of a lack of personal jurisdiction. As a result, Judge Lambros sought the

assistance of other judges to help shoulder the burden of the many cases then set for trial. CP 1040-41. OAL Order 125 transferred 44 cases to the Eastern District of Michigan for trial. CP 1040-41.

At a January 8 hearing, during which the court was contemplating transfer of the cases from the Northern District of Ohio to the Eastern District of Michigan, ship owner defendants vehemently objected. As to the prospect of transfer, counsel for the Thompson Hine defendants, which included Matson, stated as follows:

I had one point that I wanted to be sure that the Court understood; we did not agree or concede to trials of any of these cases in Detroit. We had put our objection on the record before, **but trials of the Ohio cases in Detroit are something that our clients waived jurisdictional objections to proceed here in Cleveland.** To go to Detroit is something they don't agree to. I just want to be sure that the Court understands that in formulating whatever orders that you are formulating.

CP 1044-45 (emphasis supplied).

The cases were transferred but upon their arrival in Michigan, the defendants, which included Matson in several cases, objected and requested that the cases be transferred back to Ohio to proceed. CP 1047-58. On May 17, 1991 the Eastern District of Michigan issued Pretrial Order No. 12 which transferred the cases back to Ohio for their continued litigation and trial. CP 1060-66.

3. Ongoing Litigation in the Northern District of Ohio.

Not only did many defendants represent that they had waived their personal jurisdiction defenses to allow for the cases to proceed in the Northern District of Ohio, it was understood by the plaintiffs that a vast number of defendants intended to litigate maritime asbestos cases in the Northern District of Ohio on a going forward basis. Mr. Hartley Martyn was appointed by Judge Lambros as Special Master for the MARDOC litigation pending in the Northern District of Ohio in 1988. CP 1068. Mr. Martyn served as Special Master through 1991 and worked closely with the Court and counsel for the plaintiffs and for the defendants throughout his tenure. CP 1068.

Mr. Martyn recalled that after the entry of Order No. 41, “counsel from Thompson Hine & Flory informed Judge Lambros and me that a large majority of their clients desired to waive the defense of lack of personal jurisdiction in order to remain in the Northern District of Ohio.” CP 1068. Moreover, “[c]ounsel from Thompson Hine & Flory also informed Judge Lambros and me of their clients’ intent to not object on the basis of personal jurisdiction for the ongoing filing of MARDOC cases filed in the Northern District of Ohio and to allow the cases to be litigated in that district.” CP 1068-69. Mr. Martyn recalls specifically that

there was an agreement between Leonard C. Jaques on behalf of Plaintiffs and Thomas O. Murphy of Thompson Hine & Flory for cases to continue to be filed in the Northern District of Ohio without Defendants threatening to file motions to dismiss or motions to transfer based on a lack of personal jurisdiction. Thomas O. Murphy made this agreement in his capacity as counsel for all Thompson Hine & Flory Defendants.

CP 1069.³

Plaintiffs were again presented with evidence that ship owner defendants, including Matson and Olympic, consistent with their prior conduct and representations, argued against the transfer of maritime asbestos cases from Ohio when an asbestos MDL was contemplated. In their Brief in Opposition to Transfer to MDL, Thompson Hine Defendants, including Matson and Olympic, detailed the progress that had been made in the maritime asbestos litigation in Ohio. CP 1076-78. Counsel for Matson and Olympic, among others, stated that the maritime asbestos cases “are proceeding pursuant to a Case Management Plan adopted in 1987” and four cases had been tried in 1990 and “another 336 have been placed in priority status with trials in the first clusters of cases scheduled to commence after April 29, 1991.” CP 1077-78.

Counsel for Matson and Olympic, and other defendants, ended their Brief by once again reiterating that these cases be litigated in Ohio:

³ Thomas O. Murphy of Thompson Hine & Flory and Leonard C. Jaques of The Jaques Admiralty Law Firm, PC are now both deceased. CP 1495.

“If transfer is to take place, Shipowner-Defendants request that it be to the Northern District of Ohio. Procedures are already in place for the pretrial management of seamen's asbestos cases, and this is the district in which the largest number of seamen's cases is pending.” CP 1079.

Therefore, prior to the establishment of MDL 875, there was ample evidence from the actions of the ship owner defendants in general and Matson and Olympic in particular, including the filing of answers, the express invocation of waiver of personal jurisdiction in an agreement between counsel, the litigation and trial of cases, and the opposition to transferring the cases to Michigan or elsewhere, from which counsel for Plaintiffs could reasonably conclude that maritime asbestos cases should be litigated in the Northern District of Ohio. The same can be said of the actions of the ship owner defendants even following the establishment of MDL 875.

B. MDL 875 and Remanded Cases in the Northern District of Ohio.

By order entered July 29, 1991, the Judicial Panel on Multidistrict Litigation established MDL 875 to consolidate federal asbestos personal injury cases. *In re Asbestos Products Liab. Litig.* (No. VI), 771 F.Supp. 415, 417-18 (Jud.Pan.Mult.Lit. 1991). The MARDOC cases were

transferred to MDL 875 as well and additional MARDOC plaintiffs' cases continued to be transferred to MDL 875 thereafter.

Despite the Orders issued in 1996 and 1997, mentioned earlier, that stayed most of the maritime cases, not all MARDOC cases remained frozen. A few cases were reinstated and remanded to the Northern District of Ohio for prosecution. Among those were the cases concerning plaintiffs Walter L. Pritchett, John L. White, Charles J. Wille, Rolf L. Lindstrom, Charles A. Welch, James E. Jackson and William Stark. There were over sixty (60) ship owner defendants named in those cases including Defendant Matson. CP 1086-87. Only one ship owner defendant, Alaska Steamship, attempted to have claims against it dismissed for lack of personal jurisdiction in the Northern District of Ohio and this motion was withdrawn as soon as it became apparent that it would not be granted. *See* CP 1089-93. The ship owner defendants in each and every case remanded to the Northern District of Ohio, as they had in the past, litigated the cases in Ohio. CP 1095-1332 (demonstrating the omission of *any* Thompson Hine Defendant raising lack of personal jurisdiction as a defense).

At the time McCabe filed his suit in Ohio, ship owner defendants, including Matson and Olympic, routinely litigated maritime asbestos personal injury suits in that venue despite a lack of personal jurisdiction.

Indeed, counsel for McCabe was aware that a host of defendants not only elected to litigate and did litigate maritime cases in Ohio, these ship owner defendants, including Matson, fought to keep cases in Ohio to be litigated. This occurred throughout the 1990s. The motion filed by Alaska Steamship, in 1999, was the last Motion to Dismiss for lack of personal jurisdiction filed by a ship owner defendant in the MARDOC cases until new motions were filed in 2012—over a decade after McCabe filed his initial suit and many years after it was amended.

II. PROCEDURAL HISTORY

Plaintiffs initiated this case in the Superior Court of Washington, King County on August 1, 2014. CP 1-16. Plaintiffs' claims against Defendants Matson and Olympic pending in MDL 875 were not dismissed by Judge Robreno until April 14, 2014, based on a lack of personal jurisdiction. CP 1334-37, 1363.

On November 7, 2014, Defendant Matson filed its Motion for Summary Judgment based on the statute of limitations. CP 400. Similarly, on November 7, 2014, Defendant Olympic Steamship filed its Motion to Dismiss Based on Statute of Limitations. CP 464. Plaintiffs filed their Response in Opposition to both Matson's Motion for Summary Judgment and Olympic Steamship's Motion to Dismiss on November 24, 2014 and asserted that they were entitled to the equitable tolling of their

statutes of limitations. CP 528, 552. Matson's Reply was filed on December 1, 2014, and Olympic Steamship's Reply was also filed on December 1, 2014. CP 1453, 1459.

Judge Bruce E. Heller conducted a hearing on the Defendants' Summary Judgment Motions on January 9, 2015, treating Olympic Steamship's Motion to Dismiss as a Motion for Summary Judgment. RP 1. Defendants argued Plaintiffs were not entitled to an equitable tolling of the statute of limitations and claimed that the earlier finding of no waiver precluded a finding of equitable tolling. RP 7. Plaintiffs argued that equitable tolling was an available remedy to which they were entitled regardless of "whether or not the defendants waived." RP 21.

During the hearing, however, the trial court concluded that because Judge Robreno did not find that the rigorous standard for waiver was met, it could not find the standard for equitable tolling had been met, as evinced from the following question posed to Plaintiffs:

is [Plaintiffs'] equitable tolling argument based on this waiver notion that [Plaintiffs'] argued?

And if so, are [Plaintiffs] precluded from arguing waiver based on the fact that Judge Robreno essentially denied the waiver argument three times? Or is it your position that the court can essentially reconsider all of those arguments now?

RP 18. The trial court also inquired:

if I come to the conclusion that the defendants did not waive, which I think I have to do, how can [Plaintiffs] argue that notwithstanding the fact that [Defendants] didn't waive that it was reasonable for [Plaintiffs] to believe that [they] could litigate in Ohio when there were no contacts between Matson and Ohio?

RP 21.

In the letter ruling, the trial court stated as follows: “At oral argument, Plaintiffs’ counsel acknowledge the preclusive effect of these decisions under collateral estoppel. Yet, Plaintiffs’ equitable **estoppel** argument is based in part on waiver.” CP 2069 (emphasis added). That statement is incorrect not only because Plaintiffs did not make an equitable estoppel argument but also because Plaintiffs’ argument did not depend whatsoever upon whether waiver had been found as to these Defendants in McCabe’s case in MDL 875. Nevertheless, the court stated,

Plaintiffs also contended at oral argument that the Court could apply equitable tolling even without finding waiver by the defendants. The Court is not persuaded. If the defendants did not waive the personal jurisdiction defense, then it is difficult to fathom how Plaintiffs could have reasonably concluded that jurisdiction was proper in Ohio.

CP 2069. Thus, the trial court never properly considered whether Plaintiffs’ statute of limitations was capable of being equitably tolled because it found the issue was precluded by Judge Robreno’s ruling on waiver in the Eastern District of Pennsylvania. CP 2068-70.

STANDARD OF REVIEW

The granting of a motion for summary judgment is reviewed by the appellate court de novo. *Clare v. Saberhagen Holdings, Inc.*, 129 Wash.App. 599, 602 n.1, 123 P.3d 465, 466 n.1 (2005). “In reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court.” *Id.* (citing *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030, 1031 (1982)). Summary judgment is appropriate only if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). The reviewing court should treat “[a]ll facts and reasonable inferences . . . in a light most favorable to the nonmoving party.” *Halleran v. Nu West, Inc.*, 123 Wash.App. 701, 709-10, 98 P.3d 52, 56 (2004).

ARGUMENT

I. SUMMARY

For fifty years, the United States Supreme Court and many other courts have confirmed the availability of the remedy of equitable tolling to plaintiffs in circumstances similar to those found in this case. Because the Mr. McCabe and Plaintiffs timely and diligently pursued their claims in a court where they reasonably concluded the merits could and would be decided. Defendants were on notice of Plaintiffs’ claims so the rationale of the statutes of limitations would not be served by enforcing them here.

Other extraordinary circumstances, such as the transfer of this case to MDL 875 and the delay it experienced after transfer, also weigh in favor of providing Plaintiffs an equitable remedy. Therefore, the statutes of limitations should be equitably tolled and Plaintiffs' claims should be allowed to proceed against Defendants. The trial court erred by failing to afford Plaintiffs the remedy of equitable tolling and erred when it required a showing of waiver before properly considering the availability of equitable tolling. As the following section will explain, the trial court's grant of summary judgment and dismissal of Plaintiffs' claims should be reversed.

II. LEGAL DISCUSSION

A. The Trial Court Erred in Granting Summary Judgment to Defendants Because Plaintiffs are Entitled to the Equitable Tolling of the Statutes of Limitations for Their Claims.

Plaintiffs' claims, whether statutorily based in the Jones Act, or based in general maritime federal common law, all have three-year statutes of limitations. The Jones Act incorporates the three-year Federal Employers' Liability Act ("FELA") statute of limitations. *See* 46 U.S.C. § 30104; 45 U.S.C. § 56. The general maritime time claims are also governed by a three year statute of limitations. *Cunningham v. Interlake S.S. Co.*, 567 F.3d 758 (6th Cir. 2009). As Plaintiffs' claims are federal in nature, federal law also governs the applicability of the doctrine of

equitable tolling. *Cf. Mandarino v. Mandarino*, 408 Fed.Appx. 428, 430 (2d Cir. 2011) (“federal law governs the equitable tolling of Appellant’s federal claims . . .”).

“[E]quitable tolling pauses the running of, or ‘tolls’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstances prevents him from bringing a timely action.” *Lozano v. Montoya Alvarez*, ___ U.S. ___, 134 S. Ct. 1224, 1231-32 (2014) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed.2d 669 (2005)). The United States Supreme Court established the judicial power to toll statutes of limitations on equitable grounds in a FELA setting in *Burnett v. N.Y. Central Railroad Co.*, 380 U.S. 424 (1965). The Court concluded that the statute should be tolled because “the humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so.” *Id.* at 434.

The decision in *Burnett* supports the recognition of equitable tolling in Jones Act cases. The United States Supreme Court has stated that it “presume[s] that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute.” *Lozano*, 134 S. Ct. at 1232 (citing *Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036 (2002) (“It is hornbook law that limitations periods are

‘customarily subject to “equitable tolling,”’ unless tolling would be ‘inconsistent with the text of the relevant statute’”).

The discussion of the intent of Congress with respect to the FELA by the Court in *Burnett* is persuasive because the Jones Act incorporates the FELA statute of limitations and affords seaman the same type of protection the FELA provides to railroad workers. “[T]he Supreme Court has reiterated that the purpose of the Jones Act was to enlarge admiralty’s protection of seamen and that its terms should be interpreted to benefit them.” *Fanning v. United Fruit Co.*, 355 F.2d 147, 149 (4th Cir. 1966) (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S. Ct. 262 (1939)). “From time immemorial, the seaman has been the object of special care on the part of both Courts and Legislature. ‘They are regarded as the wards of the court and every shield and safeguard which the law can give is thrown around them, both by legislative enactment and judicial decision’” *Evans v. Nicholson Transit Co.*, 58 F. Supp. 82, 83 (D. Ohio 1944) (quoting *The James H. Shrigley*, 50 F. 287 (D.N.Y. 1892)). In fact, courts have liberally construed jurisdictional rules in the favor of merchant seaman based upon the “traditionally liberal attitude of admiralty towards seaman and their rights.” *Id.*

Although the decision in *Burnett* addressed equitable tolling in the context of a dismissal due to lack of venue, many other courts have recognized that equitable tolling may be employed in cases that had been dismissed previously for lack of personal jurisdiction. *See, e.g., Mayes v. Leipziger*, 729 F. 2d 605, 608 (9th Cir. 1984) (California law permits equitable tolling despite earlier dismissal for lack of personal jurisdiction); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 204-10 (3d Cir. 2002) (interpreting Virgin Islands law to permit equitable tolling despite earlier dismissal for lack of personal jurisdiction); *Hosogai v. Kadota*, 700 P.2d 1327, 1334 (Ariz. 1985) (same holding under Arizona law) *superseded*, *Jepsen v. New*, 792 P.2d 728 (Ariz. 1990) (superseded by passage of savings statute); *Mitzner v. W. Ridgelawn Cemetery*, 709 A.2d 825, 827-29 (N.J. Super. Ct. App. Div. 1998) (same holding under New Jersey law).

Consistent with these cases and *Burnett*, other courts have held that equitable tolling may be invoked in Jones Act or other maritime cases which were dismissed previously for lack of personal jurisdiction. *See, e.g., Reynolds v. Logan Charter Serv., Inc.*, 565 F. Supp. 84, 86 (N.D. Miss. 1983) (“it would not be inconsistent with the legislative intent underlying the [Jones Act] to avoid the injustice that would result from the dismissal of [plaintiff’s] claim because [he] made an erroneous choice with regard to [the jurisdiction of the court]”); *Flores v. Predco Servs.*

Corp., 2011 U.S. Dist. LEXIS 83443 at *21-22 (D.N.J. July 29, 2011) (denying motion for reconsideration and applying equitable tolling to maritime claims despite earlier dismissal for lack of personal jurisdiction); *Walck v. Discavage*, 741 F. Supp. 88, 91 (E.D. Pa. 1990) (applying equitable tolling in Death on the High Seas Act claims despite earlier dismissal for lack of personal jurisdiction).

Given the general presumption in favor of recognizing equitable tolling, special protection that courts and legislatures have historically afforded seaman, the enlarged protection of seaman Congress intended by passing the Jones Act, and that Act's analogous purpose and relationship to the FELA, statutes of limitations for Jones Act and general maritime claims are subject to equitable tolling even if the prior case was dismissed for lack of personal jurisdiction. Therefore, equitable tolling is a remedy available to Plaintiffs.

B. Plaintiffs are Entitled to Equitable Tolling in this case.

The trial court erred when it ruled that Plaintiffs were not entitled to have their statute of limitations equitably tolled and granted Defendants' motions for summary judgment. The impropriety of the trial court's rulings is most apparent when one simply compares the facts of this case to those the United States Supreme Court found determinative in *Burnett*.

In *Burnett*, the Supreme Court noted that the plaintiff “did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction” and timely “service of process was made upon respondent notifying him that petitioner was asserting his cause of action.” *Burnett*, 380 U.S. at 428. Therefore, the Court concluded that the railroad defendant “could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy.” *Id.* at 429-30. In this case, McCabe did not sleep on his rights and brought the initial action within the statutory period and notified Defendants of his claims. Defendants had additional notice that McCabe’s claims were being pursued when the current Plaintiffs amended the initial suit and asserted claims based on McCabe’s later developed asbestos-related mesothelioma and death. Thus, the ship owner Defendants in this case could not and should not have relied upon the policy of repose embodied in the statutes of limitation because they were aware that Mr. McCabe and Plaintiffs were continuing to pursue Mr. McCabe’s Jones Act and general maritime claims.

All of Mr. McCabe’s claims were brought in a court of competent jurisdiction because the federal district court in which they were brought had subject matter jurisdiction over these claims. Other courts have recognized that when the Court in *Burnett* invoked the phrase “competent

jurisdiction” it was referring to subject matter jurisdiction and not personal jurisdiction. *See, e.g., Flores v. Predco Servs. Corp.*, 2011 U.S. Dist. LEXIS 25588 at *14-18 (D.N.J. March 11, 2011).

The Supreme Court also noted that even though venue was improper in Ohio, “venue objections may be waived by the defendant, and evidently in past cases defendant railroads, including this respondent, had waived objections to venue so that suits by nonresidents of Ohio could proceed in state courts.” *Burnett*, 380 U.S. at 428. In the present case, personal jurisdiction could be waived and actually was waived by these Defendants in other cases and by other ship owner defendants so that maritime asbestos cases could be litigated in Ohio. Plaintiffs have provided extensive evidence that ship owner defendants had, in the past, waived personal jurisdiction to litigate in Ohio and even insisted that cases not be transferred to other jurisdictions so they could be litigated in Ohio. Even Judge Robreno recognized that some ship owner defendants “actually elected to make the strategic legal decision to waive the defense of personal jurisdiction.” *In re Asbestos Products Liab. Litg. (No. VI)*, No. 02-MD-875, 2014 WL 944227, at *5 (E.D. Pa. Mar. 11, 2014). Plaintiffs had merely failed to show that there had been “a *universal waiver by all defendants, in all cases, in perpetuity.*” *Id.*

The trial court reasoned that if Defendants had not waived personal jurisdiction, “it is difficult to fathom how Plaintiffs could have reasonably concluded that jurisdiction was proper in Ohio.” CP 2068-70. The United States Supreme Court had no difficulty in holding that equitable tolling was appropriate in *Burnett* despite an absence of waiver. Indeed, if courts were to require waiver before allowing equitable tolling, the latter doctrine would be rendered obsolete. A defendant would either waive a defense, be it venue or personal jurisdiction, and the suit would proceed in the original court or the defense would not be waived, the case would be dismissed and the subsequent filing would never be entitled to equitable tolling because of a lack of waiver. Contrary to the trial court’s ruling and understanding, waiver is not a prerequisite necessary for a court to consider equitable tolling.

Also supportive of the Supreme Court’s decision to allow equitable tolling in *Burnett* was the recognition that certain procedural safeguards, available elsewhere, were unavailable to the plaintiff in Ohio. The Court noted that 28 U.S.C. § 1406 allows for the transfer of cases between federal district courts and that, as evinced by the enactment of that statute, “Congress thereby recognized that the filing of a lawsuit ‘itself shows the proper diligence on the part of the plaintiff which ... statutes of limitations were intended to insure.’” *Burnett*, 380 U.S. at 430 (quoting *Goldlawr*,

Inc. v. Heiman, 369 U.S. 463, 467 (1962)). The Court also noted that many states had developed tools to help preserve statutes of limitations, such as allowing for transfer within the state if venue was initially improper and by the enactment of savings statutes that allow for re-filing within a certain period following dismissal. *Id.* at 431-32.

Noting that the plaintiff's claim could have been transferred to a proper venue if Ohio had such a transfer statute, and that the statute of limitations would have been tolled by Ohio's savings statute had it been a state law claim, the Supreme Court determined "that Congress did not intend the statute of limitations to bar a plaintiff who brings a timely FELA action in a state court of competent jurisdiction, who serves the defendant with process, and whose action is later dismissed for improper venue." *Id.* at 432.

As in *Burnett*, Plaintiffs' claims were not capable of being dismissed and re-filed pursuant to a savings statute for Jones Act or maritime claims. Also, as in *Burnett*, Plaintiffs' claims against Defendants were not capable of being transferred, despite the enactment of 28 U.S.C. § 1406, the enactment of 28 U.S.C. § 1631, and even Judge Lambros' initial determination that transfer, not dismissal, was appropriate because McCabe's case, along with the other maritime cases, was transferred to a court for multi-district litigation. Judge Robreno determined that transfer

of McCabe's and other plaintiffs' cases to courts in which personal jurisdiction could be established was precluded due to the Supreme Court decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, which prohibits transfers from MDL courts. *See* 523 U.S. 26 (1998); *see also* CP 1335 (transfer not permitted by *Lexecon*).

An additional basis that was not present in *Burnett* is present in this case. The MDL court did not re-activate McCabe's case until 2011 and did not hear any motions regarding the issue of personal jurisdiction until 2013. *In re Asbestos Products Liab. Litig. (No. VI)*, 965 F.Supp.2d 612 (E.D. Pa. 2013). This initial delay resulted in McCabe not living to see his day in court. The combined delays served to deprive McCabe, and Plaintiffs, of an early determination of the personal jurisdiction issue such that a re-filing in another court could have been accomplished before the statutes of limitations had run.

Plaintiffs pursued McCabe's rights diligently and reasonably, timely filing the original action in the Northern District of Ohio. Since then, extraordinary circumstances surrounding the history of this litigation prevented Plaintiffs from bringing a timely action in Washington. Plaintiffs are entitled to an equitable remedy.

Granting equitable tolling to Plaintiffs in this case would be consistent with the long held principle of maritime law that "it better

becomes the humane and liberal character of the proceedings in admiralty to give than to withhold the remedy.” *Moragne v. State Marine Lines*, 398 U.S. 375, 387, 90 S. Ct. 1772, 26 L.Ed. 2d 339 (1970) (citing *The Sea Gull*, 21 F. Cas. 909, 910 (C.C. Md. 1865) (NO. 12, 578)).

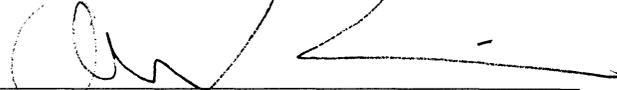
CONCLUSION

For the reasons herein stated, Plaintiffs’ respectfully request that this Court reverse the judgment of the trial court granting Matson Navigation Company, Inc., on its own behalf and as Successor-In-Interest to The Oceanic Steamship Company’s and Olympic Steamship Company, Inc.’s motions for summary judgment and hold that Plaintiffs are entitled to the equitable tolling of the statutes of limitations for their Jones Act and general maritime claims in this case. In the alternative, Plaintiffs-Appellants respectfully request that this Court reverse the decisions of the trial court and remand the matter for further proceedings so that the trial court may re-consider the issue of equitable tolling because Plaintiffs are not precluded from that relief due to the earlier ruling concerning waiver in another court.

DATED this 6th day of July, 2015.

Respectfully submitted,

WEINSTEIN COUTURE PLLC



BENJAMIN R. COUTURE, WSBA #39304

BRIAN D. WEINSTEIN, WSBA # 24497

MARISSA C. LANGHOFF, WSBA #48323

ALEXANDRA B. CAGGIANO, WSBA #47862

Attorneys for Appellants

Of Counsel:

MOTLEY RICE LLC

JOHN E. HERRICK, *pro hac vice*

28 Bridgeside Boulevard

Mount Pleasant, South Carolina 29464

(843) 216-9000